

INTERFERENCE: DISPUTE ASSOCIATED WITH DETERMINATION OF OWN
EMPLOYMENT BY CONTRACTOR IN CONSTRUCTION

KOK WING YAN

A project report submitted in partial fulfilment of the
requirements for the award of the degree of
Master of Science (Construction Contract Management)

Faculty of Built Environment
Universiti Teknologi Malaysia

JULY 2017

ACKNOWLEDGEMENT

First and foremost, I would like to take this opportunity to express my grateful thanks to my supervisor Assoc. Prof. Dr. Maizon Hashim. Throughout the process for developing and completing this project, Assoc. Prof. Dr. Maizon Hashim has contributed her knowledge, experiences and guidance. I am thankful to her priceless and irreplaceable time and effort in assisting me through every step in producing in the research. All her knowledge, suggestions and ideas are truly appreciated.

In addition, I would also like to express my gratitude to my loving parents and friends who have helped and given me encouragement throughout the whole journey in completing this research. Without doubt, their willingness to share their knowledge and experiences have greatly helped me to learn a lot within and also outside my research topic.

Not forgetting my fellow classmates and colleagues who was always there for me through good and bad. I would like to sincerely thank them for their unconditional support and ideas during the discussions for this research. Their time and effort in assisting me to complete this research is greatly appreciated.

ABSTRACT

Delays and disruption are common interferences in construction projects. Majority of the employers find it difficult not to interfere the work schedule of contractor on site. The interference of employers constituted to the increase of the intensity on the relationship between the employers and contractors, which result to the existence of disputes. To overcome these losses, contractors may apply for determination of own employment and request for interference claims from employers through PAM 2006, Clause 26.1 or CIDB 2000, Clause 45.1(a)(ii). Contractors can also claim damages through law of tort, tortious interference, especially for parties that use PWD 203A as their project's contract. There is no clause on determination of own employment by the contractor under PWD 203A. As a result, contractors may encounter some difficulties on interference claim within the legal process. In most cases, the documentation of evidences available to the contractor is not sufficient enough to support the claims because the subjects of interference claims are very subjective. Therefore, two objectives were proposed for this research, which are to identify whether interference by employers can lead to determination of own employment by contractors and also to identify the circumstances which allow contractor for interference claims. In order to achieve the two objectives, there are a total of eleven law cases abstracted from Lexis Nexis. For the first objective, two number of cases reflected that the contractor had the right to determinate own employment with interference by employer with condition that the contractor is able to provide the above standard evidences on the interference by employer which had constituted in the losses of the contractor. For the second objectives, it was found that there are three out of nine cases that proved contractor is liable for interference claim against employer with condition of there are interference by employer, employer had knowledge of the existence of contract, employer had the intention to interfere with the contract and the last is the contractor had suffered loss.

ABSTRAK

Kelewatan dan campur tangan adalah tindakan gangguan yang biasa berlaku dalam projek-projek pembinaan. Kebanyakan majikan menghadapi kesukaran untuk menjauhkan diri daripada penglibatan jadual kerja kontraktor dalam tapak pembinaan. Campur tangan majikan telah menjejaskan perhubungan antara majikan dan kontraktor, mengakibatkan pertikaian. Untuk mengatasi kerugian, kontraktor boleh memohon penamatan kontrak bagi projek tertentu dan membuat tuntutan gangguan daripada majikan melalui PAM 2006, Fasal 26.1 atau CIDB 2000, Fasal 45.1(a) (ii). Kontraktor juga boleh membuat tuntutan ganti rugi melalui undang-undang tort, terutama bagi pihak yang menggunakan JKR 203A sebagai kontrak projek. JKR 203A tidak mempunyai fasal- fasal yang berkaitan tentang kontrak penamatan daripada kontraktor. Oleh itu, kontraktor akan menghadapi halangan dalam proses tuntutan “gangguan” melalui proses undang-undang. Kebanyakan kes menggambarkan bukti-bukti yang ada pada kontraktor tidak mencukupi untuk memohon tuntutan gangguan kerana tuntutan gangguan adalah sangat subjektif. Oleh itu, dua objektif telah dicadangkan untuk penyelidikan ini iaitu mengenal pasti sama ada gangguan oleh majikan boleh membawa kepada kontrak penamatan daripada kontraktor dan juga mengenal pasti keadaan yang membolehkan kontraktor bagi tuntutan gangguan. Dalam usaha untuk mencapai kedua-dua objektif, terdapat sejumlah sebelas kes diambil daripada Lexis Nexis. Bagi objektif yang pertama, dua kes menggambarkan bahawa kontraktor berhak untuk menamatkan kontrak dengan gangguan daripada majikan, jika kontraktor dapat membuktikan gangguan dengan majikan telah mengakibatkan kontraktor kerugian. Bagi objektif kedua, bahawa terdapat tiga daripada sembilan kes membuktikan kontraktor berhak untuk membawa tuntutan terhadap majikan dengan syarat ada bukti kontraktor diganggu oleh majikan, majikan telah mengetahui kewujudan kontrak, majikan mempunyai niat untuk mengganggu kontrak dan yang terakhir adalah kontraktor telah mengalami kerugian.

