

**CONTRACTOR'S LIABILITIES TOWARDS EMPLOYER'S DEFECTIVE
BUILDING WORK CLAIMS DURING DEFECT LIABILITY PERIOD**

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

Faculty of Built Environment
Universiti Teknologi Malaysia

JULY 2011

DEDICATION

*To my parents for giving me such a good start,
and to my beloved friends for your love and the countless hours of laughter and joy we
shared throught the years.*

Thanks for support, guidance and everything.

ACKNOWLEDGEMENT

First of all, I would like to express my highest gratitude to my supervisor, Assoc. Prof. Dr. Maizon Hashim for her guidance, patience, advice and support in assisting me to complete this dissertation throughout the semester.

Appreciation also goes to all the lecturers on the Master of Science (Construction Contract Management) course, for their patience and advice during the process of completing this master project.

Very importantly, I would like to thank my parents and family members for their support and encouragement throughout the research. Finally, my appreciation goes to my fellow coursemates with whom I exchanged much information and those who had contributed directly and indirectly to this master project.

ABSTRACT

The contractor's liability towards the defects discovered during defect liability period is related to the issue of their rights and liability during that period. The issues included are the employer's obligation to notify the contractor of defects, the contractor's liability towards defective work caused by design defects, materials supplied by employer and whether the contractor's liability to warn the employer if any faulty design that they knew about. The objective of this research is to identify the defective building work claims made by the employer for the defective building works during defect liability period and the circumstances whether the contractor is liable to the claims. The findings of this study show that, during the defect liability period, the contractor is liable and has the duty and rights to return to the site to rectify the defects and the employer is under the obligation to notify the contractor of the defects discovered. The contractor is not liable for the defective work caused by the quality of materials provided by employer, supplier chosen by employer and designer's defective designs. But, it is the contractor's liability to warn the employer of the faulty designs. The contractor is in breach of contract when he fails to rectify the defect during the defect liability period, and is liable to pay damages to the employer. The damages under employer's defective work claims are cost of rectification, loss of amenity and consequential loss. The contractor is not liable for the full cost of rectification when the employer fails to give the notice of defects or refuses the contractor to rectify the defects. The contractor is liable to the damages for the loss of amenity when the work is not up to the satisfaction of the employer. The contractor is also liable to compensation for the consequential loss. The case analysis show that the employer can claims under the contract and common law. This study can use as a guidance for the employer and contractor on their legal rights and liability in respect to the defective works which appear during defect liability period.

ABSTRAK

Liabiliti kontraktor terhadap penampilan kecacatan dalam tempoh liabiliti kecacatan adalah berkaitan dengan masalah hak-hak dan kewajipan selama tempoh itu. Masalah tertakluk kewajipan majikan untuk memberitahu tentang penampilan kecacatan, samada kontraktor bertanggungjawab terhadap kecacatan kerja yang disebabkan oleh kecacatan rekabentuk, bahan-bahan pembinaan yang disediakan oleh majikan, dan samada kontraktor bertanggungjawab untuk memberi amaran kepada majikan jikalau mereka tahu tentang sebarang kecacatan rekabentuk. Tujuan kajian ini bertujuan untuk mengenal pasti tuntutan kecacatan yang dibuat oleh majikan untuk kerja-kerja cacat selama tempoh liabiliti kecacatan dan keadaan sama ada kontraktor nertanggungjawab kepada tuntutan itu. Keputusan kajian menunjukkan bahawa, selama tempoh liabiliti kecacatan, kontraktor bertanggungjawab dan mempunyai tugas dan hak-hak untuk kembali ke tapak pembinaan untuk memperbaiki sebarang kecacatan. Majikan adalah berkewajipan untuk memberitahu kontraktor tentang kecacatan yang ditemui. Kontraktor adalah tidak bertanggungjawab untuk kecacatan kerja yang disebabkan oleh qualitynya bahan-bahan yang dibekal atau pembekal yang dipilih oleh majikan, kecacatan rekabentuk daripada pereka bentuk. Namun, kontraktor berliabiliti untuk memberi amaran kepada majikan tentang kecacatan rekabentuk. Kontraktor yang melanggar kontrak dengan gagal untuk memperbaiki kerja-kerja cacat selama tempoh liabiliti kecacatan, dan bertanggungjawab untuk membayar ganti rugi kepada majikan. Tuntutan gantirugi adalah kos pembaikan, kehilangan kepuasan, dan kerugian atas sebab. Kontraktor adalah tidak bertanggungjawab kepada pembayaran penuh kos pembaikan jika majikan gagal untuk memberi notis kecacatan atau tidak memberi peluang untuk kontraktor membaiki kecacatan. Kontraktor adalah bertanggungjawab terhadap gantirugi atas kehilangan kepuasan jika kerja tidak menemui tahap kepuasan majikan. Kontraktor juga bertanggungjawab untuk pampasan kepada kerugian atas sebab. Analisis kes-kes menunjukkan bahawa majikan boleh menuntut di bawah kontrak dan “common law”. Kajian ini boleh digunakan sebagai rujukan kepada majikan dan contractor untuk memahami hak-hak dan kewajipan berkaitan kecacatan kerja yang menampil sepanjang tempoh liabiliti kecacatan.

