

Summary Judgment in Malaysian Construction Contract

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Abstract

This paper aims to identify what circumstances, limited as they may, that allow summary judgment to be available to the parties in a building contract mainly through documentary analysis of law journals. The construction contract has built-in potential for conflicts and disputes which 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 dispute. Litigation is one method, but the process takes a substantial period of time to come to determination. Therefore most disputes in construction contracts are resolved by arbitration or mediation. In a litigation process, there are procedures where the parties can obtain quick judgment without going to trial. It is known as a summary judgment procedure. However, it is available only in limited circumstances. Furthermore, it appears that it is not frequently used in construction contract cases. The results show that there are four circumstances where the summary judgment has been made available to the parties in a building contract in Malaysian construction cases. All four of these circumstances are related to claims for progress payments that the employer (or main contractors) refused or failed to pay to the main contractor (or sub-contractors as the case may be). In conclusion, it can be said that this summary judgment procedure is only suitable for actions claiming undisputed payment.

Keywords: Summary Judgment, Malaysian Construction Contract

1. Introduction

The disputes that arise in Malaysian construction industry vary in nature and impact to the project. The method of dispute resolution may be divided into three main groups; (a) formal (litigation and arbitration), (b) semi-formal (adjudication, mediation, conciliation etc.), and (c) informal process which enables parties to reach a settlement through their own negotiation. In construction contract, the agreement to arbitrate is often included as one of the clause of a standard form of contract. The implications of arbitration clauses are very wide in almost any matter, disputes or differences should refer to arbitration. It also binds the parties to resort in the event of disputes arising from the contract to arbitration for a settlement. Therefore, in Malaysian construction industry, few disputes actually reach the court and the rest is covered by arbitration.

In the view of the fact that there are cases relating construction contract brought to the court for determination of dispute, it is found that some situations permit the party to refer the dispute directly to the court. For example, when the parties agreed to resort the dispute to the court or, arbitration agreement is null and void, inoperative or incapable of being performed or, no dispute between the parties, and etc.

Although the parties are permitted to refer the dispute directly to the court, usually the process for settlement or determination through litigation tends to takes more time and cost comparing to arbitration and Alternative Dispute Resolution (ADR) methods. But, there is a procedure for obtaining quick judgment without trial and it is known as summary judgment or Order 14 judgment. It is useful procedure for disposing of cases which are virtually incontestable but the application of this special procedure must comply with certain condition and requirements.

2. Objective

The paper presents any circumstances that available to the party use summary judgment in construction contract litigation as a method to obtain quick judgment and settling the dispute. The study focuses on construction cases only and the result may benefit as a reference to know when summary judgment will be available to dispute party and its provide the general outline of the summary judgment application under civil procedure of Malaysia.

3. Summary Judgment

Summary judgment is a judgment in action which is entered without plenary trial and which is based upon the affidavits of the parties. It was introduced in England in the 19th century to enable plaintiff, by prompt action, to defeat a defendant who puts upon record an intention to defend merely to delay the proceedings. Therefore, this special procedure enables the plaintiff at an early stage of the proceedings, to obtain judgment on his claim or part of his claim without going to trial. The principle underlying summary judgment is that a defendant must have no arguable defence to the claim or, that the claim should not be contested. The plaintiff should be entitled to save time and costs by having a summary judgment awarded against the defendant.

In Malaysia, statutory provision for an application of summary judgment is available to a plaintiff under Order 26A of the Subordinate Court Rules 1980 (SCR) and Order 14 of Rules of the High Court 1980 (RHC). It is an application to sign final judgment without waiting for a trial

of the action. O 14 and O 26A provides for the application for summary judgment and rule 2 of both the Orders provides the scope or the type of action where application are summary judgment are prohibited.

Under our Rules of High Court 1980, summary judgment is not available if an action contains a claim by a plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction, fraud, breach of promise to marry and in action of specific performance, rescission and forfeiture which applies under O 81. In addition, O 14 also cannot apply against the government (O 73 of RHC 1980) and use for an admiralty claim in rem as adopted by the court of Malaysia in Singapore case *The 'August 8th'; The August 8th' Owners v Costas Bachas*. The party who may apply for summary judgment must know that these entire claims are outside the scope and not applicable under O 14 or O 26A.

In relation to who may apply for summary judgment, O 14 of RHC provides only a plaintiff entitled to make an application on a claim or a particular part of such a claim. A defendant is not entitled to apply for summary judgment unless he has served a counterclaim on the plaintiff and his application is with regard to a claim made in the counterclaim or a particular part of such a claim. In Malaysian construction cases which involved an application for summary judgment shows that most parties who apply for summary judgment are main-contractor and subcontractor who are claims for outstanding payment or unpaid interim payment.