TABLE OF CONTENTS

CHAPTER	TITLE	PAGE
	DECLARATION	ii
	DEDICATION	iii
	ACKNOWLEDGEMENTS	iv
	ABSTRACT	v
	ABSTRAK	vi
	TABLE OF CONTENTS	vii
	LIST OF TABLES	xiii
	LIST OF FIGURES	xiv
	LIST OF ABBREVIATIONS	xv
	LIST OF CASES	xvi
1	INTRODUCTION	1
	1.1 Background of the Problem	1
	1.2 Statement of the Problem	3
	1.3 Objectives of the Study	6
	1.4 Scope of the Study	7
	1.5 Significance of the Study	7
	1.6 Research Methodology	8
	1.6.1 Stage 1: Initial Study	8
	1.6.2 Stage 2: Data Collection	8
	1.6.3 Stage 3: Data Analysis	9
	1.6.4 Stage 4: Conclusion and Recommendations	9
	1.7 Outline of the Chapter	11
	1.7.1 Chapter One	11
	1.7.2 Chapter Two	11

1.7.3	Chapter Three	12
1.7.4	Chapter Four	12
1.7.5	Chapter Five	12
1.8	Conclusion	13
2	LITERATURE REVIEW	14
2.1	Introduction	14
2.2	Interference	17
2.3	Determination of Own Employment By Contractor	19
2.3.1	Contractual Determination	19
2.3.2	Law of Tort for Termination	22
2.4	Impact of Termination to Employer and Contractor	23
2.5	Circumstances That Allow Contractor for Interference Claims	25
2.5.1	Employer Interfere Contractor's Work Progress	26
2.5.1.1	No Damage for Delay Clause	32
2.5.2	Employer Interfere Contract Administrator in Issuance of Certificate	34
2.5.2.1	Certificate of Practical Completion	35
2.5.2.2	Certificate of Partial Completion	37
2.5.2.3	Certificate of Extension of Time	38
2.5.2.4	Certificate of Non- Completion	39
2.5.2.5	Certificate of Making Good Defects	40
2.5.2.6	Interim Certificate	41
2.5.3	The Interference Cause By Third Parties	43
2.5.3.1	Contractor Sue Architect (Third Party) For Interference	45
2.5.3.2	Contractor Sue Engineer (Third Party) For Interference	48
2.5.3.3	Contractor Sue Superintending Officer (Third Party) For Interference	50
2.6	Effect Of Interference That Cause Delay and Disruption by Employer	52

2.6.1	Disruption	52
2.6.2	Delay	53
2.6.3	Interrelationship Among Delay, Disruption and Interference	54
2.7	Dispute Arising From Interference	59
2.7.1	Defective Work/ Incomplete Design or Information	63
2.7.2	Variation Order	64
2.7.3	Extension of Time/ Poor Planning	64
2.7.4	Nature of Contract/ Contract Terms	65
2.7.5	Interim Payment	65
2.7.6	Final Account	66
2.8	Conclusion	66
3	RESEARCH METHODOLOGY	69
3.1	Introduction	69
3.2	Research Process	70
3.3	Research Method	73
3.4	Survey Instrument	73
3.5	Survey Sample	74
3.6	Analysis Method	75
3.7	Conclusion	76
4	DATA ANALYSIS	77
4.1	Introduction	77
4.2	Objective One: To Identify Whether Interference by Employer Can Lead to Determination of Own Employment By Contractor	78
4.2.1	Bina Jaya Mantap Sdn Bhd v Institute of Technology Petronas Sdn Bhd [2014]	79
4.2.2	R.B. Burden Ltd v Swansea Corporation [1957]	81
4.2.3	Review the Objective One on Whether Interference by Employer Can Lead to	82

	Determination of Own Employment by Contractor Due to Interference	
4.3	Objective Two: To Identify the Circumstances That Allow Contractor for Interference Claim	84
4.3.1	Cases Related With the Contractor's Success in the Interference Claim against Employer	84
4.3.1.1	Employer Interfere Contractor's Work Progress	85
4.3.1.1.1	Review of Contractor Succeeded Claim against Employer for Interference with Contractor's Work Progress	87
4.3.1.2	Employer Interferes with Contract Administrator Issue Certificate	88
4.3.1.2.1	Review of Contractor Succeeded Claim against Employer for Interfere Contract Administrator Issue Certificate	90
4.3.1.3	Interference Caused by Third Parties	91
4.3.1.3.1	Review of Contractor Succeeded Claim against Third Parties Who Cause Interference	93
4.3.2	Cases Related With the Contractor Unsuccessful Interference Claim against Employer	94
4.3.2.1	Failure in Claiming Employer Interference with Contractor's Work Progress	94
4.3.2.1.1	Review on Failure of Contractor's Claim against	96

	Employer for Interference in Contractor's Work Progress	
4.3.2.2	Failure in Claiming Employer Interference with Contract Administrator in Issuance of Certificate	97
4.3.2.2.1	Review on Failure of Contractor's Claim against Employer for Interference with Contract Administrator in Issuance of Certificate	103
4.3.2.3	Failure in Claiming Interference Caused by Third Parties	105
4.3.2.3.1	Review on Failure of Contractor's Claim against Third Parties Who Cause Interference	110
4.4	Conclusion	112
5	CONCLUSION AND RECOMMENDATIONS	125
5.1	Introduction	125
5.2	Research Findings	125
5.2.1	Objective One: Whether Interference by Employer Can Lead to Determination of Own Employment by Contractor	125
5.2.2	Objective Two: Circumstances that Allow Contractor for Interference Claim	127
5.2.2.1	Cases Related With Unsuccessful of Contractor Interference Claim Against Employer	128
5.2.2.2	Cases Related With the Contractor's	132

Success in the Interference Claim
against Employer

5.3	Problem Encountered During Research	135
5.4	Recommendation for Further Study	136
5.5	Conclusion	136

REFERENCES

142

LIST OF TABLES

TABLE NO.	TITLE	PAGE
4.1	Summary on Whether Interference by Employers Can Lead to Determination of Own Employment by Contractor	114
4.2	Summary of Cases Related With the Contractor's Success in the Interference Claim against Employer	116
4.3	Summary of Cases Related With the Contractor Unsuccessful Interference Claim against Employer	119

LIST OF FIGURES

FIGURE NO.	TITLE	PAGE
1.1	Steps in Conducting Research	10
2.1	A cause map showing some of the consequences of disruption, interference and delay in Project.	57
2.2	Type of adjudication disputes	60
2.3	Type of arbitration disputes	61
2.4	Type of litigation disputes	62
3.1	Steps in Conducting Research	72

