

BREACHES OF CONTRACT IN CONSTRUCTION INDUSTRY

LAWRENCE YAP SIE KIONG

UNIVERSITI TEKNOLOGI MALAYSIA

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LAWRENCE YAP SIE KIONG

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

Faculty of Built Environment
Universiti Teknologi Malaysia

JULY 2009

Especially to.....

My Beloved Dad, Mum, Sisters

Friends

and

SIC Members

Thanks for everything!!

ACKNOWLEDGEMENT

A debt of gratitude is owed to many individuals who have given me the benefit of their unconditional help, tolerance and knowledge in writing and completing this master project. First of all, I would like to express my highest gratitude to my supervisor, Encik Norazam Othman for his guidance, advice and support in order to complete this master project.

My appreciations also go to all the lecturers for the course of MSc Construction Contract Management, for their patient and kind advice during the process of completing the master project. Further, I would like to express my special thanks my fellow classmates, who have in their own way helped me a great deal throughout the preparation and production stages of this master project.

Finally, I would like to extend my truthful appreciation to my dearest parents and sisters for giving their full supports.

ABSTRACT

The doctrine of freedom to contract, as the cornerstone of contract law in the common law countries (Malaysia inclusive) has consequently generated an extensive array of contracts of various characteristics and varieties. In Malaysia, there are two basic components in the contract documents used for the contracting of most construction work that is the Contract Conditions and technical specifications and drawings. As a general principle, once a party enters into a contract, he must perform his obligations strictly according to the terms of the contract. However, in the construction industry, breaches of contract are commonplace to the point of routine. Moreover, under the complicated provisions of many construction contracts the possible breaches of contract either by contractor or employer are numerous, and in each case the general principles must be applied in order to determine what, if any, damage is recoverable for the breach. This research therefore set out to illustrate the types of breaches of contract that are currently fashionable in Malaysian construction industry. The research is also to address the legal issues in relation to damages. The approach adopted in this research is documentary analysis of case laws. A total number of 53 cases were studied, where only 11 of them were associated with the breaches of contract. Findings show that there are 7 types of breaches existed in construction industry for the past thirty years. Most of the cases were breached due to the reason of “abandonment of work”. On the other hand, 3 legal issues closely related to damages were addressed in this research. In summary, findings of this research may assist the relevant parties in addressing and overcoming the problems associated to breaches of contract and creates a win-win situation for all parties in the Malaysian construction industry.

ABSTRAK

Doktrin kebebasan berkontrak, kerana asas undang-undang kontrak dalam negara-negara “common law” telah mengakibatkan penjanana satu tatasusunan yang meluas dalam pelbagai ciri and jenis-jenis kontrak. Di Malaysia, terdapat dua komponen asas dalam dokumen-dokumen kontrak yang digunakan untuk kontrak kerja pembinaan iaitu Syarat-syarat Kontrak dan penentuan-penentuan teknikal serta lukisan-lukisan. Secara prinsip umum, apabila satu pihak memasuki suatu kontrak, pihak tersebut perlu menjalankan kewajibannya semata-mata menurut syarat-syarat kontrak. Bagaimanapun, dalam industri pembinaan, pelanggaran kontrak adalah biasa dan menjadi rutin. Lagipun, di bawah peruntukan-peruntukan rumit itu banyak kontrak pembinaan kemungkinan mempunyai pemungkiran kontrak sama ada oleh kontraktor atau majikan, dan dalam setiap kes, prinsip umum itu mesti digunakan dalam perintah bagi menentukan apa, jika mana-mana, kerosakan boleh dibaikpulihkan. Oleh itu, penyelidikan ini mengenalpasti jenis-jenis pemungkiran kontrak yang cukup lazim pada masa kini dalam industri pembinaan di Malaysia. Penyelidikan ini juga adalah untuk melihat isu-isu berkaitan kerosakan. Pendekatan itu menggunakan penyelidikan secara menganalisis dokumen kes undang-undang. Jumlah keseluruhan mencapai 53 kes telah dipelajari, di mana hanya 11 berkaitan dengan pemungkiran kontrak. Penemuan-penemuan menunjukkan terdapat 7 jenis pemungkiran wujud dalam industri pembinaan dalam tiga puluh tahun yang lepas. Kebanyakan kes kemungkiran berlaku disebabkan “pembuangan kerja”. Sebaliknya, 3 isu perundangan yang berkait rapat dengan kerosakan dikemukakan dalam penyelidikan ini. Natijahnya, penemuan-penemuan penyelidikan ini mungkin membantu pihak tertentu dalam mengemukakan dan mengatasi masalah-masalah berkaitan pemungkiran kontrak dan mewujudkan situasi menang-menang untuk semua pihak dalam industri pembinaan di Malaysia.

