

ABSTRACT

In most contracts, the employers delegate the role of assessing the contractor's application for extension of time to the Contract Administrators or Superintending Officers. In making any determination under a building contract, Contract Administrators or Superintending Officers have the duty to act fairly and reasonably on a rational basis. Any assessment they make must be based on reasons that can stand up to scrutiny by the other parties to the contract. They should carry out a detailed, logical and methodical analysis of the documents and other evidence submitted in support of the application for an extension of time. Failure to act fairly can lead to invalidation of their certificates. However, it is difficult to give the actual definition of 'fair and reasonable assessment' in granting extension of time. A dispute arises when there is an issue of determining whether the Contract Administrator or Superintending Officer acts correctly regarding the 'fair and reasonable assessment' in granting extension of time. The objective of this study is to identify how Superintending Officers or Contract Administrators approach their duties in assessing Extension Of Time fairly and reasonably. The approach adopted in this research is based on four case laws and five case studies in housing projects located in various areas in Pahang, hoping that the findings will assist the Superintending Officers or Contract Administrators to assess the Extension Of Time to contractors fairly and reasonably. However, an analysis of past courts' judgments indicate no case law that clearly defines 'fair' and 'reasonable' assessment for granting extension of time, although the English case of *John Barker Construction Ltd v London Portman Hotel Ltd* (1996) 83 BLR 31, held that there was a guideline for the Superintending Officers or Contractor Administrators to act in a fair and reasonable way in assessing the contractor's applications for extension of time.

ABSTRAK

Kebiasaannya dalam sesuatu kontrak, tanggungjawab untuk membuat penilaian untuk lanjutan masa telah diwakilkan oleh Pihak Klien kepada Pegawai Kontrak atau Pegawai Penguasa. Pegawai Penguasa atau Pegawai Kontrak mempunyai kewajipan tugas secara adil dan munasabah dalam membuat sebarang penilaian dan keputusan. Sebarang penilaian yang dibuat mestilah bersandarkan alasan yang kukuh oleh pihak yang berkontrak. Mereka hendaklah membuat penilaian secara terperinci, logik dengan menganalisa segala dokumen serta bukti-bukti untuk membantu dalam membuat penilaian untuk lanjutan masa. Kegagalan berbuat demikian boleh mengakibatkan sijil lanjutan masa yang dikeluarkan tidak sah. Walaubagaimanapun, adalah sukar untuk memberi maksud sebenar penilaian secara adil dan munasabah. Masalah timbul apabila penilaian yang dibuat oleh Pegawai Penguasa atau Pegawai Kontrak dipertikaikan. Kajian ini bertujuan untuk mengenalpasti bagaimana pendekatan Pegawai Penguasa atau Pegawai Kontrak berlaku adil dan munasabah dalam membuat penilaian terhadap lanjutan masa. Pendekatan yang digunakan dalam kajian ini adalah berdasarkan empat kes mahkamah serta lima kajian kes dalam projek perumahan di Negeri Pahang. Melalui analisis mahkamah, didapati tiada satu pun kes yang menerangkan secara jelas maksud adil dan munasabah dalam membuat penilaian untuk lanjutan masa, bagaimanapun melalui kes Mahkamah Inggeris, *John Barker Construction Ltd v London Portman Hotel Ltd (1996) 83 BLR 31* ada menjelaskan garis panduan untuk berlaku adil dan munasabah dalam membuat penilaian lanjutan masa terhadap kontraktor.