LIST OF ABBREVIATIONS

AIA	-	American Institute of Architect
AI	-	Architect Instruction
AC	-	Appeal Cases
BLR	-	Bankruptcy Local Rules
CIPAA	-	Construction Industry Payment and Adjudication Act 2012
EOT	-	Extension of Time
FIDIC	-	(Fédération Internationale Des Ingénieurs-Conseils) Standard Form of Contract
ICP	-	Interim Certificates of Payment
IEM	-	(Institution of Engineers Malaysia) Condition of Contract
KLRC	-	Kuala Lumpur Regional Center for Arbitration
LAD	-	Liquidated Ascertain Damages
S.O	-	Superintending Officer

LIST OF CASES

CASES	PAGES
<i>Bina Jaya Mantap Sdn Bhd v Institute of Technology Petronas Sdn Bhd</i> [2014] 11 MLJ 352	5, 79, 114, 126,127
<i>Barr Inc. v Studio One, Inc</i> [2015] U.S. Dist. LEXIS 156007. C.A. No. 15-40056-MGM	46, 91, 118, 134, 140
Chin Ivan v H P Construction & Engineering Pte Ltd [2015] SGCA 14	102
<i>C&H Electric v. Town of Bethel</i> [2014] 312 Conn. 843	32, 94, 119, 128, 139
<i>DSC Logistics, Inc. v. Innovative Movements, Inc.</i> [2004] 04 L 010290 C	44
<i>Golden Hill Ventures Ltd. v Kemess Mines Inc</i> [2002] 7 B.C.L.R (4th.)	2
<i>George Fischer Holding Limited (formerly George Fischer (Great Britain) Limited) v Davis Langdon & Everest and Others</i> [61 Con. L.R.85] (1998)	36
<i>Howard Contracting, Inc. v. MacDonald Construction Co., Inc. and City of Los Angeles</i> (1998) 71 Cal.App.4th 38	33

<i>Hock Huat Iron Foundry (Suing As A Firm) v Naga Tembaga Sdn Bhd</i>	85, 116,
<i>[1999] 1MLJ 65</i>	133, 140
<i>Hiap Hong & Co Pte Ltd v Hong Huat Development Co(Pte) Ltd</i>	18, 98, 121,
<i>[2001] 2 SLR 458</i>	130, 140
<i>Hickman & Co v Roberts Hickman & Co v Roberts</i>	[1913] AC 229
	34
<i>Kejuruteraan Bintai Kindenko Sdn Bhd v Serdang Baru Properties</i>	5, 105, 123,
<i>Sdn Bhd & Ors</i>	[2016] 9 MLJ 354
	131, 140
<i>Lapp-Gifford Co.v Muscoy Water Co,</i>	<i>134P.989</i>
<i>(Cal. 1913)</i>	30
<i>Lintest Builders Ltd v Roberts</i>	(1980) 13 BLR 38
	22
<i>Ling Heng Toh Co v Bornea Development Corporation Sdn Bhd</i>	21, 97, 120,
<i>[1973]1 MLJ 23</i>	129, 139
<i>London Borough of Merton v Stanley Hugh Leach</i>	(1985) 32 BLR 51
	99
<i>Mae Engineering Ltd v Dragages Singapore Pte Ltd</i>	[2002] SGHC 86
	46
<i>NYU Hospitals Center v HRH Construction, LLC</i>	[2015] U.S. Dist.
<i>LEXIS 31967</i>	15
<i>Panamena Europea Navigacion v Leyland</i>	[1943] 76 Lloyd's Repprts
<i>113</i>	41
<i>Page v Llandaff and Dinas Powis Rural District Council</i>	(1901)
<i>Hudson's BC 4th ed. Vol. 2 316</i>	42

<i>Peter Kiewit Sons' Co. v. Iowa S. Utilities Co</i> (1973) 355 F. Supp. 376	33
<i>Perini Corporation v Commonwealth of Australia</i> [1969] 2 NSW 350	38
<i>Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd</i> [2007] 4 MLJ 113	24
<i>Q2 Engineering Sdn Bhd v PJI-LFGC (Vietnam) Ltd & Ors</i> [2013] 8 MLJ 157	107, 124, 131, 140
<i>RB Burden Ltd v Swansea Corporation</i> [1957] 1 WLR 1167	18,81, 115, 126, 138
<i>United States Steel Corp v Missouri Pacific Railroad Co</i> 668 F.2d 435 (8 th Cir. 1982)	29
<i>Ser Kim Koi v GTMS Construction Pte Ltd</i> [2016] 3 SLR 51	101, 122, 130, 140
<i>View Esteem Sdn Bhd v Bina Puri Holdings Bhd</i> [2015] MLJU 695	88, 117, 133, 140
<i>Waldinger v Ashbrook-Simon-Hartley, Inc.</i> , 564 F. Supp.970 (C.D. Ill.1983)	49
<i>Wessex Regional Health Authority v HLM Design Ltd</i> (1995) 71 BLR 32	51
<i>WRB Corp. v United States</i> [1968] 183 Ct. Cl. 409	31

CHAPTER 1

INTRODUCTION

1.1 Background of the Problem

In order for a project to be completed successfully, it has to be done on time and within the budget. However, this is not the case for some contractors and employers. In fact, the parties' anticipation to successfully complete a project is often ruptured and they may face determination of employment either by employer or the contractor's own determination while in the process of construction.

