

**LIABILITIES OF THE CONTRACT ADMINISTRATOR
IN CERTIFICATION**

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ABSTRACT

Contract Administrator engaged by the Employer ,acts as his agent for the purpose of securing the completion of the works ,in an economical and timely manner. Under PAM 2006 Form ,the “Architect” is the contract administrator and “Engineer” in IEM form whilst CA is also known as “Superintending Officer” in PWD and CIDB forms.CA in this study is focused to the professional CA , the Architect and Engineer. As a contract administrator and agent of the Employer , CA provides information to the contractor to enable him to carry out his contractual works ,issue variations which may alter the extent ,nature and quantity of the works, nominates sub-contractors and suppliers on the Employer’s behalf ,supervises and approves the works. In his capacity as contract administrator and independent certifier, it is the Architect’s duty to issue certifications on all payments due under the contract and certify acceptance of completed works in conformity to contract specifications and accepted standards. The contract administrator must act with independence, impartial and fairness. The professional obligation to act fairly extends to such of his duties to use his professional skill and judgment in forming an opinion or making a decision where he is holding the balance between the Client and the Contractor. The CA is duty bound to serve the Employer faithfully as his agent. The Employer would reasonably expect that the Architect possesses the requisite ability and skill and be liable to the Employer if he had been professional negligent. The finding of this research is based on the judgment of 11 cases where the CA has wrongful in certifying the certificates .They are categorised as error in certificate , signing by non authorised person and due to fraud and dishonest. Thus it is important for the CA to ensure that pre-conditions as expressly stipulated in the particular terms of the condition of the contract have been satisfied.

ABSTRAK

Pentadbir Kontrak (PK) dilantik oleh majikan sebagai agen yang memainkan peranan penting untuk memantau kerja yang sedang berjalan supaya dapat disiapkan didalam tempoh kontrak yang telah ditetapkan dengan kos yang ekonomik. Pentadbir Kontrak dikenali sebagai “Arkitek” didalam borang kontrak PAM 2006, “Jurutera” didalam borang kontrak IEM, dan “Superintending Officer” di dalam borang kontrak JKR203A dan CIDB2000. Pentadbir Kontrak yang dalam konteks kajian ini adalah PK professional iaitu Arkitek dan Jurutera. Di dalam bidang kuasanya sebagai pentadbir kontrak dan agen kepada majikan, PK perlu memberikan informasi secukupnya kepada kontraktor supaya dapat menjalankan kerja dengan baik, mengeluarkan arahan perubahan kerja bagi pihak majikan yang akan mengubah skop kerja dan kuantiti kerja kontrak asal, melantik sub-kontraktor yang dinamakan dan pembekal bagi pihak majikan, menyelia kemajuan tapak, memberi kelulusan serta menerima kerja-kerja yang telah disiapkan oleh kontraktor. Di dalam kapasiti sebagai PK dan Peraku yang bertaualiah, adalah menjadi tugas Arkitek dan Jurutera untuk memperakui pembayaran dibawah kontrak pembinaan dan memperakui kerja-kerja yang telah disiapkan itu memenuhi spesifikasi dan piawaian yang ditetapkan didalam kontrak. Semasa menentukan keputusan, PK mesti berlaku adil, munasabah dan saksama. Obligasi sebagai professional adalah untuk berlaku adil semasa mentadbir kontrak, menggunakan kepakaran skil serta pertimbangan yang wajar didalam membuat keputusan atau memberi pendapat. Peranan PK perlulah seimbang diantara majikan dan kontraktor. Ini kerana majikan mengharapkan PK melaksanakan tanggungjawabnya dengan cekap dan PK akan dipertanggungjawabkan sekiranya berlaku kecuaiian. Penemuan kepada kajian ini adalah berdasarkan kehakiman sebelas(11) kes-kes mahkamah yang diperolehi, dimana mahkamah memutuskan PK berlaku cuai semasa memberi perakuan persijilan di dalam kontrak. Kesalahan perakuan persijilan tersebut adalah kesilapan di dalam sijil, sijil ditandatangani oleh PK yang bukan professional serta sijil yang ada unsur penipuan. Oleh itu sebagai PK, adalah penting untuk memastikan syarat-syarat kontrak telah dipenuhi sebelum Sijil Perakuan dikeluarkan.

