JUDICIAL INTERPRETATION OF THE HIGH COURT
IN APPLICATION OF THE SECURITY FOR COSTS

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UNIVERSITI TEKNOLOGI MALAYSIA
JUDICIAL INTERPRETATION OF THE HIGH COURT
IN APPLICATION OF THE SECURITY FOR COSTS

THAM YOON FAH

A dissertation submitted in partial fulfillment of the
requirements for the awards of the degree of
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DEDICATION

Deepest thanks to my parents, Siew How and Choy Har,
my family and friends
for their love, guidance, understanding and the countless hours of joy
we shared throughout the years.

Two small words to convey my inherit feeling in my heart:
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ABSTRACT

Security for costs is a fund of money paid into Court by a plaintiff to protect defendants from unrecoverable costs associated with the plaintiff’s action. The High Court is guided by some considerations to make order for security for costs but the considerations are not defined in detail and left the Court to interpret the meaning. This has caused the Courts to give different interpretations in making the decisions. Another issue which arise is whether the High Court has the power to grant interim measures and make security for costs under section 11(1) of Arbitration Act 2005 in support of an arbitration which is taking place or will take place outside Malaysia. Besides that, section 11(1) of Arbitration Act 2005 has stated that any party including the plaintiff may apply to the Court for interim measure which is nature is contradictory to the general rule that is the security for costs is applied by the defendant. Section 19 of Arbitration Act 2005 gives overlapping but not coextensive powers to the arbitral tribunal that is baffling whether an interim order should be sought from the High Court or the arbitral tribunal. In order to clear the doubt regarding the application of security for costs, this research project is carried out to determine the grounds for the High Court to order or dismiss the application for security for costs. Legal cases are collected from year 1986 to year 2009 from Malayan Law Journal via Lexis Malaysia website and documentary analysis was conducted on the related cases. Finally, this research has shed some light in exposing what are the possible reasons that the High Court may order or dismiss the application for security for costs. From the analysis done on the cases, it is observed that the party who apply the security for costs has to be the defendant. The High Court has to consider all the circumstances in a particular case before making any decisions. The High Court will order the plaintiff to furnish such security when the High Court believes that the security is necessary.
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Gordano Building Contractors Ltd v Burgess [1988] 1 WLR 890, CA (Eng).....59
Government of Malaysia v Lim Kit Siang [1988] 1 CLJ 219.......................38
Government of Sarawak v Sami Mousawi-Utama n Sdn Bhd (in liquidation) [1998] 3
MLJ 820..............................................................................................55, 78, 80, 101, 113, 118, 125, 129
Great Western Rly v Philips (1908) AC 101..............................................13
Green v Charnock (1971) 1 Ves 396.............................................................51
Gula Perak Bhd v Agri-Projects (M) Sdn Bhd [1989] 1 MLJ 4221..............56
Gurubachan Singh v Seagrott & Campbell [1962] MLJ 309.........................63
Hawkins v Rigby (1860) 29 LJCP 228………………………………………………25
Hawkins Hill Consolidated Gold Mining Co Ltd v Want, Johnson & Co (1893) 69 LT 297………………………………………………………………………………63
Hinde v Hasew (1884) 1 TLR 94, DC (Eng)……………………………………….56
Hitachi Shipbuilding and Engineering Co Ltd v Viafieil Compamia Navira SA [1981] 2 Lloyd’s Rep 498, CA (Eng)……………………………………………………53
Hogan v Hogan (No. 2) [1924] 2 Ir R 14…………………………………………59
Hutchison Telephone (UK) Ltd v Ultimate Response Ltd [1993] BCLC 307, CA (Eng)……………………………………………………………………………….58
John Barker Construction v London Portman Hotel (1996) 12 Const LJ 277……...35
Jones and Saldanha v Gurney [1913] WN 72……………………………………….53
Keary Developments Ltd v Tarmac Construction Ltd & Anor [1995] 3 All ER 534………………………………………………………………………………………………102, 103
Keveorkian v Burney (No. 2) [1973] 4 All ER 468, CA (Eng)……………………52
La Grange v McAndrew (1879) 4 QBD 210…………………………………………48, 97
Lek Swee Hua v American Express International Inc [1991] 2 MLJ 151……………….52
Letang v Cooper [1965] 1 QB 232……………………………………………………38
Lewis v Haverfordwest RDC [1953] 2 All ER 1599, [1953] 1 WLR 1486…………….24
Lim Kean v Choo Koon [1970] 1 MLJ 158………………………………………………….38
Low Chee Yan v Loh Kong Yew (1917) 2 FMSLR 176………………………………65
Luminous Crossroads Sdn. Bhd. v Lim Kong Huat Construction [2001] MLJU 475………………………………………………………………………………………………77, 80, 92, 112, 117, 125, 129
Maatschappij Voor Fondsenbezit v Shell Transport and Trading Co [1923] 2 KB 166, CA (Eng)……………………………………………………………………………….57, 91
Madan Lal v Ho Siew Bee [1983] 1 MLJ 105…………………………………………41
Mapleson v Masini (1879) 5 QBD 144 at 147, DC (Eng)……………………………..53, 58, 91
Masling v Motor Hiring Co (Manchester) Ltd [1919] 2 KB 538, CA (Eng)……………55
Merton v Times Publishing Co Ltd (1931) 48 TLR 34, CA (Eng)……………………63
Mynn v Hart (1845) 9 Jur 860

