

**EMPLOYER'S IMPLIED OBLIGATION IN CONSTRUCTION CONTRACT**

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EMPLOYER'S IMPLIED OBLIGATION IN CONSTRUCTION CONTRACT

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

In the Name of Allāh, the Most Gracious, the Most Merciful

**Specially Dedicate To:**

*My Beloved Mother and Father, My Family, My Friends and My Beloved One.*

*Thank you for your support, love and encouragement.*

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## ABSTRACT

The employer's implied obligation is one of significant elements in the construction contract as there is a few of express obligations for employer in the standard form of contract. A breach of implied obligation carries the same weight as the breach for express obligation. However, this implied obligation has a certain extent to which it is imply as there are conditions to be fulfilled before a term is implied into a contract. For employer, there are two types of implied obligation, duty to cooperate which also known as positive implied obligation and another one is the duty not to interfere or prevent which also known as negative implied obligation. These positive and negative implied obligations give rise to a duty to co-operate from the employer in every works to make the contract workable. Due to the nature of construction contract that involved a lot of works, there are certain works that demand the cooperation from the employer such as giving possession and access to the site, supply information and appoint competence contract administrator. This implication will need to follow certain principle before it can be imposed as the extent of employer's implied obligation. Therefore this research is carried out to identify the extent of the employer's implied obligation in the construction contract. This is basically a descriptive research and the methodology used is essentially based on case law analysis and review. The cases are retrieved from the Lexis Malaysia online database. All the cases are in the scope of construction contract. The analysis revealed that, the employer's implied obligation will have certain extent and the employer's implied obligation will have certain requirement to be implied.

## ABSTRAK

Tanggungjawab tersirat majikan merupakan salah satu elemen penting dalam kontrak pembinaan kerana terdapat beberapa tanggungjawab yang nyata bagi majikan dalam borang kontrak setara. Pelanggaran tanggung jawab tersirat mempunyai kesan yang sama dengan pelanggaran tanggungjawab yang nyata. Walau bagaimanapun, tanggungjawab tersirat ini akan mempunyai tahap tertentu di mana terdapat satu syarat bagi meletakkan terma dalam kontrak tersebut. Bagi majikan, terdapat dua jenis tanggungjawab tersirat iaitu tanggungjawab untuk bekerjasama yang mana dikenali sebagai tanggungjawab tersirat positif dan tanggungjawab tidak mengganggu atau menghalang dikenali sebagai tanggungjawab tersirat negatif. Tanggungjawab tersirat positif dan negatif ini akan menimbulkan kerjasama daripada majikan dalam setiap kerja untuk membolehkan kontrak itu berfungsi. Berdasarkan keadaan kontrak pembinaan yang melibatkan pelbagai jenis kerja, terdapat kerja-kerja tertentu yang memerlukan kerjasama daripada majikan seperti memberi hak pemilikan dan kebenaran masuk ke dalam tapak pembinaan, menyediakan maklumat dan melantik penasihat kontrak yang berkecualan. Sejauh mana tanggungjawab tersirat majikan bergantung kepada beberapa prinsip sebelum ia diimplikasikan. Oleh itu, kajian ini dijalankan untuk menentukan sejauh mana tanggungjawab tersirat majikan dalam kontrak pembinaan. Secara amnya, kajian ini adalah deskriptif dan kaedah metodologi yang digunakan adalah berdasarkan ulasan dan analisis kes undang-undang. Kes-kas tersebut dicapai dari bekalan data atas talian Lexis Malaysia. Semua kes tersebut adalah di dalam skop kontrak pembinaan. Hasil kajian mendapati bahawa tanggungjawab tersirat majikan mempunyai sesuatu tahap dan kehendak tertentu untuk diimplikasikan.

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**LIST OF ABBREVIATIONS**

AC	-	Law Reports : Appeal Cases
All ER	-	All England Law Reports
AMR	-	All Malaysia Reports
Ch	-	Cases in Chancery
Ch D	-	The Law Reports, Chancery Division
CLJ	-	Current Law Journal (Malaysia)
CLR	-	Commonwealth Law Reports
Constr LR	-	Construction Law Reports
FMSLR	-	Federated Malay States Law Reports
HL	-	House of Lords
KB	-	King Bench
Lloyd's Rep	-	Lloyd's List Reports
LR	-	Law Reports
MLJ	-	Malayan Law Journal
PWD	-	Public Works Department
PAM	-	Pertubuhan Arkitek Malaysia
PC	-	Privy Council
QB	-	Queen Bench
SCR	-	Session Cases Report
SLR	-	Singapore Law Report
WLR	-	Weekly Law Report