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LIST OF ABBREVIATIONS

AC	Appeal Cases, House of Lords
All ER	All England Law Reports
ALJR	Australia Law Journal Reports
AMR	All Malaysia Reports
BCL	Building and Construction Law Cases
BLR	Building Law Reports, UK
Con LR	Construction Law Reports
ER	Equity Reports
ICR	Industrial Cases Reports
ILR	International Law Reports
IR	Irish Reports
JP	Justice of the Peace / Justice of the Peace Reports
LIL Rep	Lloyd's List Reports
MLJ	Malayan Law Journal
NSWLR	New South Wales Law Reports
QB	Law Reports: Queen's Bench Division
QSR	Queensland State Reports
SC	Session Cases
SCR	Supreme Court Reporter
SLR	Singapore Law Reports
WLR	Weekly Law Report

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CHAPTER 1

INTRODUCTION

1.1 Research Background

In construction, there are number of factors that cause defect to building works, including negligent design, inferior materials, inadequate supervision, shoddy workmanship or other forms of negligent construction¹. Defective construction works give the bad implications and effects to parties involved, and it was found that poor quality workmanship can result in a long list of defects².

In a traditional contract, it is the contractor's obligation to carry out and complete the building works which require him to provide the workmanship and materials as required by the specifications given by the architect and engineers³. The contractor is required to perform and complete the construction fully in accordance

¹ Ter, Kah Leng (1989). *Builders's Tort Liability for Economic Loss Arising from Defective Buildings*. Malayan Law Journal.

² Summerlin & Ogborn. (2006). *Construction Defects*. Construction Law Attorneys, Thomson Business.

³ Chan CF. P. (2002), "*Commonwealth construction cases-the Singapore perspective*." Sweet & Maxwell Asia, Singapore, a Thomson Company.

with the contract documents, usually consisting of at least plans, specifications and the building code within required time⁴. Thus, if the contractor fails to construct in accordance with applicable contract documents, he is responsible for the resulting damages.

So far as the standard of work is concerned, the contractor's basic obligation is to comply with the terms of the contract. Most formal building or engineering contracts contain an initial express obligation of the contractor in some such words as to "carry out and complete the works in accordance with the contract". This is, in fact a dual obligations that are, both to carry out and to complete the works.⁵

The terms of contract include both express terms (such as the requirement of contract that work shall be of the standards described in the bills) and implied terms (such as the principle that all materials shall be of 'satisfactory quality')⁶. It was too often that contractors believe that liability is limited to what is written in the contract which is a crucial misconception. There are many areas of contractual liability which are implied and not expressed⁷. Practically, this implied contractual liability might be the contractor's obligation to perform its work in a good workmanlike manner. Therefore, even when dealing with contractual liability, the contractor is often subject to a scope of liability which is usually different from, the written contract and often more comprehensive.

In a construction contract, a contractor undertakes to do works and supplies materials impliedly, including⁸:

⁴ Ficken. B. W. (2006). *Legal Consideration and Dispute Resolution: The Water-Related Construction Failure*. American Society for Testing and Materials. Race Street, Philadelphia, PA 19103.