TABLE OF CONTENTS

CHAPTER	TITLE	PAGE
	DECLARATION	ii
	DEDICATION	iii
	ACKNOWLEDGEMENT	iv
	ABSTRACT	v
	ABSTRAK	vi
	LIST OF CASES	xiii
	LIST OF TABLES	xv
	LIST OF FIGURES	xvi
	LIST OF ABBREVIATIONS	xvii
	LIST OF APPENDICES	xviii
CHAPTER 1		
	INTRODUCTION	1
1.1	Introduction	1
1.2	Problem Statement	3
1.3	Objective of the Study	5

1.4	Scope of the Study	5
1.5	Research Methodology	6
1.5.1	Stage 1 : Identifying The Research Issue	7
1.5.2	Stage 2 : Literature Review	7
1.5.3	Stage 3: Data Collection	7
1.5.4	Stage 4: Research Analysis	8
1.5.5	Stage 5 : Conclusion And Recommendation	8

CHAPTER 2

CONSTRUCTION DELAYS		10
2.1	Introduction	10
2.1.1	Definition Of Delay	11
2.2	Types of delays	12
2.2.1	Excusable delay	13
2.2.1.1	Excusable delays/compensable delays	13
2.2.1.2	Excusable/non-compensable delays	14
2.2.2	Non –Excusable delays	14
2.3	Concurrent delays	15
2.4	Causes of Delay	15
2.4.1	Owner –Caused Delay	17
2.4.2	Designer –Caused Delay	17
2.4.3	Contractor –Caused Delay	18
2.4.4	Subcontractor –Caused Delay	18
2.4.5	Delay not caused by parties to the design	19
2.4.6	Prevention of Delay	19
2.4.6.1	Pre-Contract Stage	19
2.4.6.2	Post-Contract Stage	21

2.5	Conclusion	21
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CHAPTER 3

EXTENSION OF TIME		23
3.1	Introduction	23
3.2	Purpose of extension of time clause in building contract	24
3.3	The ground for extension of time	24
3.4	Neutral Events	25
3.5	Employer’s delays	26
3.6	Relevant event of extension of time under IEM Form Condition of Contract	26
3.7	Procedure for claiming an extension of time under express Contract provisions	36
3.8	The Procedure of claiming of extension of time under JKR 203A form of contract	38
3.9	Timing of the Notification	42
3.10	Detailed Particulars Of the extension Of Time Claimed	43

CHAPTER 4

ASSESSMENT OF EXTENSION OF TIME		45
4.0	Introduction	45
4.1	Fair and Reasonable Extension Of Time	46
4.2	Basis of Assessment	48
4.3	The Assessment Process	49

4.4	Duties of the Engineer/Architect/S.O in Granting Extension of Time	50
4.5	The Law Cases Relating to Fair And Reasonable Extension Of Time	51
4.6	The Protocol Of The Society Of Construction Law – Granting Extension Of Time	53
4.6.1	Programme and records	54
4.6.1.1	Core Principle	54
4.6.1.2	Guidance	54
4.6.1.3	Commentary	55
4.6.2	Extension Of Time	56
4.6.2.1	Core Principle	56
4.6.2.2	Guidance	57
4.6.2.3	Commentary	58
4.6.3	Float	59
4.6.3.1	Core Principles	59
4.6.3.2	Guidance	59
4.6.3.2	Commentary	61
4.6.4	Concurrent Delay	61
4.6.4.1	Core Principles	61
4.6.4.2	Guidance	62
4.6.4.3	Commentary	63
4.6.5	Retrospective delay analyses	64
4.6.5.1	Core Principle	64
4.6.5.2	Guidance	64
4.6.5.3	Commentary	64
4.6.6	Mitigation of delay and loss	65
4.6.6.1	Core Principle	65
4.6.6.2	Guidance	65
4.6.7	Monetary claims	66

4.7	Conclusion	67
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CHAPTER 5

DATA ANALYSIS AND RESULT		68
5.1	Introduction	68
5.2	Findings and discussions	76
5.3	Case Study No.1	78
5.4	Case Study No. 2	79
5.5	Case Study No. 3	80
5.6	Case Study No. 4	80
5.7	Case Study No. 5	81
5.8	Findings and discussions	82
5.9	Conclusion	86

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS		87
6.1	Introduction	87
6.2	Summary of Research Findings	87
6.3	Problems Encountered When Conducting This Study	90
6.4	Recommendations	90
6.5	Further Studies	92
6.6	Conclusion	92

REFERENCES	94
Appendix A	95

CHAPTER 1

INTRODUCTION

1.1 Introduction

A contractor is under strict duty to complete on time except to the extent that he is prevented from doing so by the employer or is given relief by the express provision of the contract. The effect of extending time is to maintain the contractor's obligation to complete within a defined time and failure by the contractor to do so leaves him liable to damages, either liquidated damages or general, according to the term of the contract.