## CHAPTER 1

### INTRODUCTION

#### 1.1 Research Background

The common practice in construction contract is by using standard form of contract. In Malaysia, there are numbers of standard form of contract that are usually used in the construction industry such as PAM 2006, PWD 203A (Rev. 2010) and CIDB 2000. A successful standard form of building contract would lend itself to regulate the day-to-day relationship on site and provide a clear and definitive understanding of the parties, professional of their roles and responsibilities<sup>1</sup>. When a contract is made in writing, the meaning to be given to its express terms is a question of law. The court will seek to give effect to the intention of the parties as expressed in the written documents<sup>2</sup>.

In practice, the express terms will be included in the contract to provide clear information to the contracting parties. Due to the nature of construction industry which involves complex work, clear obligation and responsibility is needed to avoid

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<sup>1</sup> Rajoo, S. (2001). *The PAM 2006 Standard Form of Building Contract – A Change in Risk Allocation*. Malayan Law Journal. Vol. 4.

<sup>2</sup> *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357.

breach of contract. This is due to the fact that where any party in the contract fails without lawful excuse to perform fully and exactly a contractual obligation, that party is guilty for a breach of contract<sup>3</sup>.

However, in construing the construction contract, the court will not totally depend on the express term only. Where the parties have used a standard form of contract or have drafted their own, the express terms may not comprise the whole of the agreement and the common situation that often arises is that although a contract exists, the terms of that contract need to be implied<sup>4</sup>. Under the law, there is no general rule that terms cannot not implied into a standard form of contract<sup>5</sup> as the standard form of contract is the common practice in construction industry.

In respect of implying terms into the contract, it will affect the obligations of the contracting parties especially the employer and main contractor. This obligation is known as implied obligations and all the parties have their own implied obligation in the contract and certain important issue. For example, when the terms are implied, they carry the same weight as express terms and may found a claim for breach of contract<sup>6</sup>. This will lead to repudiation of the contract and claiming damages from the innocent party.

One of the purposes of implying the terms to the contracting parties is for the business efficiency. Bowen L.J. said in *The Moorcock* case<sup>7</sup>,

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<sup>3</sup> Murdoch, J. and Hughes, W. (2008). *Construction Contract: Law and Management*. 4<sup>th</sup> Edition. Abingdon, Oxon: Taylor & Francis Group. p.140.

<sup>4</sup> Adriaanse, J. (2007). *Construction Contract Law: The essentials*. Second Edition. Basingstoke: Palgrave Macmillan. p.109.

<sup>5</sup> A Mohaimin Ayus. (2009). *Law of Contract in Malaysia*. Volume I. Kuala Lumpur: Sweet & Maxwell Asia. p. 972.

<sup>6</sup> O'Reilly M. (1999). *Civil Engineering Construction Contracts*. 2<sup>nd</sup> Edition. London: Thomas Telford Publishing. p. 14.

<sup>7</sup> (1889) 14 P.D. 64, at p.68.

*“The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving business efficiency to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side....”*

The principle in *The Moorcock* is applied when without implied term, the contract will not workable<sup>8</sup>. In *BP Refinery (Westport) Pty Ltd v Shire of Hasting*<sup>9</sup>, Lord Hasting summarised the condition to be satisfied for a term to be implied:

- a) It must be reasonable and equitable.
- b) It must be necessary to give business efficiency to the contract, so that no term will be implied if the contract is effective without it.
- c) It must be so obvious that ‘it goes without saying.
- d) It must be capable of clear expression.
- e) It does not contradict any express term of the contract.

Based on the case above, it shows that in implying a terms into contract, the terms need to fulfill certain condition or the terms will fail to be implied. As a result, these implied terms whether by necessary inference from agreement or by law, which carry with them significant impact on the extent of obligations between the parties<sup>10</sup>. Literally, majority of the standard form of contract expressly provided specific provisions for the main contractor but not for the employer.

In Malaysia, only a few of the standard form of contract have provided specific express provision for employer’s obligations. Compared to this three types of standard of contract, PAM 2006, PWD 203A and CIDB 2000, only CIDB 2000 Form of Contract for Building Works have provide specific for employer’s general

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<sup>8</sup> Murdoch, J. and Hughes, W. (2008) *Construction Contract: Law and Management*. 4<sup>th</sup> Edition. Abingdon, Oxon: Taylor & Francis Group. p 171.