⁵ I. N. Duncan Wallace (1995). "Hudson's Building and Engineering Contracts." 11th Edition. (Sweet & Maxwell) pp. 472

⁶ Murdoch, J and Hughes, W. "Construction Contracts: Law and Management." (London: Spon Press, 2000) pp. 147

⁷ Simon, S. M. (1979), *Construction Contracts and Claims*. New York: McGraw-Hill Book Company.

⁸ I. N. Duncan Wallace. *Supra* 5. pp. 519

- a) to do the work undertaken with care and skill or, as sometimes expressed, in a workmanlike manner;
- b) to use materials of good quality. In the case of materials described expressly this will mean good of their expressed kind and free from defects. (In the case of goods not described, or not described in sufficient detail, there will be reliance on the contractor to that extent, and the warranty (c) below will apply);
- c) that both the workmanship and materials will be reasonably fit for the purpose for which they are required, unless the circumstances of the contract are such as to exclude any such obligation (this obligation is additional to that in (a) and (b), and will only become relevant, for practical purposes in any dispute, if the contractor has fulfilled his obligations under (a) and (b)).

In addition to the principal express or implied obligation to complete the construction, there are express reference to “substantial completion” or “practical completion” in formal English-style contracts which often used as definitions in formal contracts to denote the begin of the maintenance or defect liability period. This is also significant to secure the release to the contractor of the first portion of any “retention moneys”. In general, what is contemplated by these expressions is a state of apparent completion free of known defects which will enable the employer to enter into occupation and make use of the project, with the result that they will usually bring any possible liability of the contractor for liquidated damages for delay to an end. The scheme of this type of contract thus contemplates the commencement of a period when the employer enters into occupation but at the end of which any then known omissions or defects will be made good by the contractor⁹.

⁹ I. N. Duncan Wallace. *Supra* 5. pp. 474

The liability, obligations and responsibilities of the contractor do not stop with the contract¹⁰. There are broader and more inclusive. Liability may rest in the field of torts. Although the contract may specify that the contractor is obligated to act in a reasonable manner or even if the contract does not specify it, the law of torts does. Under the law of torts, every person owes every other the obligation to exercise reasonable care and skill¹¹. This obligation extends beyond the contracting party, and it applies to all persons. Therefore, the contractor may be liable for its failure to exercise reasonable care in the performance of his duties, even though it is fulfilling its contractual obligations. It can be said that a contractor who lives by its contract is merely inviting potential liability.

In construction industry, most of the standard forms of building or engineering contract contain provisions that deal with defective works where defective works could be in the forms of design fault, defective building materials or bad workmanships. In construction contracts, it cannot be said that the works have been practically completed, if the work is so defective that it would prevent the owner from using the building as intended by the contract.¹²

Defect Liability Period (DLP) is a common feature in all the standard form of construction contracts in Malaysia, i.e. Pertubuhan Arkitek Malaysia (PAM) 2006 / Public Work Department (PWD) 203A (Rev.2007) / Institution of Engineer Malaysia (IEM) / Construction Industry Development Board (CIDB) 2000. During the DLP, the Contractor is obliged and liable to rectify defects that appear between the period the Certificate of Practical Completion (CPC) is issued and the expiry of the DLP¹³. Defects can be classified into two main categories, patent defects and latent defects. Patent defects are defects that can be discovered by normal

¹⁰ Frank E. and James A. (1988). *Building Subsidence: Liability and Insurance*. London: Oxford BSP Professional Books.

¹¹ Simon, S. M. *Supra* 7.

¹² Mohd Suhaimi Mohd Danuri (2005), "The Employer's Rights and the Contractor's Liabilities in Relation to the Defects Liability Period." (The Malaysian Surveyor). pp. 54

¹³ Anon (2007), "*What Are The Obligation Of The Contractor During Defect Liability Period?*" The Entrusty Group, Master Builders, 1st quarter 2007

examination or testing during the defects liability period whereas latent defects are by its very nature concealed and may not manifest itself for many years.