New Fenix Compagnie Anonyme d’Assurances de Madrid v General Accident, Fire and Life Assurance Corp Ltd [1911] 2 KB 619, CA (Eng)

Northern Regional Health v. Derek Crouch Construction Co Ltd (1984) 26 BLR

Pearson v Naydler [1977] 3 All ER 531

Peppard and Co. Ltd v Bogoff [1962] IR 180


Pirelli Cable Works v Oscar [1983] 1 ALL ER 65

Pooley’s Trustee v Whetham (1884) 28 ChD 38, CA (Eng)

Procon (GB) Ltd v Provincial Building Co Ltd [1984] 2 All ER 368, [1984] 1 WLR 557, CA (Eng)

Raju Rajaram Pillai v MMC Power Sdn Bhd [2000] 6 MLJ 551

Re an arbitration between Authoreptic Steam Boiler Co Ltd and Townsend, Hook & Co (1888) 21 QBD 182

Re an arbitration between Walker & Son and Brown (1882) 9 QBD 434

Re Aplinallis Co’s Trade-Marks [1891] 1 Ch 1, CA (Eng)

Re B (Infants) [1965] 2 All ER 651n

Re Contract and Agency Corp Ltd (1887) 57 LJ Ch 5

Re Percy and Kelly Nickel, Cobalt and Chrome Iron Mining Co (1876) 2 ChD 531

Re Smith, Bain v Bain (1896) 75 LT 46, CA (Eng)

Re Wadsworth, Rhodes v Sugden (1885) 29 ChD 517

Rhodes v Dawson (1886) 16 QBD 548, CA (Eng)

Sacker v Bessler & Co (1887) 4 TLR 17

Salchi SPA v Ler Cheng Chye (No 2) 1 MLJ 556

Seloga Jaya v Pembinaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97

Serlaz v Hanson (1800) 5 Ves 261

Sir Lindsay Perkinson & Co. Ltd v Triplan Ltd [1973] 1 QB 609

Siti Juliana Suen Abdullah & Ors v Sungei Wang Properties Sdn Bhd & Ors [2009] 2 CLJ 592

Skrine & Co. v MBf Capital Berhad & Anor [1998] 44 AMR 3298
Solitaire Land Sdn Bhd v Hong Leong Bank Bhd [2001] 4 MLJ 75
Stratford & Son Ltd v Lindley No 2 [1969] 1 WLR 1547
Strong v Carlyle Press (No 2) [1893] WN 51
T Sloysan & Sons (Builders) Ltd v Brothers of Christian Instruction [1974] 3 All ER 715
Thye Hin Enterprises Sdn Bhd v Daimler Chrysler Malaysia Sdn Bhd [2004] 5 AMR 562
Vale v Offert (1874) 30 LT 457
Visco v Minter [1969] 2 All ER 714
Waiheke Homes v Laughland [1991] 3 NZLR 377
Wee Tiang Kheng v Ngu Nii Soon & Ors [1989] 1 MLJ 252
Westmnbrg v Mortimore (1875) LR 10 CP 438
Willmott v Freehold House Property Co (1885) 33 WR 554, CA (Eng)
Winterfield v Bradnum (1878) 3 QBD 324, CA (Eng)
CHAPTER 1

INTRODUCTION

1.1 Background Of The Study

The Arbitration Act 2005 which substantially founded on the UNCITRAL model law governs the arbitration proceedings in Malaysia.\(^1\) After 15\(^{th}\) of March 2006, this Arbitration Act only applies to arbitrations commencing.\(^2\) Arbitrations that began before this date are governed by the Arbitration Act 1952.\(^3\)