<sup>9</sup> [1978] 52 ALJR 20 PC.

<sup>10</sup> Cheng, T., Wong, E. and Soo, G. (2004). *Construction Law and Practice in Hong Kong*. Hong Kong: Sweet & Maxwell Asia. p. 97.

responsibilities under Clause 6.1. In the clause expressly stated the employer shall give the contractor right of access to and possession of the site<sup>11</sup>, not obstruct or interfere with the performance of the contract<sup>12</sup> and not interfere with of influence or obstruct the issue of any certificate by Superintending Officer under the contract<sup>13</sup>.

The reason why the employer appears to have relatively few express contractual obligation and to play merely passive role is that contract usually allocates numerous duties to the contract administrator. However, if the contract administrator fails to perform, the contractor may claim against the employer for the breach of contract<sup>14</sup>. It shows that, although there are no specific express provisions for employer, by implication, the employer still has to be responsible in the contract to make sure the contractor can do his work properly. The understanding of employer's implied obligations is crucial to avoid serious risk of causing confusion and resulting problems.

## 1.2 Problem Statement

Basically, the primary obligation of the employer is to pay for the work carried by the contractor<sup>15</sup>. In addition to payment, the employer has further obligations arising out of the nature of construction contract. In order for the contractor to complete the works within the stipulated time, the contractor will require the cooperation of the employer. The employer's implied obligation was

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<sup>11</sup> Clause 6.1 (a). CIDB 2000.

<sup>12</sup> Clause 6.1 (d).CIDB 2000.

<sup>13</sup> Clause 6.1 (e). CIDB 2000.

<sup>14</sup> Murdoch, J. and Hughes, W. (2008) *Construction Contract: Law and Management*. 4<sup>th</sup> Edition. Taylor & Francis Group. pp 140.

<sup>15</sup> Adriaanse, J. (2007). *Construction Contract Law*. Second Edition. Basingstoke: Palgrave Macmillan. p 109.

highlighted in the case of *London Borough of Merton v Stanley Leach*<sup>16</sup>. The court expressed as follows:

- a) The employer will not hinder or prevent the contractor from carrying out all its obligations in accordance with the terms of the contract and from executing the work in a regular and orderly manner.
- b) The employer will take all steps necessary to enable the contractor to discharge its obligations and execute the work in a regular and orderly manner.

According to above statement, the duty itself can be divided into two aspects which are contrary in the sense that they are both positive and negative. The positive aspect of the duties is required where the contractor is to do a piece of work that requires the employer's cooperation<sup>17</sup>. The obligation under the negative aspect of the duty is not to hinder or wrongfully interfere with the performance of the contract. Together both positive and negative implied obligation lead to the employer's cooperation which is needed by the contractor in all aspects of the contract work<sup>18</sup>. It is because; the duty not to prevent and the duty to cooperate may be seen as two sides of the same coin<sup>19</sup>.

The cooperation from employer is needed in all aspect of contract works. Without cooperation from the employer in certain aspects, it is impossible for the contractor to complete his work. If the employer fails to perform this implied obligation, the employer will not fulfill the contractor's rights to carry out the

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<sup>16</sup> (1985) 32 BLR 51

<sup>17</sup> O'Reilly, M. (1999). *Civil Engineering Construction Contracts*. 2<sup>nd</sup> Edition. Thomas Telford Publishing: London. p.140.

<sup>18</sup> Murdoch, J. and Hughes, W. (2008). *Construction Contract: Law and Management*. 4<sup>th</sup> Edition. Abingdon, Oxon: Taylor & Francis Group. p.140.

<sup>19</sup> Cheng, T., Wong, E. and Soo, G. (2004). *Construction Law and Practice in Hong Kong*. Hong Kong: Sweet & Maxwell Asia. p.97.

works<sup>20</sup> and this will lead to denied the contractor's rights for payment as the works will not be workable without cooperation of the employer's part.

Due to the nature of construction process which is complex and involved a lot of works that will required cooperation from employer. The employer's implied obligation involve such matters as giving possession of the site; appointing an architect and nominating sub-contractors and suppliers; supplying the necessary information, instruction, drawings and plans<sup>21</sup>.