Although each contract will obviously be unique, broad conceptual types of contract may be identified, and even a contract created specifically to meet the individual requirement of a given situation, it will inevitably have points of similarity to other contracts. The DLP provisions are found under the following clauses of the standard forms of construction contracts:-

- PAM 2006: Clause 15 – Practical Completion & Defects Liability.
- PWD 203A 2007: Clause 48 – Defects Liability and Making Good.
- CIDB 2000: Clause 27 – Defects Liability after Completion.

According to the standard form of construction contract, sub-clause 15.1 of PAM 2006 form of contract specifies that the works shall be deemed to be practically completed if the architect is of the opinion that all necessary works specified by the contract have been completed and the defects existing in such works are ‘de minimis’¹⁴. Clause 45(a) of JKR 203 form of contract specifies that the contractor is responsible for any defect, imperfection, shrinkage, or any other fault which appears during the Defects Liability Period, which will be six (6) months from the day named in the Certificate of Practical Completion issued, unless some other period is specified in the Appendix¹⁵. Similarly in CIDB 2000 form of contract, Clause 27.1 specifies that the contractor shall complete any outstanding work and remedying defects during the Defects Liability Period.

Once the works have been practically completed and the issuance of the Certificate of Practical Completion, the Defects Liability Period will begin. Any defects, shrinkages or other faults arising during this period due to defective

¹⁴ Mohd Suhaimi Mohd Danuri. *Supra* 12. pp. 54

¹⁵ Lim Chong Fong. “The Malaysian PWD Form of Construction Contract.” (Malaysia: Sweet & Maxwell Asia, 2004) pp. 105

materials or workmanship must be put right by the contractor at his own expense¹⁶. Refer to this, sub-clause 9(a) of PWD 203A requires the contractor to use materials and workmanships that comply with the specifications, further, sub-clause 9(b) entitles the superintending officer to instruct the contractor to demolish or open up the work done and the associated cost will be borne by the contractor if the works have not carried out in accordance with the contract.

Where in the case of *H.W. Nevill (Sublest) v William Press and Son*¹⁷, which the Joint Contracts Tribunal (JCT) standard form of contract was used, Judge Newey QC said that:

“the clause 15(2) and (3) (the clause relating to DLP) provided an efficient way of dealing with defects to the advantage of both parties. If the owner have had seek contractors new to the site to do the remedial work it might well have had difficulty in finding them. It would also almost certainly have had to pay them more and would then have sought to have recovered from the Contractor more than the cost to the Contractor of making good the defects.”

Therefore, under the contract, the contractor is liable for the defective works and has the rights and duty to return to the site to remedy the defects during defect liability period. The employer is under an obligation to give first priority to the ordinary contractor to rectify the defects before engaging another contractor to remedy the defects. The ordinary contractor who responsible, is usually carrying out the repairs with more cheaper cost and more efficient than the employer engaging a third party to repair the defects.

¹⁶ Murdoch, J and Hughes, W. Supra 6. pp. 184

¹⁷(1981) 20 Build LR 78

1.2 Problem Statement

Defective construction work, whether the result of inadequate design, faulty workmanship or poor materials, or some combination of these failings, is a frequent cause of legal disputes¹⁸.

Defective work claim is the most common claim made by employer¹⁹. A contractor is someone who is usually to be blamed, other than the other building team members. Unless otherwise stated in the contract, defective work entitles a building owner to rectify the defective work and/or claim damages against the contractor in contract and/or at common law. Hence, it is important that the contractor should possess a good knowledge of their responsibilities and liabilities²⁰.

Frankel²¹ noted that the construction defects can arise from improper soil analysis / preparation, site selection and planning, architectural design, civil and structural engineering, negligent construction or defective building materials. Frankel further stated that the recent explosion in new construction has spawned, increased construction defect litigation.

Where in the case of *Crown Estate Commissioners v. John Mowlem*²², Stuart-Smith LJ indentified three cases for dealing with defects in quality of the work:

- i. Case A - the criteria stipulated in the contract documents (standard specification).

¹⁸ Kevin Barrett (2008). "Defective Construction Work".

¹⁹ Jim Doyle (2005). "Defective Work Claims". Doyles Construction Lawyers

²⁰ Kevin Barrett. Supra 18

²¹ Frankel E. R. (2005). Insurance Coverage for Construction Defect Claims. Real Estate Finance; ABI/INFORM Global. pp 20.