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LIST OF ABBREVIATIONS

AC	Law Reports Appeal Cases
All ER	All England Law Reports
ALJ	Australian Law Journal
ALR	Australian Law Reports
ALJR	Australian Law Journal Reports
App Cas	Appeal Cases
B	Beavan
B & S	Best and Smith's Reports
Build LR	Building Law Reports
CA	Court of Appeal
CB	Common Bench Reports
Ch	Chancery
Ch App	Chancery Appeal
Ch D	The Law Reports, Chancery Division
CIDB	Construction Industry Development Board
CLD	Construction Law Digest
DC	Divisional Court, England
Const LJ	Construction Law Journal
Const LR	Construction Law Reports
CP	Law Reports, Common Pleas
CPD	Law Reports, Common Pleas Division
DLR	Dominion Law Reports
Exch	Exchequer Reports
Eq	Equity Case
EWHC	High Court of England and Wales Decisions

FC	Federal Court
F & F	Foster & Finlayson's Reports
H & N	Hurlstone & Norman's Exchequer Reports
HGCRA	Housing Grants, Construction and Regeneration Act
HL	House of Lords
HKC	Hong Kong Cases
HKLR	Hong Kong Law Reports
IR	Irish Reports
KB	King Bench
LGR	Local Government Reports
LJKB (QB)	Law Journal Reports, King's (Queen's) Bench
Lloyd's Rep	Lloyd's List Reports
LR	Law Reports
LT	Law Times Reports
JP	Justice of the Peace / Justice of the Peace Reports
MLJ	Malayan Law Journal
NS	Nova Scotia
NZLR	New Zealand Law Reports
PAM	Pertubuhan Arkitek Malaysia
PWD	Public Work Department
PD	Probate, Divorce and Admiralty Division of High Court
QB	Queen Bench
TCC	Technology and Construction Court
SLR	Singapore Law Reports
Stark	Starkie's Nisi Prius Reports
WLR	Weekly Law Reports
WR	Weekly Reports

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CHAPTER 1

INTRODUCTION

1.1 Background of Study

The doctrine of freedom to contract, as the cornerstone of contract law in the common law countries (Malaysia inclusive) has consequently generated an extensive array of contracts of various characteristics and varieties. Coupled with an explosion of contractual dealings arising out of the globalization and liberalization process the practical ramifications are a multitude of contracts in all fields of human endeavour; the construction industry not being expected. It is a tall order to deal with the entire spectrum of such contracts.¹

Basically, a contract is an agreement enforceable by law.² In other words, a contract is an agreement which is legally binding between the parties. The agreement between two or more parties is constituted by an offer and an acceptance of it.³ The Housing Grants, Construction and Regeneration Act 1996 of England

¹ Harbans Singh, K. S. (2004). *Engineering and Construction Contracts Management: Law & Principles*. Selangor: Malayan Law Journal Sdn Bhd., pp.235

² Section 2(h) of *Contract Act 1950*.

³ Vohrah, B. and Wu, Min Aun. (2000). *The Commercial Law of Malaysia. Second Edition*. Petaling Jaya: Pearson Malaysia Sdn. Bhd., pp.8

defined construction contract as an agreement for carrying out construction operations, including sub-contracted work and architectural design or surveying work or advice on building, engineering, decoration or landscape.⁴

In Malaysia, there are two basic components in the contract documents used for the contracting of most construction work. The first of these contains a list of legally crafted terms and conditions and is usually referred to as the “Contract Conditions”. The second component consists of a set of technical specifications and drawings which together define the scope, standards and other technical requirements of the project.⁵

Where the employer is a government authority, the contract conditions frequently take after a standard contract form used by the contracting authority (for example, the Public Works Department Standard Form 203A). Alternatively, it may consist of one of the standard contract forms issued by professional and trade bodies such as the Pertubuhan Akitek Malaysia⁶ (PAM) or the Construction Industry Development Board (CIDB). References in this work will be made to some of the major provisions contained in the more common standard forms. In practice, these standard conditions may be modified, sometimes substantially, and legal liabilities and rights of the parties to the contract would be fashioned accordingly.⁷

Consequently, once a party enters into a contract, the party must perform his obligations exactly according to the terms of the contract.⁸ The contracting parties are liable to answer for any of the obligations which they have failed to discharge and it is no defence to an action for incomplete performance that the parties have done everything that can be reasonably undertaken if the end result falls

⁴ Section 104 & 105 of *Housing Grants, Construction and Regeneration Act 1996* of England.