In Malaysia construction industry, PWD (Public Works Department) Standard Form of Contract, PAM (Pertubuhan Arkitek Malaysia) Standard Form of Contract, and CIDB (Construction Industry Development Board) Standard Form of Contract are the three most commonly used reference by construction parties. Most of construction contracts include some clauses which provide the rights for contractors to determinate their own employment by default. The default that is indicated under standard form of contract generally refers to employers who fail to make payment to the contractors base on the amount that is stated under contract, the project is suspended, substantial portion of time is prolonged without fraud or mistake of the contractors and lastly if the employers do not have enough financial resources to complete the project. The clauses signify that once the contractors successfully determinate their own employment, the contractors will be able to recover their losses and expenses, such as reasonable overhead, profit and any damages. The contractors may also be able to claim back their loss and expenses on

work that is not executed yet in accordance to some of the contract and local law. But, from the perspective of the employers, they always neglect on contractor's right and are only concerned of the contractor's default. The contractor's default refers to the failure of a contractor to make payment to its subcontractors after receiving payment from the employer, failure to perform the work which is compulsory referring to the contract documents and overlook authorization of employer or regulations that is stated in most of the construction contract.

Furthermore, a majority of employers find it difficult to stay away from project sites and tend to interfere with the contractor's work schedule. Employers often forgot that contractors are the person in charge of the site after the employers have given possession of site to the contractors. The employers' interference may likely effect and cause changes to the means, methods, or order of construction. These changes may cause the increase of expenses of the contractors and this will constitute the contractors to have an excuse to claim for disruption, change of order, suspension of work, or changed conditions. These contractors' claims are known as "Interference Claims" which is stated in most of the standard forms of contract showed in PAM 2006 Clause 26.1(b), PWD 203A (Rev. 1/2010) Clause 51.2 and CIDB 2000 Clause 45.1(a) (ii).

In case of *Golden Hill Ventures Ltd. v Kemess Mines Inc. [2002]*¹, the contractor was given the task to construct a pit mine and other related structure. Once the task was carried out, the employer decided to take matters to his own hands. The unreasonableness of the employer includes requiring it to work on multiple areas of the site simultaneously; rearranging of its construction priorities; carrying out particular works in designated areas only; and mobilizing all of its equipment on site at once. With the attitude of the employer, the judge held that the employer has breached the contract by failing to allow the contractor to take control of the work and thus results in the employer to be responsible for extra cost suffered by the contractor. (Pratt & Kristjanson, 2016).

¹ [2002]7B.C.L.R.(4th)

With the supporting of Golden Hill Ventures's case², the term "Interference" became a platform for contractors to protect his own rights if the contractors are being determinates by employers or if contractors want to determinate their own employment under construction contract. In the light of inadequate knowledge of contractor with the term "Interference" under construction contract, it will constitute the contractor to misuse this term, resulting in dispute between both parties while in determination process. Therefore, this study highlights the most standard form of contract which is implied to protect the rights of employer but there are still some flaws that can fully utilize by contractors to fight back and one of it is "Interference". Due to this problem, this study intends to reveal questions on how the court interprets the term "Interference" in the construction industry.

1.2 Statement of the Problem

For the completion of a successful construction project, it is not just for the necessary work to be completed, but it must be completed within the specific time, using a particular amount of money in a budget wisely, and the project is to be done base on a required technical standards. But, the increase commercialization of construction contracts have given greater stress to contractors, especially if the employers want to ensure that projects are being able to carry on as planned and that all possible terms are provided in the contract. If any unforeseen accidents were to happen on the site, generally the employers will be passing the risk to contractors, especially if employers like to interfere with the contractors' work progress (Insta research Ltd, 2016).

Once there is interference present during the construction of work, the contractor's work performance will be affected and this will lead to a decrease in output of work. The decreasing of output of work will lead to losses in time and cost. If these losses go beyond the budget of the contractor, then extra time or extra

² Golden Hill Ventures Ltd. v Kemess Mines Inc. Supra

money or both likely will be claimed by the contractor. The contractor prefers recover their losses from the employer through interference claims.

It is stated in every construction contract that the work progress done by contractors will not be interfered or obstructed by the employers. From the perspective of contractors, they are liable to determinate of own employment due to the employers' interference in matters of issuance of payment certificate by the architect or employers giving instructions directly on the site without the acknowledgement of contractors and so on. As a result, if any defects are done to the contractors' work, then the employers should take responsibility financially.

Besides, most of the construction contracts express the term related with interference in PAM 2006 and CIDB 2000. Under PAM 2006, Clause 26.1(b), it states that contractors are entitling to determinate their own employers if the employers are found to interfere or obstruct the issue of any certificate by the architect. Under CIDB 2000, Clause 45.1(a) (ii), it states that only in the case, where it is expressly stated in the contract which agreed by both parties. If not, by rule, the employer cannot interfere or obstruct with the performance of the work as stated in the contract (Hansen, 2012). Therefore, the term "Interference" becomes an assurance for contractors to protect their benefit if they were to encounter any conflicts or disputes with their employer.

However, employers like to selectively neglect Clause 26.1(b) under PAM 2006 and Clause 45.1(a) (ii) in CIDB 2000. Employer may like to challenge the qualifications of contractors who intend to make interference claim against the employers. The unclear term of "Interference" stated in the standard form of contract carries out many conflicts as different parties have various interpretations of the term "Interference".

William (2002) has noted that, “*The idea of delay and interference within projects is well-known and is often the subject of claims. But, it is difficult to justify such claims within a legal process.*” Difficulties exist in defining all parts of an interference claim because such claims require definite clarity of all parts of the construction contract, from the scope of the project, to the details of what constitutes interference and permissible delay. Besides, Pickavance has noted there are difficulties in the method of proving the existence of interference under construction. Interference claims are generally subjective; therefore a majority of contractors fail in provide adequate documentation and records to substantiate the claims (Pickavance, 2005). The general formation of an interference claim follows a logical interpretation of the events and actions leading up to the claim and the deduction of the losses from those actions and events (Pickavance, 2005). This means that the situation of inadequate evidence causes the contractors to face difficulty in determining whether it is an interference action, or what elements of that interference, and the contractor’s actual compensation under the contract.