In the absence of the extension provisions, time is put at large by prevention and contractor's obligation is to complete within a reasonable time. The contractor's liability can then only be for general damages but first must be proved that he has failed to complete within a reasonable time. ¹

¹ Brian Eggleston , "Liquidated Damages and Extension Of Time In Construction Contract", Second Edition, (Blackwell Science,1992), pp.162

According Lim Chong Fong,² the operation of clause 43 modifies the liability of the Contractor to complete the Works by the Date for Completion specified in the Appendix and to pay Liquidated and Ascertained Damages to the Government upon the failure of the Contractor to meet the deadline. It imposes a duty on the Superintending Officer to grant a fair and reasonable extension of time for the completion of Works in certain specified circumstances.

The period of work may be extended, subject to any extension of time granted by the architect for delays that are not the fault of the main contractor under the contract. When the contractor applies for an extension of time, it is often the case that the architect will take some time to review before making a decision or withhold the decision until the delay becomes apparent. In the absence of the instruction from the architect, the contractor cannot recover the cost of acceleration of the work to meet the completion date.

Therefore, contractors may take the risk of incurring liquidated damages for the delay rather than spend extra money on acceleration. It should also be noted that under no circumstances will the contractor be entitled to receive financial compensation from the employer for the delay itself, as time can be extended without increasing the overall cost of the contractor. The only entitlement for monetary compensation from the employer is for the direct loss and /or expense suffered by the main contractor as a direct consequence of the cause.³

According to Entrust Group⁴, the evaluation to derive at the Extension of time entitlement (EOT) can indeed be a complex subject especially when there is more than one delaying events. Invariably, an evaluation of EOT will be made based

² Lim Chong Fong, "The Malaysian PWD Form Of Construction Contract", (Sweet & Maxwell Asia, 2004), pp.92

³ Teresa Cheng, Evia Wong, Gary Soo, "Construction Law And Practice In Hong Kong", (Sweet & Maxwell Asia, 2004), pp.344

⁴ Entrust Group, "Is The Contractor Still Entitled To Extension Of Time Where Is Concurrent Delay?", First Quarter, (Master Builders Journal, 2006), pp.74-75

on programmes submitted by the contractor (Kevin, 2005)⁵. Besides the programmes, the contractor is advised to provide relevant information related to delay such variations and architect's instruction for references, towards consideration for EOT (Lim, 1998).⁶ Teresa Cheng⁷ views that being fair and reasonable is the measure of the extension of time to be granted to the contractor in relation to the causes(s) so submitted.

1.2 Problem Statement

In construction contract, time may be stated either by reference to specified date or by reference to a construction period.⁸ This practice has important repercussions for parties to the contract, as a failure to complete by the date stipulated may expose the contractor to claim for damages. Alternatively, where a liquidated damage clause is inserted, delay will make the contractor liable for certain liquidated amounts usually calculated at a daily or weekly rate in the contract itself.