⁵ Chow, Kok Fong. (1988). *An Outline of the Law & Practice of Construction Contract Claims*. Singapore: Longman Singapore Publishers Pte. Ltd., pp.4

⁶ *Malaysian Institute of Architects*

⁷ Chow, Kok Fong. (1988). *op. cit.*, pp.5

⁸ *Ibid*, pp.27

short of that required by the contract.⁹ However, breach of contract happens, when a party, without lawful reason, wrongs or fails to perform the terms and obligations of the contract as agreed.¹⁰

The Contract Act 1950, vide Section 40 proffers the following provision for breach of contract:¹¹

“When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.”

Examples of a breach of contract in relation to sale of goods include non-delivery altogether, delivery of wrong quantities or of defective goods, or delay in the delivery. Similarly, in construction contract, there may be non-performance, defective or delayed performance of construction works.¹² Thus, every breach of contract carries with it the potential for dispute. In addition, whether the breach is serious or not, it will give the innocent party a right to claim for damages from the other party for any loss or damage sustained by the breach. However, only certain types of serious breaches will entitle an innocent party not only to a claim for damages but also to be discharged from all future obligations.¹³

As a general principle, where an employer is guilty of a breach of a contract, the contractor is entitled to damages under two headings. The first is damages for any actual loss that has been suffered, and the second is damages for any profit of

⁹ *Paradine v. Jane* (1647) Aleyn 26.

¹⁰ Cheong, May Fong. (2007). *Civil Remedies in Malaysia*. Malaysia: Sweet & Maxwell Asia., pp.9

¹¹ Section 40 of *Contract Act 1950*.

¹² Cheong, May Fong. *loc. cit.*

¹³ Eggleston, B. (2008). *Liquidated Damages and Extension of Time. Third Edition*. Oxford: Blackwell Science., pp.1

which the contractor has been deprived.¹⁴ The following are examples of common breach situations in construction contracts which do not usually afford a sufficient premise for the contractor to bring the contract to an end and for which the primary recourse for the contractor is an action in damages:¹⁵

- i. An employer fails to afford the contractor unfettered site possession within a reasonable time from the signing of the contract.¹⁶
- ii. The employer is in breach of an express obligation to supply instructions relating to the execution of the works.¹⁷
- iii. The employer failed to nominate specialist subcontractors and specialists in a timely manner and as a consequence of which the critical path of the project is adversely affected.¹⁸
- iv. Disruptions have been caused by other contractors engaged separately by the employer to work alongside the main contractor.

Hence, damages are granted to the contractor as compensation for the damage or loss he has suffered through a breach of contract caused by the employer.

¹⁴ Murdoch, J. and Hughes, W. (2008). *Construction Contracts: Law and Management. Fourth Edition*. Oxon: Taylor & Francis Group., pp.308

¹⁵ Chow, Kok Fong. (1988). *An Outline of the Law & Practice of Construction Contract Claims*. Singapore: Longman Singapore Publishers Pte. Ltd., pp.34

¹⁶ *Lawson v. Wallasley Local Board* (1882) 11 QBD 229; *Ibmac v. Marshall* (1968) 208 EG 851; *Robert v. Bury Comissioners* (1870) LR 5 CP 310.

¹⁷ *Robert v. Bury Comissioners* (1870) LR 5 CP 310; *Trollope & Colls v. Singer* (1913) 1.

¹⁸ *North West Metropolitan Regional Hospital Board v. TA Bickerton & Sons Ltd* [1970] 1 WLR 607.

1.2 Problem Statements

In the construction industry, breaches of contract are commonplace to the point of being routine.¹⁹ In some contracts certain breaches by the employer, such as failure to make payment on an interim certificate, entitle the contractor to determine his employment under the contract but such remedies are few and as a general rule the contractor's remedy for employer's breach is the recovery of general or unliquidated damages. That is to say, damages which are assessed after the breach.²⁰

Unlike the equitable remedies of specific performance and injunctions, damages are awarded to the innocent party as of right, subject only to exceptions such as mitigation and remoteness of damage.²¹ Section 74 (1) of the Contracts Act 1950 sets out the provision for such compensation. The said section reads:

Compensation for loss or damage caused by the breach of contract.

“When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.”