There are two construction cases in the Malaysia in year 2016 and 2014 that have suffered from severe cost and time overruns which have been subjected to extensive disputes in relation to interference claims. There are *Bina Jaya Mantap Sdn Bhd v Institute of Technology Petronas Sdn Bhd [2014]*³ and *Kejuruteraan Bintai Kindenko Sdn Bhd v Serdang Baru Properties Sdn Bhd & Ors [2016]*⁴.

Based on Bina Jaya’s case⁵, the contractor won the case with the judge said “*Plaintiff has satisfied the threshold of a seriously arguable case that the only realistic inference is the existence of unconscionability which would basically mean establishing a strong prima facie case*”. In this case, the site memo and transcript of the meeting became the strong prima facie to proof that employer’s interference with subcontractor in matters relating to site clearance and removal of trees at the work

³ [2014]11MLJ352

⁴ [2016]9MLJ354

⁵ supra note 3

site; changes in the platform level and location of a borrow pit; construction of additional or temporary drains; as well as employer's requirement for additional work had delayed the contractor's work base on the execution of the contract.

On the other hand, in the *Kindenko's case*⁶, the contractor (plaintiff) made a claim against the directors of employer (second and third defendants) for breach of contract, tort of unlawful interference with contract, conspiracy, fraud and undervaluation of contractor's work under turnkey contract between the contractor and the employer. The judge held that the contractor failed to provide a prima facie base on the essential allegations against the directors of employer so the judge concluded that there was an unlawful interference with the directors of employer with the reason that the contractor did not have contract relationship with them but employer.

These two cases clearly show that difference judges have different justification on "Interference". Therefore, the issues above have triggered this research to be carried out to identify the term "Interference" which constitutes dispute correlated with contractor determining his own employment in construction project with the aid of law cases. Such issue will also elaborate the influence of interference in the construction industry in accordance to the law.

1.3 Objectives of the Study

The objective proposed for this study is:-

- a) To identify whether interference by employers can lead to determination of own employment by contractor.
- b) To identify the circumstances that allow contractors for interference claim.

⁶ *Kejuruteraan Bintai Kindenko Sdn Bhd v Serdang Baru Properties Sdn Bhd & Ors Supra*

1.4 Scope of the Study

The scope of this study focuses on whether interference by employers can lead to determination of own employment by contractor and identifying the circumstances that allow contractors for interference claim. The standard form of contract PAM 2006 and CIDB 2000 will be used as a reference while conducting this research. Besides the standard form of contract, law of tort, tortious interference will also be included in this research. Furthermore, court cases will be adapted as part of the research method in this research. The court cases are taken from Malaysia, Singapore and English starting from 1980 to 2016. The court cases that are being used in this research will be a basic guideline for those who are involved in the construction industry namely the employers and the contractors.

1.5 Significance of Study

As discussed earlier, the term of “Interference” which is stated in the standard form of contract causes a lot of conflicts. Employers generally will challenge the qualifications of contractors if there are allegation on the contractors interfered by employers and they intend to determinate their own employer. This is where the contractors will face difficulties due to the different point of view from both parties regarding the interpretation of the term “Interference”. Therefore an up to standard evidence becomes important for contractors in the process of applying interference claim.

Hence, the significance of this research is to provide a right path for construction parties including employer, architects and contractor to know their rights and how to protect themselves if they were to ever encounter such situation. It serves as a guideline for employers to understand their position and obligation in construction. The involved parties will have a better knowledge in the construction industry and thus, dispute can be easily avoided. Lastly, this research will enlighten the contractors and employers by providing sufficient reasons for them to put in

place an appropriate response and consequently, an appropriate legal framework to minimize such arguments by referring court cases.

1.6 Research Methodology

A legal research methodology is required in achieving the objective in identifying whether interference by employers can lead to determination of own employment by contractor and identify the circumstances which will allow contractors for interference claims. There are four essential stages which are highlighted under Figure 1.1 to show the research process.

Additional, four research stages in conducting this study will be further explained as following.

1.6.1 Step 1: Secondary Sources

Secondary resources are the first step to start the research methodology for this research. In order to identify the influence of the term of “Interference” in the construction industry that is faced by contractors and employer, it is important to get the background information, learn the basic statutory and obtain citations from relevant primary authorities. To focus on this issue, various resources such as books, treatises, journal articles and legal encyclopedias can be easily found from the UTM library and from the Internet.

1.6.2 Step 2: Primary Authorities

After the objectives of this research had been identified, primary authorities such as statutes, regulations, court rules and judge decisions that are related to the

research field will be collected in order to achieve the objectives of this study. The primary authorities that are collected must be persuasive in terms of their authoritativeness and effects in this research study. The primary authorities' sources can be gained through Lexis Nexis by using topic of case law or keyword, or through regulations by using references obtained from annotated statutory codes or table of statutory authorities and lastly, through secondary sources. Cases from Malaysia, Singapore and Europe from year 1980 to 2016 will be used as part of this research.

1.6.3 Step 3: Data Analysis

Under the analysis stage, the data analysis is done by reviewing and clarifying all the facts and issues of the case which are obtained through collected cases, information, data, ideas, opinions and comments of various related parties. This is the most important stage in this research to ensure the justifiability of primary authorities that accredit and identify subsequent developments or new authority.

1.6.4 Step 4: Conclusion and Recommendations

In the final stage, the secondary sources and primary authorities of this research will be review to ensure that the objectives of this research have been achieved. After presenting the finding of the research, further research will be suggested.