It is important to all parties that the project be finalised by a specified date, the standard forms of contract now provide details on the issues of delay in completion and liquidated damages. The contract usually provides that the contractor can apply for extension of time due to certain matters but not the fault of the contractor, that the project is being delayed. The general procedure, for example, in clause 43 I.E.M Condition of Contract For Works Mainly Of Civil Engineering Construction', the contractor shall use constantly his endeavours to prevent delay and shall do all that may reasonably be required to the satisfaction of the Engineer to

⁵ Kevin, R., "Analysing Extension of Time: What The Courts Have To Say", First Quarter, (Masterbuilders Journal.1, 2005), pp.74 -75

⁶ Lim P.K., "Evaluation Of The Contractor's Claim For Extension Of Time", (PAM Continuing Professional Development Course, 25 April 1998), pp. 1-21

⁷ Teresa Cheng, Eva Wong, Gary Soo, "Construction Law And Practice In Hong Kong", (Sweet & Maxwell Asia, 2004), pp.350

⁸ Martin, R.L., "Introduction Time Within Contracts", (Bullet-Proof EOTs Conference, Kuala Lumpur, July 2004), pp. 1-21

proceed the works. The certificate issued by the Engineer under this condition shall be referred to as the “Certificate of Delay and Extension of Time”.

A grant of extension of time to the contractor will only be issued for the period of time which is found to come within the extension of time entitlements. At numerous stages through this process, disagreement can arise between the parties, and the potential for financial liability to the contractor at the end of the day makes the issue one on which parties are unhappy to compromise.

The issues can also become contentious because the decision as to whether or not to grant extension of time is generally placed in the hands of the architect. A contractor may be dissatisfied if there is a delay by the architect in dealing with his application for an extension, or having dealt with the application, coming to a decision which is unfavourable or not sufficiently favourable to the contractor.

The assessment of claims for extension of time is extremely complex. The Superintending Officer or Contract Administrator acts as independent adjudicator, and he must act fairly, reasonably and impartially to both his employer and the contractor.

The main issue lies in the actual definition of ‘fair and reasonable assessment’ in granting extension of time. A dispute arises between the employer and the contractor when there is a reason to challenge the Contract Administrator’s or Superintending Officer’s ‘fair and reasonable’ assessment of extension of time.

1.3 Objective of the Study

The objective of the study is to identify how Superintending Officers or Contract Administrators approach their duty to assess Extension of Time fairly and reasonably.

1.4 Scope of the Study

The approach adopted in this research is based on case laws and case studies. The projects that will be investigated in this research are the housing projects i.e. Perumahan Warga Felda (PWF) at Felda Schemes. There are two on going projects which are located in Keratong 3 and Muadzam, Pahang and there were three completed projects located in Mempaga, Bukit Goh and Lepar Hilir. The studies are to identify how the Superintending Officers approach their duty to assess extension of time fairly and reasonably. The detail of the five case studies as follows:

Case Study 1	Cadangan Pembangunan Perumahan yang Mengandungi 160 Unit Rumah Kos Rendah Satu Tingkat, 45 Unit Rumah Kos Sederhan Rendah satu Tingkat Dan Satu Unit Pencawang Elektrik Di Felda Mempaga 2, Mukim Sabai, Daerah Bentong, Pahang Darul Makmur.
Case Study 2	Membina Dan Menyiapkan Rumah Kos Rendah Dan Kos Sederhana Rendah Satu Tingkat, Kedai Satu Tingkat Dan Kerja-Kerja Infrastruktur Yang Berkaitan Di Felda Bukit Goh, Kuantan, Pahang Darul Makmur.

Case Study 3	Cadangan Membina Dan Menyiapkan 192 Unit Rumah Rumah Kos Rendah, 58 Unit Rumah Kos Sederhana Rendah, 5 Unit Kedai, Bazaar, Pencawang Elektrik Dan Kerja-Kerja Infrastruktur Yang Berkaitan Di Felda Lepar Hilir Saujana, Kuantan, Pahang Darul Makmur
Case Study 4	Membina Dan Menyiapkan Rumah Kos Rendah Setingkat, Rumah Kos sederhana Rendah Setingkat, Kedai Setingkat, Pencawang Elektrik Dan Kerja-Kerja Infrastruktur Yang Berkaitan Di Felda Keratong 3, Mukim Keratong, Daerah Rompin, Pahang Darul Makmur
Case Study 5	Cadangan Membina Dan Menyiapkan 125 Unit Rumah Kos Sederhana Di Atas Lot 2263-2268, 2173 di Bandar Muadzam Shah, Mukim Bebar, Daerah Rompin, Pahang Darul Makmur

1.5 Research Methodology

In order to achieve the objectives of this study, a systematic process of conducting this study had been organized. Basically, this study process comprised five major stages, which involved identifying the study issue, literature review, data collection, data analysis, conclusion and suggestions.