4. Observation

In order to fulfil the objective of this study, observation was made to cases related in building contract in identifying the circumstances that summary judgment available to dispute parties in construction litigation. Based on the preliminary analysis, most reason that the party apply for summary judgment is regarding payment issue. The following circumstances are permit the party apply for summary judgment but it still subject to the court whether allow or dismiss the application.

a) Circumstances 1:

The employer failed to pay the contractor based on the sum stated in interim payment certificate issued by architect.

In *Pembinaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57*, the appellant (contractor) sued the respondent (employer) and sought summary judgement under Order 14 of the Rules of the High Court (RHC) alleging that the employer was under an obligation to pay at once the sum appearing in the certificate issued by the architect. The issue in this case is whether employer under building contract obliged to pay interim certificate upon being served. In this case the defendant made cross-claim and the plaintiff appeal. Hence court held allowing the appeal.

b) Circumstances 2:

The employer stop making payment to the contractor and claim liquidated and ascertained damages (LAD) for late of completion but the contractor completed the works based on revised master work programme furnished by the plaintiff.

In *Jallcon (M) Sdn Bhd v Nikken Metal (M) Sdn Bhd (No.2) [2001] 5 MLJ 716*, an application for summary judgement was made by defendant (sub-contractor) as a counterclaim against the plaintiff (main-contractor). The court held that allowing the appeal where the defendant had performed his part under sub-contract and entitled for payment regards to his counterclaim. This is the case where the defendant applies for summary judgment and served as a counterclaim on the plaintiff.

c) Circumstances 3:

The employer who had agreed to pay directly to sub-contractor which appointed by the main contractor, fails to pay according to the amount due in payment certificate in the situation that there is no privity of contract between sub-contractor and employer.

Referring to the case of *KM Quarry Sdn Bhd v Ho Hup Construction Co Bhd [2006] 7 MLJ 203*, the sub-contract agreement provided that the plaintiff to be paid directly by the employer whilst it is expressly against any privity of contract between plaintiff and the employer. In this case, the plaintiff (sub-contractor) entered summary judgment whilst the defendant then appealed claiming the there were five triable issues. The court held that there was no triable issue in the assignment of right based on Section 42 of Contract Act 1950 as raised by defendant (main-contractor). Therefore, the decision of allowing plaintiff's application for summary judgment remains.

d) Circumstances 4:

The main contractor refused to pay nominated sub-contractor's payment due to used sham defence as a defence to set-off and counter-claim nominated sub-contractor's application for summary judgment.

In the case of *Alliance (Malaya) Engineering Co. Sdn Bhd v. San Development Sdn Bhd*, the appellant who were nominated sub-contractor had brought an action against the defendant by application for summary judgment five times after the first three application had abandoned and dismissed by the court. The court held that apart from set-off and counterclaim, the defence was not a triable issue but a sham defence that used for the purpose of delay. The amount of debt had been ascertained and it was notified to the defendant and practically admitted by the defendant.

Another cases which fall under payment issues are, *Jetera Sdn Bhd v Maju Holdings Sdn Bhd [2006] 2 MLJ 313*, *Alliance (Malaya) Engineering Co Sdn Bhd v San Development Sdn Bhd*

v[1974] 2 MLJ 94, Mahkota Technologies Sdn Bhd (Formerly Known As The General Electric Co (M) Sdn Bhd) v BS Civil Engineering Sdn Bhd [2006] 6 MLJ 505 and

5. Conclusion

The Malaysian construction industry landscape shows that the Arbitration was preferred as a method in settling any dispute for a long time. In the recent years, the industry willing to explore ADR as a dispute resolution process and result an increasing in the use of multi-tier dispute resolution clauses in construction contracts. However, in litigation process, any dispute party in construction contract can apply for summary judgment to obtain quick judgment and settling the dispute. That application whether success or not are subjected to the court and procedural requirements because it is an integral part of legal system. The party must know what is the situations permit them to refer dispute direct to court, what is the ground cases applicable for summary judgment in O 14 and O26A, what is the condition and requirements need to comply and lastly what is the circumstances that benefit the party to obtain successful judgment by way of application of summary judgment. These 4 circumstances which the application of summary judgment will be available to the parties may only use as a guideline to shows the situations that the court allowing the application. However, the decision of the court to allow or dismiss the application subject on the merits of each case.

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