²² (1995) 70 BLR 1

- ii. Case B – standards and quality not stated in the contract documents, in quality and case there is an implied term that materials will be of a reasonable quality and fit for their purpose and workmanship will be to a reasonable standard.
- iii. Case C – the standards and quality is expressed to be to the architect's satisfaction.

For instance, the case of *Ruxley Electronics & Construction Ltd v Forsyth*²³, relates to damages for defective works. This case arose where a swimming pool was constructed at a depth of 6'9" instead of 7'6" as required by the Employer. The House of Lords had awarded damages regarding reasonableness as a factor to be considered in determining what that loss was to the employer.

In another case of *P & M Kaye Ltd v Hosier & Dickinson Ltd*²⁴, where the JCT form of contract was used, Lord Diplock stated that:

"....the contractor is under an obligation to remedy the defects in accordance with the architect's instructions. If he does not do so, the employer can recover as damages the cost of remedying the defects, even though this cost is greater than the diminution in value of the works as a result of the unremedied defects."

In every construction projects, the contracts envisage that the defects might occur during the DLP, and such defects shall not be considered as a breach of contract. Upon receipt of notice, the contractor is obliged to return to the site to make good the defects and the employer is obliged to allow the contractor to do so²⁵. The contractor is considered as breaching the contract, once he denies or fails to rectify the defective work, and the employer is entitled to damages.

²³ (1996) AC 344

²⁴ (1972) 1 WLR 146

²⁵ Anon. Supra 13.

It is essential that the contractor's liability for defective works which lies prior to practical completion and during defect liability period is however undeniable. The failure of the contractor to rectify the defects which appear during Defect Liability Period (DLP) as required by the contract would constitute a breach of contract that will entitles the employer to be remedied in the forms of damages as per Section 74(3) of Contract Act 1950. Furthermore, if the contractor has failed to rectify the defects as instructed by the contract administrator or upon receipt of the notice, the employer is entitled to appoint another contractor and recover the cost of rectifying the defects from the original contractor within the ambit of the contract provision.²⁶

It is noted that the Defect Liability Period (DLP) provision requires such a notice to be given to the Contractor. However, what would the scenario be if the Employer/Architect/ Engineer/SO fails to issue the required notice to the contractor? Is the contractor still liable to the defect works and the damages? Yet, would the employer lose its rights and remedies to recover the cost of remedying the defects?

In considering this issue, it is essential to appreciate that the requirement of such notices impliedly imposes a duty to mitigate the loss on the part of the Employer. The decision had been held in the Court of Appeal (UK) in the case *Pearce & High Limited v Baxter*²⁷, where Evans LJ said that:-

“In my judgment, the contractor is not liable for the full cost of repairs in those circumstances. The employer cannot recover more than the amount which it would have cost the contractor himself to remedy the defects. Thus, the employer's failure to comply with clause 2.5 (the clause relating to rectification of defects), whether by refusing to allow the contractor to carry out the repair or by failing to give notice of defects, limits the amount of damages which he is entitled to recover. The result is achieved as a matter of legal

²⁶ Mohd Suhaimi Mohd Danuri. Supra 12. pp. 57

²⁷(1999) BLR 101

analysis by permitting the contractor to set off against the employer's damages the amount by which he, the contractor, has been disadvantaged by not being able or permitted to carry out the repairs himself, or more simply, by reference to the employer's duty to mitigate his loss."

Evan LJ in the above case accepted that the giving of a notice with regard to defects should be regarded as a condition precedent to the employer's rights to require the contractor's compliance with the defects liability clause. It was held that the employer's failure in giving the required notice would limit the employer's recovery if the rectification cost were more than the cost of the original contractor to rectify the defects.

The contractor is under the duty to rectify the defects during the defect liability period. The contract stated that it is the client's rights to get another person to rectify the defects and has the rights to claims for the cost of rectification. However, does it mean that the contractor has to pay everything that the client claimed? The clauses in standard form of contract has stated that the employer can employ a 3rd party to rectify the defects, but it didn't stated the situation that the contractor is not liable to the full cost of the rectification. The contract also didn't state the situation or exception that the contractor is not liable to the defects.