1.5.1 Stage 1 : Identifying The Research Issue

The study issue arises from intensive reading of books, journals and articles which can be attained from the UTM library, Building Construction Information Centre (BCIC) and Resource Centre of Alam Bina (RC). Based on the study issue, the objective of the study has been identified. In addition to that, this research is executed to review the relevant court decisions with the intention of identifying how Superintending Officers or Contract Administrators approach their duty to assess Extension of Time fairly and reasonably.

1.5.2 Stage 2 : Literature Review

Collection of various documentation and literature regarding the study field is of most important in achieving the research objectives. Besides, secondary data is collected from reading materials in printed form like books, journals, research paper, magazines, reports, proceedings, seminar paper as well as information from the internet. It is important to identify trends and developments over time in construction industry, as well as the general state of knowledge concerning the subject area of delay such as background, definition, type, procedures, relevant events and etc.

1.5.3 Stage 3: Data Collection

In this stage, after identifying all the background and relevant issues through literature review, legal cases based on written opinions of courts, which are related to the study issue, will be collected from different sources such as All England Law

Reports, Malayan Law Journals, Singapore Law Report and etc. via UTM library electronic database, namely Lexis-Nexis Legal Database. Data from the five case studies had also been collected from Felda Engineering Services Sdn Bhd.

1.5.4 Stage 4: Research Analysis

Once the previous related court cases under Malayan Law Journal were collected, reviewing and clarifying of all the facts of the cases will be conducted. The data from the five cases also were also collected in housing projects procured by Felda Engineering Services Sdn Bhd. The focus will be to identify how Superintending Officers or Contract administrators approach their duty to assess Extension of Time fairly and reasonably. After presenting the issues of each case based on case studies, a thorough discussion and comparison will be done in order to achieve the objectives of this study.

1.5.5 Stage 5 : Conclusion And Recommendation

In this stage, reviews on the whole process of the study will be made to identify whether the study objective has been achieved. After presenting the study findings, recommendations and limitations of the study and a topic for further research emerge. Figure 1.1 shows a flowchart of the research methodology to achieve the objectives of the study.