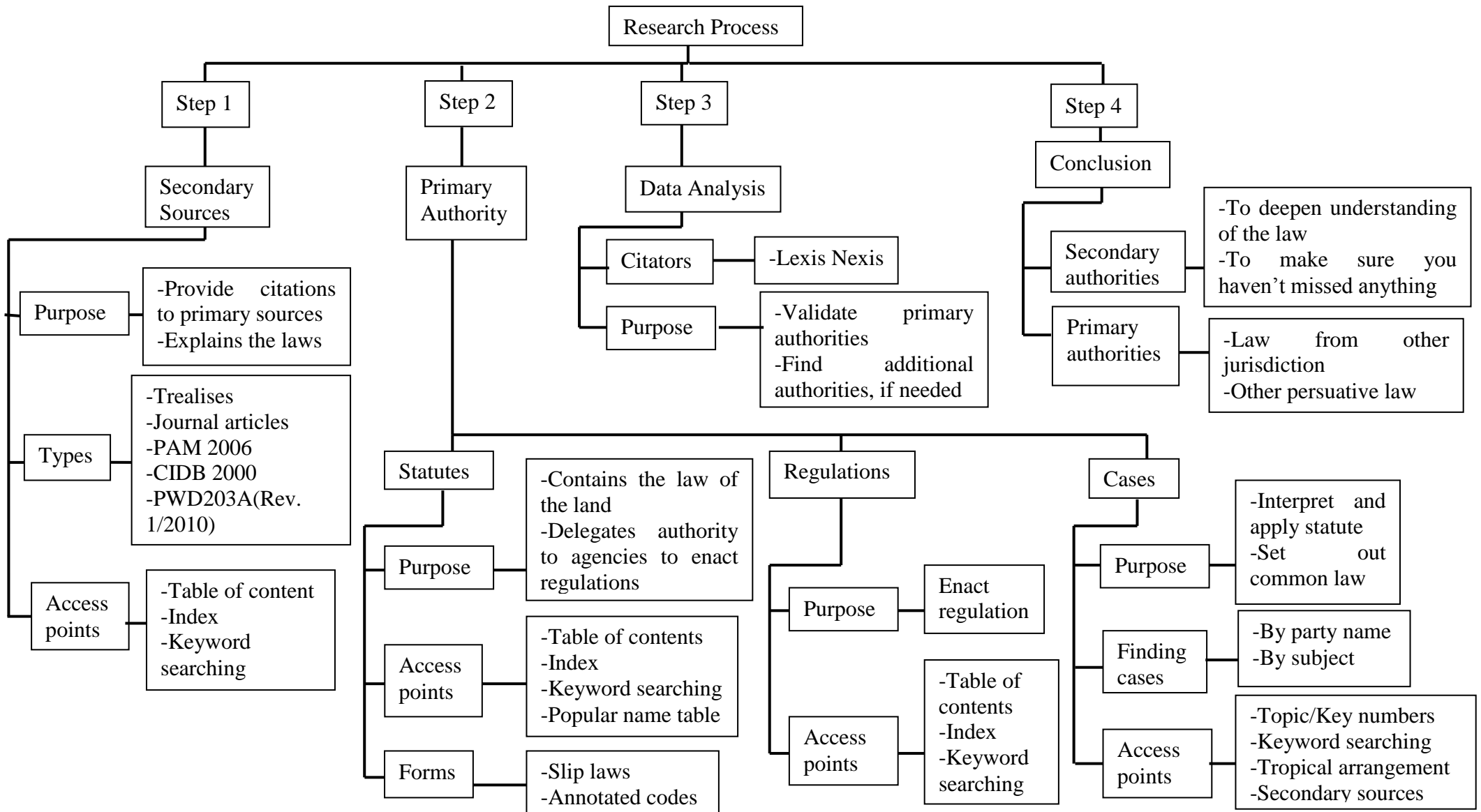


Figure 1.1: Steps in Conducting Research

1.7 Outline of the Chapters

This section briefly introduces the outline of this research. This research is divided into five chapters.

1.7.1 Chapter One

In Chapter one, the overall programme of this dissertation is discussed so that readers will have a clear idea on the mission and vision of this research. This chapter also includes a brief introduction of the employer's interference caused contractors' determination of own employment, problem statement, objectives of research, scope of the research, significance of the research, legal research methodology and outlines of the chapters.

1.7.2 Chapter Two

In Chapter two, literature review will be used to focus on sources gained from various documentations for the objectives of this research. The sources included books, treatises, journal articles and legal encyclopaedias can be easily found from the UTM library and from the Internet.

1.7.3 Chapter Three

Chapter Three defines and explains the process of research methodology that is being used for this research. Four steps are conducted for this research. The research methodology for this research is gained from collection of data through secondary and primary resources. Then the research method of Descriptive and Analytical Research will be used to describe the facts from the collected info and analyse them.

1.7.4 Chapter Four

In order to achieve the two objectives of this research, data from law cases from Malaysia, Singapore and Europe countries will be analysed. The first objective of this research is to identify the laws with regards to determination of own employment by the contractor due to interference. For the second objective, the distribution into interference claim able to be requested by contractor, and interference claim unable to be requested by contractor, in order will be used to identify the circumstances that will allow contractors for interference claims. Data from cases law will be identified and analysed together with the view of judges.

1.7.5 Chapter Five

Chapter Five gives readers a bird's eye view of this research and provides some recommendations for future study.

1.8 Conclusion

In a nutshell, this chapter provides an overall view of this research. Below is a summary of what chapter one is about:-

- a) Brief introduction with regards to the employer's interference which can cause contractor to determinate their own employment.
- b) Issues that are faced by construction parties especially in the event where by a contractor intends to ask for interference claims and determinate own employer from a particular project.
- c) Objectives of this research which is to identify whether interference by an employer can lead to determination of own employment by the contractor and identify the circumstances that can allow the contractor to make interference claims.
- d) Scope of the research that is used to develop the research progress in order to provide the outlook of this research.
- e) Significance of the research which is used to show the benefit of this research being conduct.
- f) Research methodology is used to introduce the legal research methodology which is being applied by in this research. This section briefly introduces the steps that will be applied in this research so that the objective of this research can be achieved.
- g) Outlines of the chapters so that readers will have an ideas about the purpose on this research through the presentation in every single chapter.