The following discussions give rise of the several questions:

- i. Are the contractor responsible to all the cost of rectification,
- ii. Are the contractor obligated to rectify the works, and are there any exception,
- iii. If the employer direct another party to rectify the defects, is that mean the contractor has to pay all the cost.

Therefore, this study will analyse the defective building works claims during defect liability period and the contractor's liability towards the defects, so that through this study, the contractor will be able to have better understanding on the possible defective building work claims that the employer may claim during defect liability period and their legal positions and liabilities to the claims.

1.3 Objectives of Research

The above aim of research is supported with the following objective:

- To determine the circumstances that the contractor is not liable for the defect, imperfection, shrinkage or any other fault which appeared during defect liability period.

1.4 Scope of Research

The following are the scopes for this study:

1. Only cases related to defective building works during defect liability period will be discussed in the study.
2. The circumstances discussed are those concerning between both the main contractor and employer only.
3. Standard forms of contract commonly referred to and examined in this research are Pertubuhan Arkitek Malaysia (PAM) Standard Form of Contract 2006, Public Works Department (P.W.D) Form 203A (Rev.2007), Construction Industry Development Board (CIDB) Standard Form of Contract for Building Works (2000 Edition).

1.5 Significant of Research

This research is important in order to find out and define the liabilities of the contractor when there is defective building works. Through this study, the contractors may have the knowledge on their liability towards the employer's claims in relation to defective building works.

1.6 Research Methodology

The methodologies of this study has been separated into few steps, namely indentifying the research issue, literature review, data collection, research analysis and conclusion and recommendation. This approach is to ensure that the collection of the information and the data analyzing can be precisely implemented.

I. Initial Study and Identifying the Research Issue

The overview of concept for the study was obtained through intensive reading of books, journals, articles and newspaper cutting which can easily attained from the library of faculty and UTM's Library. Discussions with supervisor, lecturers, as well as course mates, were held so that more ideas and knowledge relating to the topic could be collected. Related information concerning current scenario of construction industry in Malaysia and the contract issues in the industry were referred. From the research issue, the objectives of the study are identified.

II. Literature Review

Various documentation and literature review regarding to contractor's liabilities towards employer's damages in relation to defective building works are collected to achieve the research objectives. Books, journals, research papers, reports, newspaper as well as sources from the internet are referred. Primary data: electronic database; secondary data: books, act, articles, seminar papers and etc. Related legal cases based on previous court cases, journals, papers, and reports are collected from Malayan Law Journals via UTM library collection and electronic database.