For example, in the case of *Neodox v Swinton and Pendlebury Borough Council*<sup>22</sup>, the employer needs to provide the instruction and details for the execution of work within the reasonable time. Nevertheless, in the case of *Glenlion Construction Ltd v The Guinness Thuss*<sup>23</sup>, the employer's implied obligation does not extent to providing information to allow the contractor to complete earlier than the contract period.

Based on these two cases above, it shows that each of implied obligation that have been imposed on the employer have the extent either duty to cooperate or not to prevent the contractor's works. Moreover, Devlin J also highlighted the same issue in the case *Mona Oil Equipment Co. v Rhodesia Railway*<sup>24</sup>,

*"I can think of no term that can properly be implied other than one based on the necessity for co-operation. It is no doubt, true that every business contract depends for its smooth working on co-operation but in the ordinary business contract, and apart, of course, from express terms, the law can enforce co-operation only in a limited degree – to the extent that it is necessary to make the contract workable"*

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<sup>20</sup> Murdoch, J. and Hughes, W. (2008). *Construction Contract: Law and Management*. 4<sup>th</sup> Edition. Abingdon, Oxon: Taylor & Francis Group. p 172.

<sup>21</sup>Ibid, n. 20.

<sup>22</sup> [1958] 5 BLR 38

<sup>23</sup> (1987) 39 BLR 81

<sup>24</sup> [1942] 2 A11 ER 1014

Notwithstanding the statement above, the employer's implied obligation still leave a question mark over the extent of the implied obligation itself. In addition, the wide scope of the contractor's works will lead to the uncertainty of that the employer's implied obligation towards the contractor. These will cause confusion and misunderstanding between the contracting parties. Thus, it is important to identify the extent of implied obligations of the employer in order to get a clear view of employer's obligation during the project period.

### **1.3 Objective of Research**

Based on the above problem statement, the objective of this research is essentially to identify the extent of employer's implied obligations in construction contract.

### **1.4 Scope of Research**

The scope of this research is relating to the case law analysis. The cases are mainly those that are reported in the law reports provided by the Lexis Malaysia online data base. The cases include Malaysian as well as case from common law jurisdiction or Commonwealth countries.



## **1.5 Significance of Research**

The significance of this research is to give a clear view of employer's implied obligation in the construction contract which involved a lot of works during the construction process. However, the nature of construction project which involve a lot of works raise the question to the of employer's implied obligation in the contract. This research is important to give some guideline for client or people who want to involve in construction contract to carry out his obligations as an employer although there are few of express obligation in the contract. With clearer view of employer's implied obligation from this research, there will be less construction dispute in the project and benefit the contractor to complete the project within stipulated time.

## **1.6 Research Methodology**

In order to achieve the objective of this research and successfully complete it within the stipulated time, there is a need to have a proper plan for its implementation. Basically, this research is carried out in four main stages, they are: initial study stage, data collection stage, data analysis stage and completion stage. All of these stages will be explained further.

### **1.6.1 Initial Study**

Initial study is important as at this stage the issue or the problem is identified. This stage requires extensive readings from various sources of literature materials in order to get a clear view on the topic chosen. This stage also involves discussion

with lecturers to get more ideas relating to the topic and feasible issues of the subject matter. After all the issue and objective as well as the scope are identified, the next stage is the collection of data.

### **1.6.2 Data Collection**

The data or information required for this research are mainly relating to the commentaries of case law. The sources for those commentaries are in the various articles, seminar papers, books and journals. The other main information require for the research is of course the relevant case law collected from the law journals available from the Lexis Malaysia online database. The data collection stage is in fact being carried continuously beginning from the initial stage. All data related to the research topic is valuable even though it is not being cited in the research writing.

There are two types of data, primary and secondary. However, this research will be based on secondary data for the data collection. The commentaries on the case law are considered as the secondary data. The relevant landmark and important cases are important for the purpose of achieving the objective of the research. The relevant cases are retrieve from Lexis Malaysia online database the University's Library, (Perpustakaan Sultanah Zanariah) subscribes.

### **1.6.3 Data Analysis**

This is the final stage of the whole research process where researcher needs to compare and discuss all the law cases in order to achieve the objective. Data analysis

is very crucial because this part requires fine analytical and critical thinking. It appraises the researcher's mental and intellectual ability to analyse and synthesis the legal principles, the contract provisions and legal arguments collected.