¹⁹ Eggleston, B. (2008). *Liquidated Damages and Extension of Time. Third Edition*. Oxford: Blackwell Science., pp.1

²⁰ *Ibid*

²¹ Phang, Andrew Boon Leong *et al.* (1998). *Cheshire, Fifoot and Furmston's Law of Contract. 2nd Singapore and Malaysian Edition.*, pp.636-637

Furthermore, Dato' Justice Kadir Musa in the *Castle Inn*²² case went on to the state that:

“What would be most probably justifiable for the plaintiff, if it can be so proved, is to claim compensation for damages for the defendant’s non-fulfillment of their ‘obligation’ under the contract by virtue of section 76 of the Contract Act 1950.”

However, under the complicated provisions of many construction contracts the possible breaches of contract either by contractor or employer are numerous, and in each case the general principles must be applied in order to determine what, if any, damage is recoverable for the breach in question.²³

In brief, whether any types of breach becoming the “trend” of the construction industry, or how can a claimant realize the legal issues of damages that arise in the industry? Therefore, it is crucial for the claimants to identify the types of breaches might occur and the legal issues associated with damages as to clear obstacles for claiming damages that are entitled to them.

²² *LEC Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd* [2001] 5 MLJ 510

²³ Wallace, D. (1970). *Hudson’s Building and Engineering Contracts. Tenth Edition*. London: Sweet & Maxwell Ltd., pp. 579

1.3 Objective of Study

The objectives of this study are:

- ◆ To illustrate the types of breaches of contract that are currently fashionable in Malaysian construction industry.
- ◆ To address the legal issues in relation to damages.

1.4 Scope of Study

The following are the scopes of this study:-

- ◆ Only construction cases will be discussed in the study.
- ◆ The study only examines the contracts between employers and contractors as well as contracts of contractors and subcontractors.
- ◆ Examine court cases related to the issue, particularly Malaysian cases in the past thirty (1978-2008) years. Reference is also made to cases in other countries such as United Kingdom, Singapore, Australia, and Hong Kong.

1.5 Significance of the Study

The significance of this study is to give an insight of current scenario of breaches of contract in Malaysian construction industry and also to bring up to date of the legal issues in relation to damages. The study may help the parties to the construction contract to have a more complete understanding on the exact situation happening in the industry. In addition, the findings of the study could be used as guidance to the parties to avoid themselves from committing any breaches.

1.6 Research Methodology

Research methodology proposes an arrangement of research procedures. Therefore, research methodology is one of the crucial parts to ensure the research can be carried out methodically to achieve the proposed objective of this research. It is a systematic technique to use in the data collection process. The methodology for this research is divided into five main stages: *Identify Research Issue*, *Literature Review*, *Data Collection*, *Data Analysis* and *Preparation of Full Research Report*.

1.6.1 Identify Research Issue

Identifying the research issue is the initial stage of the whole research. To identify the issue, firstly, it involves reading on variety sources of published materials such as seminar papers, journals, articles, previous research report, newspapers, magazines and electronic resources as well through the World Wide

Web and online databases from library of Universiti Teknologi Malaysia, PSZ's website.

1.6.2 Literature Review

Literature review is the stage which the research title is further explained and discusses with the aim of various types of data and information that are gathered through books, articles, magazines, journals, newspapers that obtained from library and World Wide Web. Besides this, reported court cases from different sources such as Malayan Law Journal, Construction Law Report, and Building Law Report will be referred too. This phase is vital to support and strengthen the research before proceed to other stages.

1.6.3 Data Collection

Collection of relevant data and information can be started in this stage. Data will be collected mainly through documentary analysis. All collected data and information are recorded systematically. Data collected to analyse are from Malayan Law Journal and other law journals as mentioned before. It is collected through the *LexisNexis* legal database. All the cases relating to research topic will be sort out from the databases. Important cases will be collected and used for the analysis at the later stage.

1.6.4 Data Analysis

In this stage, all the data, information, ideas, opinions and comments collected are arranged, analysed and interpreted. Different types of analysis will be carried out according to the requirements of the research objective. This procedure is to process and convert the data collected into information that are useful for the research. It is important in conducting case study in the way to identify the trends and developments in the issue that is to be studied.

1.6.5 Conclusion and Recommendations

Conclusion and recommendations is the final stage of the research. In this stage, the findings would be able to show the result of the research. Conclusion need to be drawn in-line with the objectives of the research. At the same time, some appropriate recommendations related to the problems may be made for a better solution in relation to the said problem, or for further research purposes.