

THE RESTRAINTS OF PERFORMANCE BOND CLAIMS IN CONSTRUCTION
INDUSTRY

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“I declare that this thesis entitled “*The Restraints of Performance Bond Claims in Construction Industry*” is the result of my own research except as cited in the references. The thesis has not been accepted for any degree and is not concurrently submitted in candidature of any other degree.”

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ABSTRACT

Construction industry is full of uncertainties. It is a risky enterprise. Due to the recent problems of the construction industry, various bonds are required. Performance bond is used to guarantee performance of contract and protect the owner from financial loss due to the failure of the contractor to perform. It has held as a comprehensive and reliable instrument for minimizing the risks in construction projects. However there are some issues that may obstruct the real purpose of performance bond and restrained the performance bond claim. In *Teknik Cekap Sdn Bhd v Public Bank Bhd*, defective notice in calling performance bond had obstructed the real purpose of performance bond. Besides, in *Edward Owen Engineering Ltd v Barclays Bank International Ltd and another*, it stated that if there is clear fraud, the surety does not have to pay according to its guarantee. In *Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd & Anor*, it also stated that unconscionability is another restraint of performance bond claims. These few case laws show that there are some circumstances that restrain performance bond claims. Therefore this research is conducted to identify the circumstances that restrain the performance bond claims in construction industry. This research is conducted by documentary analysis. In order to achieve the objective of this research, 16 Malaysia law cases which succeed in restraining the performance bond claim in construction industry are analyzed. These cases are Malayan Law Journal (MLJ) cases which are available in the database of *Lexis Malaysia* website. From the findings of this research, it can be concluded that the circumstances that restrain performance bond claims in construction industry are unconscionable conduct, prevention of irretrievable injustice, invalid demand, serious issues to be tried, balance of convenience, fraud, premature contract termination and no right to claim performance bond.

ABSTRAK

Industri pembinaan penuh dengan ketidaktentuan dan berisiko. Oleh sebab masalah dalam industri pembinaan, beberapa bon diperlukan. Bon pelaksanaan digunakan untuk menjamin pelaksanaan kontrak dan melindungi pemilik daripada kerugian kewangan yang disebabkan oleh kontraktor yang gagal melaksanakan kerja. Bon pelaksanaan dianggap sebagai instrumen yang komprehensif dan boleh dipercayai bagi mengurangkan risiko dalam projek pembinaan. Manakala terdapat beberapa isu-isu yang menghalang tujuan sebenar bon ini dan menyebabkan tuntutan bon pelaksanaan terhalang. Dalam *Teknik Cekap Sdn Bhd v Public Bank Bhd*, notis yang tidak sempurna telah menghalang tujuan utama bon pelaksanaan. Selain itu, dalam kes *Edward Owen Engineering Ltd v Barclays Bank International Ltd and another*, ia menyatakan bahawa jika terdapat 'clear fraud', penjamin tidak perlu membayar berdasarkan jaminannya. Dalam *Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd & Anor*, ia juga menyatakan bahawa 'unconscionability' ialah penghalang bagi tuntutan bon pelaksanaan. Beberapa kes ini menunjukkan bahawa terdapat beberapa keadaan yang menghalang tuntutan bon pelaksanaan. Oleh itu, kajian ini dijalankan untuk mengenal pasti keadaan yang menghalang tuntutan bon pelaksanaan dalam industri pembinaan. Kajian ini dijalankan melalui analisis dookumen. Untuk mencapai objektif kajian ini, 16 kes dalam Malaysia yang telah berjaya menghalang tuntutan bon pelaksanaan dalam industri pembinaan telah dianalisis. Kes-kes ini ialah kes dalam *Malayan Law Journal (MLJ)* yang terdapat dalam pangkalan data di laman web *Lexis Malaysia*. Melalui kajian ini, boleh disimpulkan bahawa keadaan yang menghalang tuntutan bon pelaksanaan dalam industri pembinaan ialah tindakan yang 'unconscionable', pencegahan ketidakadilan yang tidak dapat ditebus, tuntutan yang tidak sah, isu serius yang perlu dipertikaikan, imbalan kesesuaian, 'fraud', penamatan kontrak yang terlalu awal, dan tiada hak untuk menuntut bon pelaksanaan.