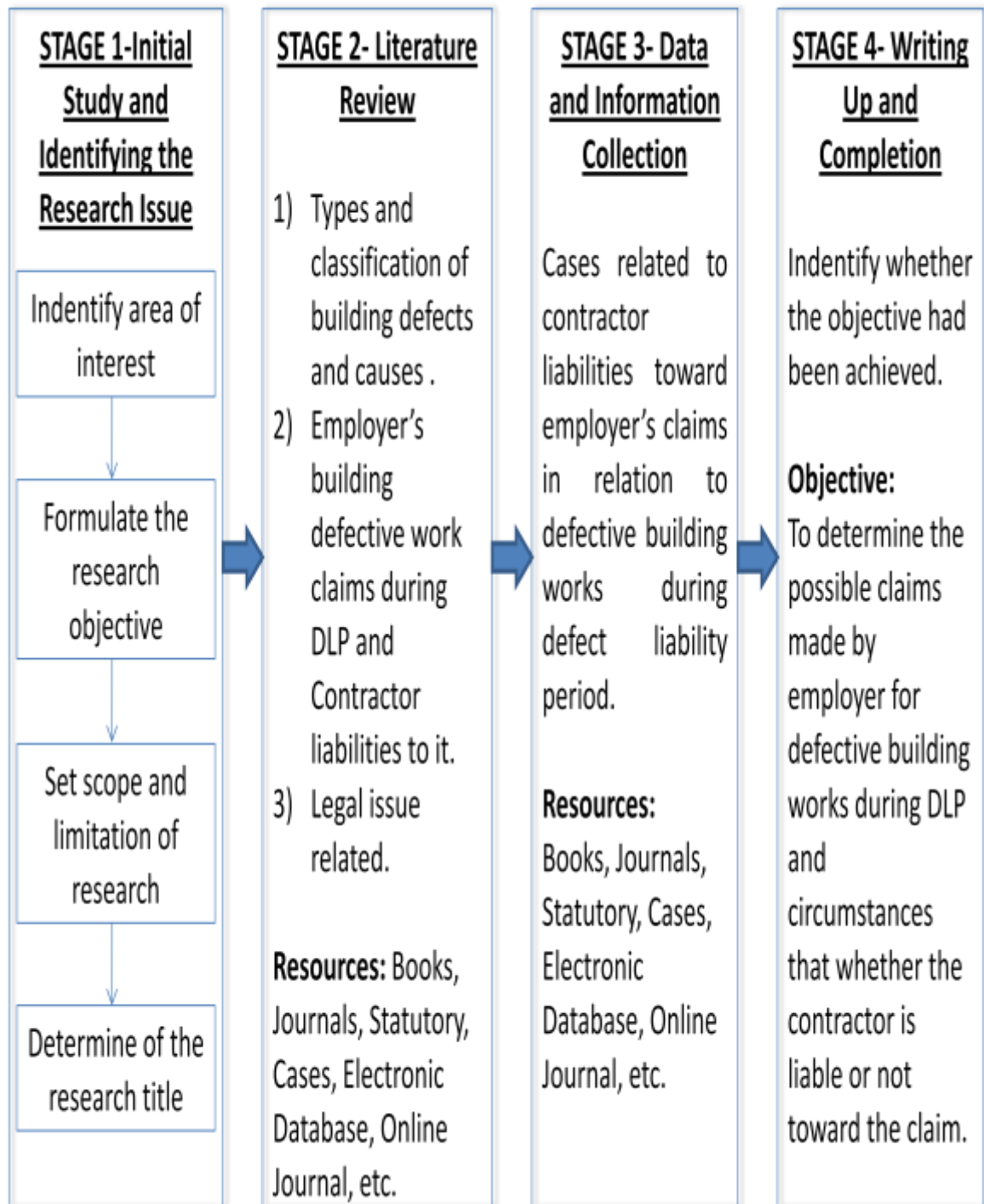
III. Data and Information Collection

In this stage, all the collected data, information, ideas, opinions and comments will be arranged, analysed and interpreted. The relevant case laws collected will be carefully reviewed, with special attention on the facts of the case, issues and judgments presented by each case law. The proper arrangement of data tends to streamline the process of writing up.

IV. Writing-up and Completion

The final stage of the research process mainly involved the writing up and checking of the writing. In this stage, the whole process of the study will be reviewed to identify whether the research objective had been achieved. Lastly, conclusion and recommendations will be made based on the findings from the analysis of data.

Figure 1.1 Flowchart of Research Methodology



1.7 Structure of Research

This dissertation is divided into five (5) chapters and each chapter covered different scope of studies. The outlines for each chapter are as follows:

I. Chapter 1 – Introduction

First Chapter is basically an introduction on the topics, problem statement, research aims and objectives, scope of research, research methodology and methods of approach and outline of structure of research.

II. Chapter 2 – Defective Building Works During Defect Liability Period

Second Chapter is the literature review about the definition of defect liabilities and the discussion on the common type of building defects, general causes of building defects and classification of building defects.

III. Chapter 3 - Employer's Defective Work Claims during Defect Liability Period and the Contractor's Liabilities

This Chapter is the literature review on the contractor's liability towards the defective work claims and liability of contractor to employer in respect of defects discovered during defect liability period. Provision of the construction industry form of contract in relation of defect liabilities will be referred and discussed.

IV. Chapter 4 – Data Analysis

Forth chapter is focusing on the court cases review and analyse the results from the judicial decisions as reported in law reports which concerning the contractor's liability towards employer's claims in relation to defective building works during defect liability period and the circumstances that the contractor liable or not liable.

V. Chapter 5 – Conclusion

This last chapter comprises of the discussion on findings and interpretation of the data collected conclusion and recommendation. The findings and analysis, conclusion and recommendation are utilized in order to answer the objectives of the research.

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