Overall, this chapter covers the research programme so that readers will have a clear idea on the mission and vision of this research.

REFERENCES

- Alexandra, V., 2014. Transcript of Chap 6: Determination of Contractor's Employment by Employer (Prof Practice 2). [Online] Available at: https://prezi.com/un_e4vctcxob/chap-6-determination-of-contractors-employment-by-employer-prof-practice-2/ [Accessed 2 October 2016].
- Ang, S. S., 2006. *Payment Issues - The Present Dilemmas Of Malaysia Construction Industry*. Master thesis, Universiti Teknologi Malaysia, KL.
- Ashworth, A., 2001. *Contractual Procedures In The Construction Industry, 4th edition*. England: Pearson Education.
- Barnard, P. D., 2013. *CDR-1256: Challenges of the Measured Mile Concept for Productivity Loss Claims*. [Online] Available at: <http://www.interface-consulting.com/articles/challenges-of-the-measured-mile-concept-for-productivity-loss-claims/> [Accessed 23 October 2016].
- Baron, S. S., Lane, H. & Schulz, D. A., 1996. Tortious Interference: The Limits of Common Law Liability for Newsgathering. *William & Mary Bill of Rights Journal*, 3(4), pp. 1-43.
- Barthet, A., 2016. *Construction Stop-Work Order: How it Can Impact a Project*. [Online] Available at: <https://www.thelienzone.com/stop-work-order-can-impact-project/> [Accessed 6 December 2016].

- Barough, A. S., Shoubi, M. V. & Preece, C. N., 2013. Evaluating The Effectiveness Of Mediation And Arbitration Processes In Resolving Disputes In The Malaysian Construction Industry. *International Journal of Civil Engineering*, 2(1), pp. 21-28.
- Cessar, S. D., 2015. *The active interference exception to no damage for delay clauses*, Boston, MA;Charleston, WV; Harrisburg, PA;Hartford, CT;Newark, NJ;Philadelphia, PA;Pittsburgh, PA: eckertseamans.com.
- Chappell, D., 2006. *Contractual Correspondence for Architects & Project Manage, fourth edition*. USA: Blackwell.
- Chappell, D., Cowlin, M. & Dunn, M., 2009. *Building Law Encyclopaedia*. United Kingdom: Wiley Blackwell.
- Colaiuta, V., 2016. *Delay Claims in Construction Disputes*, Lagos: Pinsent Masons LLP.
- Cunningham, T., 2014. *Contractors' Claims for Loss and Expense under the Principle 'Traditional' Forms of Irish Building Contract*. Irish: Dublin Institute of Technology, School of Surveying and Construction Management.
- Cushman, R. F., Carter, J. D., Coppi , D. F. & Gorman, . P. J., 2001. *Construction Disputes: Representing the Contractor*. 3rd ed. New York: Wolters Kluwer.
- Cullina, M., 2016. *Contractor Terminated By Owner Can Sue Architect For Interference*. [Online] Available at: http://www.murthalaw.com/files/construction_january_2016.pdf [Accessed 6 October 2016].
- Davidson, D. W., Ir Harban Singh, K. & Sundra, R., 2010. *The PAM 2006 Standard Form of Building Contract*. Malaysia: LexisNexis Malaysia Sdn Bhd.

- Epstein, R. C., 2005. *How Construction Contracts Cause Litigation*. [Online] Available at: http://www.americanbar.org/content/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/constructioncontracts.html [Accessed 2016 December 9].
- Errol A. Adams, J.D & M.L.S, 2011. *Legal Research Methodology*, New York: USC Law Liabrary.
- Estevez, K. M., 2016. *Beware of No-Damages-for-Delay Clauses*, Arizona: Arizona Construction Attorney Kevin M. Estevez. .
- Elliott, T., 2006. *UK: Contract Administrators - The Obligation Of Impartiality And Liability For Incorrect Certification*. [Online] Available at: <http://www.mondaq.com/x/44164/Contract+Administrators+The+Obligation+Of+Impartiality+And+Liability+For+Incorrect+Certification> [Accessed 7 December 2016].
- Group, T. E., 2008. Is Determination Of Employment And Termination Of Contract The Same In Meaning And Implications?. *Master Builder*, pp. 96-97.
- Gotshall, S., 2016. *Legal Research Starting Points: Research Process*. [Online] Available at: <http://libguides.law.drake.edu/c.php?g=151002&p=992703> [Accessed 28 October 2016].
- Hiscox, A., 2015. *What is practical completion and partial possession?*. [Online] Available at: <https://www.wrighthassall.co.uk/knowledge/legal-articles/2015/04/28/what-practical-completion-and-partial-possession/> [Accessed 7 December 2016].

- Howick, S., Ackermann, F., Eden, C. & Williams, T., 2009. *Understanding the causes and consequences of disruption and delay in complex projects: how system dynamics can help*, UK: School of Management, Southampton University, Southampton SO17 1BJ, UK .
- James D. Fullerton, E., 2015. Fullertonlaw. [Online] Available at: <http://www.fullertonlaw.com/changes-delays-and-other-claims> [Accessed 28 November 2016].
- Jervis, B., 2014. What Does 'Active Interference' Really Mean?. *ConstructionPro Week*, vol. 3, no. 37.
- Judi, S. S. & Rashid, . R. A., 2010. Contractor's Right Of Action For Late Or Non-Payment By The Employer. *Journal of Surveying, Construction & Property*, 1(1), pp. 65-95.
- Kamine, B. S., 2014. *Everything You Ever Wanted To Know About Extra Work And The Changes Clause*. [Online] Available at: <http://kamineconstructionlaw.com/publications-and-articles/everything-you-ever-wanted-to-know-about-extra-work-and-the-changes-clause/> [Accessed 6 December 2016].
- Keating, D., 2001. *Keating on Building Contracts: with Commentaries on JCT Forms of Contracts by Adrian Williamson, and a commentary on the I.C.E. Conditions of Contract by John Uff*. 7th ed. London: Sweet & Maxwell.
- Khadka, C. S., 2015. *Research Methodology (Empirical Legal Research)*, USA: LinkedIn Corporation © 2016.
- Koprince, S. J., 2008. Fighting Back: Contractors Can Use Tort Law to Challenge Claims of Fraud, Deceit, and Dishonesty. *ConstructionRisk.com Report*, vol. 10, no. 2, pp. 2-3.