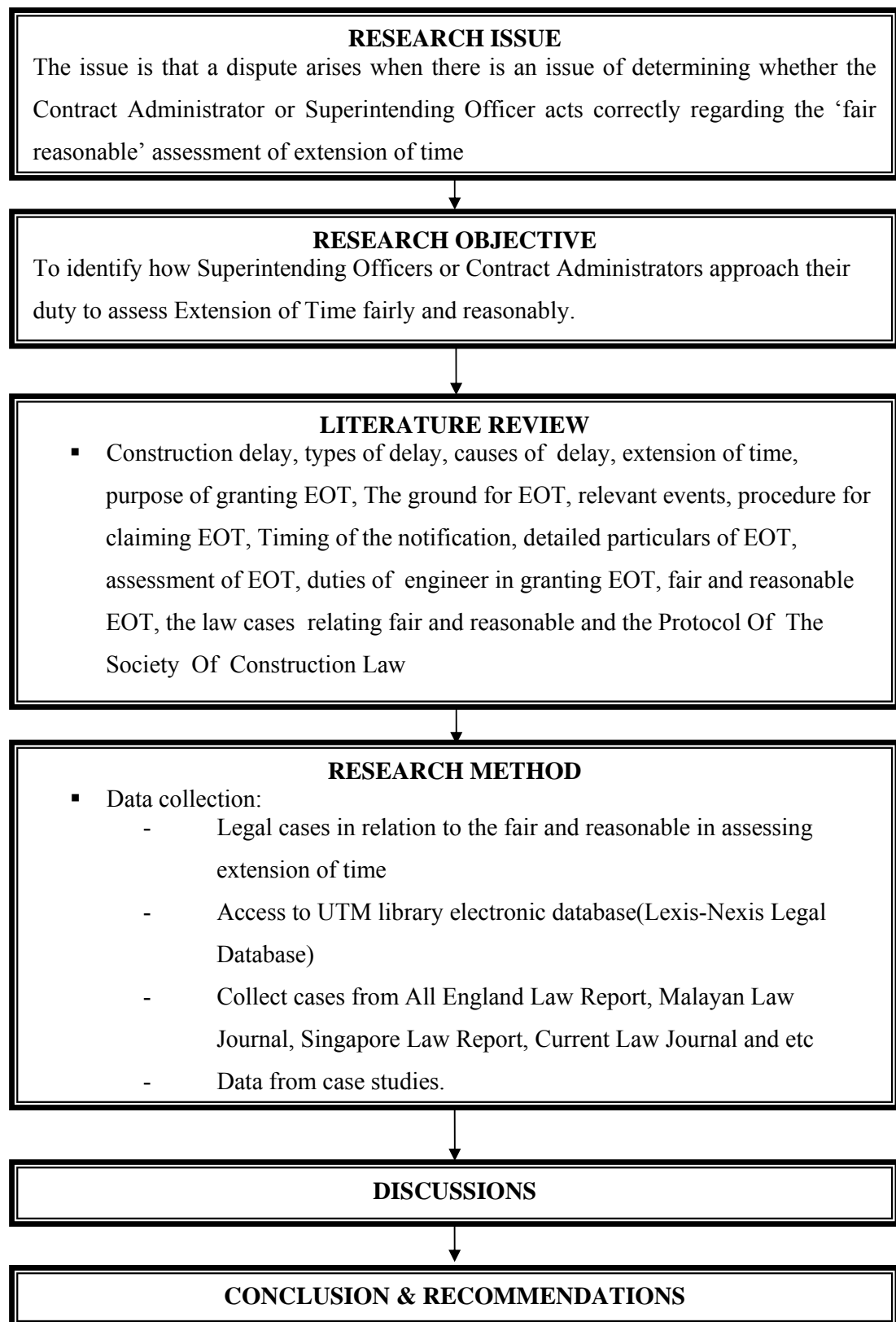


Figure 1.1: Research Methodology

REFERENCES

- Bramble, B.B, Callahan, M.T. (1992) Construction Delay Claims, 2nd Edition, John Wiley & Sons, New York
- Chow Kok Fong, (1988), “An Outline of the Law & Practice of Construction Contract Claims”, Longman, Singapore.
- Eggleston. (1997), B.Liquidated damages and Extension Of Time, 2nd Edition. Oxford: Blackwell Science Ltd
- Hashim Sikan, (2003), “Extension Of Time” The Malaysian Surveyor (3rd Quarter, Vol 38.3)
- Lim Chong Fong (2004), The Malaysian PWD Form Of Construction Contract,
- Ir. Harbans Singh K.S.,(2002), “Engineering And Construction Contract Management, Post-Commencement Practice”, Lexis Nexis Business Solutions
- Jimme Hinze(2001), Construction Contract, Second Edition
- Keating, D(1978), Building Contracts, 4th ed. London Sweet & Maxwell
- Murdoch, J. and Hughes, W.Construction Contracts - Law and Management, 3rd edition, Spon Press, London
- Nicholas J. Carnell, Causation and Delay In Construction Disputes, Second Edition
- Smith, Curie & Hancock(2001), Common Sense Construction Law, a Pratical Guide For The Construction Professional , John Wiley & Sons, Canada