Jayaseelan has reported that arbitration gradually became more important in current years as more business is operated internationally.\(^4\) The essence of the sort of arbitration is that some dispute is referred by the parties for settlement to a tribunal of their own choosing, instead of to a court.\(^5\) Arbitration is better than the usual legal process because parties can determine the span of the arbitration process and numbers of arbitrators either one or three, who are usually experts in their own field.\(^6\) It is also a more cost effective and efficient dispute resolution.\(^7\) The arbitrators are familiar in a particular areas of business with the cases involve.\(^8\)

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\(^2\) Ibid.
\(^3\) Ibid.
\(^6\) Ibid, No. 4.
\(^7\) Ibid.
\(^8\) Ibid.
Arbitration has become the dispute settlement mechanism and the norm in the construction industry. This is because the popularity of arbitration clauses in standard forms of construction contract. In addition, the use of arbitrator’s skills in technical disciplines due to the technical content of disputes. Next, the arbitrator need to be empowered to open up, review and revise decisions or certificates, arising from the architect’s or engineer’s judgment in administering the building contract.

Fees, charges, disbursements, expenses and remuneration incurred by a party or incidental to the conduct of the proceedings are examples of cost awarded by the Courts. The award of costs is discretionary and the Court must make and order as to costs to enable a party to recover such costs incidental to whom and the amount of costs to be paid to litigant. The costs awarded may either be remuneration paid by the client to his own solicitor or the costs which a litigant has to pay to another litigant to compensate the other for the expenses which he has incurred in the litigation.

The general rule for security for costs is only applies against the plaintiff and not against the defendant. Security for costs is an amount of money paid into the Court by a plaintiff to protect a defendant against otherwise unrecoverable costs either in whole or in part linked with reacting to the plaintiff’s action. Hence, the plaintiffs who start the legal proceedings are obligated to accept the resulting responsibility for costs if their claims eventually fail. There are two exceptions which are the defendant appealing and the defendant brings a counterclaim and is therefore in the position of a plaintiff with regards to the counterclaim.

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10 Ibid.
11 Ibid.
12 Ibid.
14 Ibid.
15 Ibid.
18 Ibid, No. 16.
The defendant may apply to the Court so that the plaintiff provide security as to costs where the defendant feels that the strength of the defence is good and there is a good chance of defeating the plaintiff but is worried that the plaintiff will be unable to make payment as to the order as to costs that maybe made at the end of the trial.  

The Court or the arbitrator makes order securing the right party who is eventually successful to recover his costs of the arbitration and securing the right of a successful claimant to be paid the amount of the award. There are two types of order for security which are security for costs and security for claims. If the application of the defendant for security to costs is allowed, the plaintiff will be required to reimburse specific amount of money into court within specified period.

1.2 Problem Statement

The High Court is guided by the following considerations in the practice of its discretion to order security for costs:  

i. Is the plaintiff’s claim bona fide? Does the plaintiff have reasonably good prospects of success?  

ii. Is there an admission by the defendant?  

iii. Is the application oppressive in nature that is to stifle a genuine claim?  

iv. Has the plaintiff’s want of means been brought on by the defendant?  

v. The application must be made as early as possible in the proceedings.

Each consideration should act as a guideline to the Court for ordering security for costs. However, they left behind some unclear statements. There are issues and uncertainties regarding to the considerations stated above. This is because the

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21 Ibid.  
23 Ibid.
Guideline is very general in nature and does not specifically define in detail what the considerations are and leave the Court to interpret the meaning. This situation would to a certain extent lead to different interpretations by the Courts in making decisions.

Furthermore, one question arises is whether the High Court has the power to approve interim measures under section 11(1) of Arbitration Act 2005 in support of an arbitration which is taking place or will take place outside Malaysia.\textsuperscript{24} Hence, there is an issue showing that whether the High Court has the power to approve security for costs outside Malaysia. Besides, there is an issue which is whether the power of the Court determines the grounds of the Court to dismiss the application for security for costs. In other words, will the High Court dismisses the application for security for cost due to the arbitration is held or will be held outside Malaysia?

The Arbitration Act (Amendment) 2011 amends the Arbitration Act 2005 and empowers the Malaysian court that practices admiralty jurisdiction to order the retention of vessels or the provision of security, during the determination of arbitration proceedings related to admiralty or maritime disputes.\textsuperscript{25} Above all, the Arbitration Act (Amendment) 2011 amends section 11 of the Arbitration Act 2005. The altered section 11 is as the following:

“11. Arbitration agreement and interim measures by the Court:

(1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for:....”