#### **1.6.4 Conclusion and Recommendation**

After the analysis and review of all the cases, this is the stage that the researcher will make the conclusion and summary what is basically the purpose of this. This stage will summarise the research findings for the extent of employer's implied obligation in the construction contract. The researcher will also make suggestion as to the possible future research topic in relation to this area of research. There will also an explanation on the problems, weaknesses and limitations in carrying out this research.

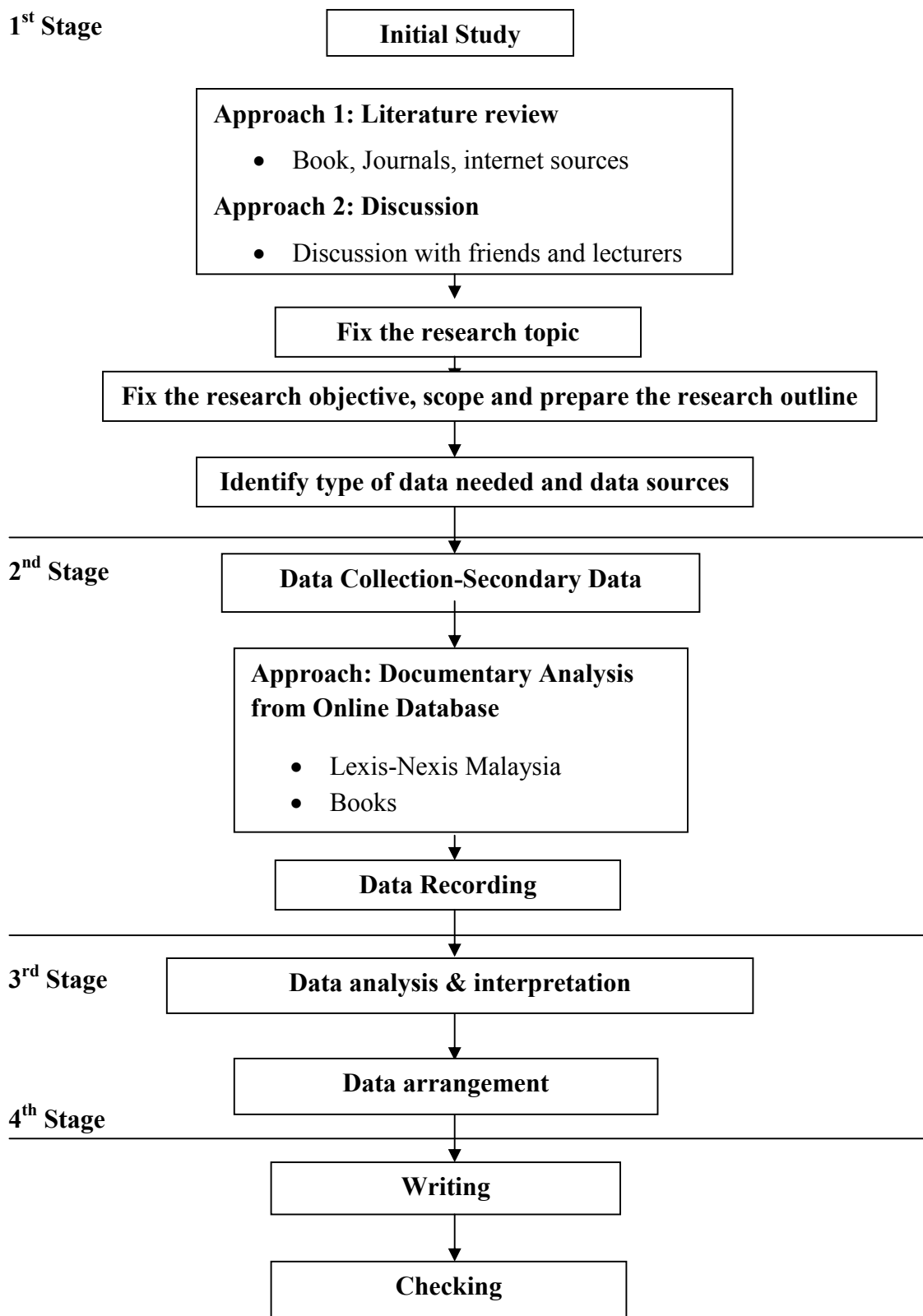


Figure 1.0: Process and Methods of Approach for the Study

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