- Kothari, C., 2004. *Research Methodology Methods and Techniques*. 2nd edition ed. New Delhi: New Age International (P) Ltd.
- Lesser, S. B. & Wallach, D. L., 2011. The Twelve Deadly Sins: An Owner's Guide to Avoiding Liability for Implied Obligations During the Construction of a Project. *The Construction Lawyer*, pp. 1-11.
- Lo, T., Fung, I. & Tung, K., 2006. Construction delays in Hong Kong civil engineering projects. *Journal of Construction Engineering and Management*, vol.132, no. 6, pp. 36-49.
- Ltd, I. R., 2016. *Disruption Claims in Construction Contracts*. [Online] Available at: <http://www.ivoryresearch.com/samples/construction-essay-example-disruption-claims-in-construction-contracts/> [Accessed 20 October 2016].
- McGrigor, A., 2010. *What are sectional completion and partial possession?*. [Online] Available at: http://www.isurv.com/site/scripts/documents_info.aspx?documentID=3411 [Accessed 7 December 2016].
- McLeod, E., 2010. *Practical Issues for Practical Completion*. [Online] Available at: <http://www.shepwedd.co.uk/knowledge/practical-issues-practical-completion>
- Minogue, A. et al., 2006. *Give us our time back*. [Online] Available at: <http://www.building.co.uk/give-us-our-time-back/3071117.article> [Accessed 8 December 2016].
- Miuccio, A. A., 2015. *Owner's Claim of Contractor's Abandonment is Barred by Owner's Interference*, New York: Welby, Brady & Greenblatt, LLP.

- Murdoch, J. & Hughes, W., 2000. *Construction Contracts Law and Managemnet, third edition*. USA: Spon Press.
- M.S. Mohd Danuri, et al., 2007. *Study on Contractor's Perception Towards Duties of S.O*, Kuala Lumpur, Malaysia: Quantity Surveying International Conference.
- Parvin, C., 2011. *Types of Claims*. [Online] Available at: <http://www.cordellblog.com/files/2011/12/Types-of-Claims1.pdf> [Accessed 21 October 2016].
- Palena, R., 2015. *Don't Get Caught Flat-Footed after Notice to Proceed: Pitfall #1*. [Online] Available at: <http://blog.mackaysposito.com/don-t-get-caught-flat-footed-after-notice-to-proceed-pitfall-1> [Accessed 6 December 2016].
- Patrick Mead, Partner, & Carter Newell, Brisbane., 1999. Liability Of The Superintendent For Wrongfully Certifying. *Australian Construction Law Newsletter*, 1(65), pp. 24-41.
- Pickavance, K., 2005. *Delay and disruption in construction contracts*. 3rd edition ed. UK: Informa Legal Publishing UK.
- Pratt , J. & Kristjanson, L., 2016. Contractor claims for owner interference. *On-Site Canada's Construction Magazine - since 1957*, pp. 46-47.
- Prickett, F., 2013. *Terminating contracts*, Australia: Clayton Utz.
- Prof (Dr) Khushal Vibhute & Filipos Aynalem, 2009. *Legal Research Methods Teaching Material*, s.l.: Prepared under the Sponsorship of the Justice and Legal System Research Institute.
- Ramus, J., Birchall, S. & Griffiths, P, 2006. *Contract Practice for Surveyors*. 4th ed. London: Butterworth Heinemann.

- Ramli, S., 2012. *Summary Flowchart: Introduction to Research Methodology*. [Online]
Available at: <http://www.slideshare.net/suhailiramli/flowchart-12037638>
[Accessed 3 September 2016].
- Richard, K. A., Peter, K. K. & Gerryshom, M., 2016. Change Order Management Factors in Building Projects in Northern Nigeria. *Asian Social Science* , 12(1), pp. 223-236.
- Robinson, N. M., Lavers, A. P., Tan, G. K. H. & Chan, R., 1996. *Construction Law in Singapore and Malaysia*. Singapore: Butterworths Asia.
- Rosenthal, M. J., 2016. *Exceptions To No-Damage-For-Delay Clause Further Limited*, s.l.: LinkedIn.
- Syed M., A., Salman, A., Mauricio Castillo & Pragnya Kappagantula, 2002. *Construction Delays in Florida: An Empirical Study*. [Online] Available at: www.cm.fiu.edu/pdfs/Research-Reports [Accessed 23 October 2016].
- Stone, R. W., 2016. *Architects' and Engineers' Liability Under IOWA Construction Law*, IOWA, US: Simmons Perrine Moyer Bergman PLC.
- Tan, S. K., 2010. *Dispute Resolution In Relation To Delay Of Construction Project*, Johor Bahru: Faculty of Civil Engineering, Universiti Teknologi Malaysia.
- Trigueros, A., 2014. *Wrongful or Tortious Interference with Contracts*. [Online] Available at: <http://www.legalmatch.com/law-library/article/wrongful-or-tortious-interference-with-contracts.html> [Accessed 10 October 2016].
- Williams, T., C Eden & F Ackermann F, 2002. Structuring a delay and disruption claim: An application of cause-mapping and system dynamics. *European Journal of Operational Research*, Issue 148, pp. 192-204.