Section 11(1) stated that any party may apply to the High Court for interim measures and it seems that the High Court may make orders for security for costs


which is contradict to the general rule that the application for security for costs is by
the defendant.\textsuperscript{26} Thus, which party is in the position to apply for security for costs? It
should be the Plaintiff or the Defendant?

Security for costs is obtained by taking action by applying interim order.
Section 19 of Arbitration Act 2005 gives overlapping but not coextensive powers to
the arbitral tribunal, the question often arises as to whether an interim order should
be sought from the court or the arbitral tribunal.\textsuperscript{27} The Arbitration Act 2005 does not
provide any guidelines in this respect.\textsuperscript{28} This will lead to another question or problem
to the arbitrators whether to approve a security for costs. On the other hand, the High
Court has no reason not to hear the application for security for costs since the Court
is given such powers in Section 19 of Arbitration Act 2005. Does the Court have
reasons not to grant security for costs for the plaintiff?

There are a few of uncertainties relating to apply security for costs as
mentioned at above. These uncertainties will definitely leads to many issues and
problems. In order to find out the solution and clear the doubt regarding to the
application of security for costs, this research project is has to carry out.

\textbf{1.3 Objective of The Study}

The objective of this study is to determine the grounds for the High Court to
order or dismiss the application for security for costs.

\textsuperscript{26} Ibid, No. 25.
\textsuperscript{27} Ibid, No. 24.
\textsuperscript{28} Ibid.
1.4 **Scope of the Study**

This study is focused on the following:


2. Legal cases reported in Malayan Law Journal and Lexis Malaysia in relation to security for costs in Malaysia and Singapore.

1.5 **Significance of the Study**

Essentially, this study was expected to generate answers for the uncertain issues that arise in arbitration specifically the issues that in relation to security of costs. In accordance to that, the identified issues stated in sub-heading 1.2 were analyzed based on the interpretation and judgment by the High Court. This study is capable to assist and guide the professionals in the construction industry to have a clear and better understanding of judicial interpretation on security for costs in arbitration.

1.6 **Research Procedure**

In order to achieve the research objective, a systematic method in conducting this research had been organized. The study process consists of five phases:
Phase 1: Preparation of Research Proposal
Phase 2: Literature Review
Phase 3: Data Collection
Phase 4: Data Analysis
Phase 5: Conclusion and Recommendation

1.6.1 Phase 1: Preparation of Research Proposal

The first stage of the research involves initial study and discussion with friends and lecturers regarding what are the issues in construction industry. Initial literature review was conducted to find the idea of the research topic. After the initial study, the brief proposal of the research topic was created. Then, the objective and scope of the research were fixed. Next, a research outline was prepared to discover what type of data was required in this research. Meanwhile, the data sources were identified as well.

1.6.2 Phase 2: Literature Review

Literature review was a fundamental phase in the research process. It was very important to assist in carrying out the research. It was conducted to provide a comprehensive background study of the research. Literature review and various documentats related to the research field had been collected to achieve the research objective. The reviews mainly focused on the Arbitration Act, Civil Procedure and Security for Costs.
1.6.3 Phase 3: Data Collection

At this phase, all the data and information related to security for costs were gathered and collected. Data collected were from the Malayan Law Journal viz the Lexis Malaysia online database. All the legal cases related to the research topic were classified out from the database. Important cases were collected and utilised for the analysis at Phase 4. Data collected were mainly through documentary analysis. All gathered data and information were documented neatly and systematically so that the data and information can be easily be traced back.

1.6.4 Phase 4: Data Analysis

This phase of research included data analysis, data interpretation and data arrangement. This phase converted the data collected into information that is useful and valuable for the research. Arrangement of data tends to simplify the process writing of the paper.

1.6.5 Phase 5: Conclusion and Recommendation

The phase 5 was the final phase of the research process. Mainly, it involved the writing up and checking of the writing. Conclusion and recommendations were prepared with reference to the findings during the phase of data analysis.
1.7 Research Flow Chart

**RESEARCH ISSUE**
- The issue is the grounds that the security for costs can be obtained or rejected is unclear.

**RESEARCH OBJECTIVE**
- To determine the grounds of High Court to approve or dismiss securities for costs.

**LITERATURE REVIEW**

**RESEARCH METHOD**
- Data collection:
  - Legal cases related to the security for costs in arbitration
  - Access to UTM library electronic database (Lexis Malaysia Legal Database)
  - Collect cases from Malayan Law Journal.
- Data analysis: Detail study on legal cases

**DISCUSSIONS**

**CONCLUSION & RECOMMENDATIONS**

*Figure 1.0: Flow Chart for Research Methodology*
REFERENCES