Sebagai PK hendaklah berpuas hati dengan status kerja bberkenaan dan mengambil tanggung jawab sepenuhnya sebelum Sijil diserahkan kepada kontraktor .

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LIST OF ABBREVIATIONS

AC	Law Reports: Appeal Cases
A/E	Architect /Engineer
All ER	All England Law Reports
AMR	All Malaysia Reports
App Cas	Appeal Cases
Build LR	Building Law Reports
CA	Contract Administrator
Cal LR	California Law Review
CCC	Certificate of Completion and Compliance
CFO	Certificate of Fitness
Ch	Cases in Chancery
Ch D	The Law Reports, Chancery Division
CIDB	Construction Industry Development Board
CLJ	Current Law Journal (Malaysia)
CLR	Commonwealth Law Reports
ER	Equity Reports
ER	Equity Reports
EOT	Extension of Time
EWCA Civ	Court of Appeal, Civil Division (England & Wales)
FMSLR	Federated Malay States Law Reports
HL	House of Lords
JKR	Jabatan Kerja Raya

KB	King Bench
LAD	Liquidated Ascertained Damages
Lloyd's Rep	Lloyd's List Reports
LR	Law Reports
MLJ	Malayan Law Journal
PAM	Pertubuhan Arkitek Malaysia
PC	Privy Council
PWD	Public Works Department
QB	Queen Bench
SCR	Session Cases Report
SLR	Singapore Law Report
WLR	Weekly Law Report

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CHAPTER 1

INTRODUCTION

1.1 Background Studies

A construction contract is an exchange of promise to produce a project for a price within a period.¹ Given the reciprocal rights and obligations between the principal and contractor, a mechanism is required to make those mutual promises work. This mechanism is usually found in the appointment of the Contract Administrator (CA).

In *Dorter and Sharkey (1990)* describes the contract administrator's role as being invidious (tendering to excite ill-feeling) and almost impossible one:

“Apart fromduties to both principal and contractor, he or she has a duty to the achievement of the contractual aim. Although the principal and the contractor are supposed to be cooperating in that achievement, in practice they are very soon evidencing their competing commercial concerns. Yet he or she is required to try to hold the balance between those contenders.”²

1 Dorter and Sharkey “Building and Construction Contracts in Australia” (1990)Vol 1 at p3511.

2 Ibid at p3512/1

It has been a standard practice for the Contract Administrator to be used in construction contract.³ Contract Administrator means architect, engineer,superintending officer or other person howsoever designated who administers a construction contract. Architects and Engineers have been engaged to supervise and manage building contracts and engineers engineering contracts. Contract Administrator is engaged as an agent to the employer to supervise the carrying out of building works. His engagement primarily is to ensure the works are executed effectively and economically.⁴ The purpose of employing an architect, engineer on a building project is to give the employer the benefit of that professional's skill and experience.

The Architect and Engineer , as a professional, carries responsibility on account of the confidence placed in his skill, knowledge, judgment and integrity. These attributes enable him to conceptualise , design, plan and supervise construction works, in an efficacious manner.

*“The employer and the contractor make their contract on the understanding that in all matters where the architect has to apply his professional skill he will act in a fair and unbiased manner in applying the terms of the contract.”*⁵

The Architect's and Engineer's as the CA is normally formalized by a services agreement between the Architect/Engineer and the Client. There is thus a contractual relationship between the parties and in the formation contract apply. The Architect's Act 1967 ,Architect Rules 1996 ,Engineer's Act 1967 govern the professional services agreement between the Architect/Engineer and Client, which should be in accordance with Architects (Scale Of Minimum Fees)2010 and Engineers (Scale Of Minimum Fees) 2000 ,the Condition of Engagement and the Memorandum of Agreement .

3 Tim Elliot QC,Contract Administrators ;The Obligations of Impartiality and Liability for Incorrect Certification

4 Chow Kok Fong (1980)The Law Relating to Building Contract Cases & Material Quins Pte Ltd, Singapore

5 Keating , Construction Contract 2006,quoting from Sutcliffe v Thackrah [1974]AC 727

In the prescribed agreement ,the Architects basic services are generally categorized under five phases namely Schematic Design, Design Development ,Contract Documentation ,Contract Implementation and Management and Final Completion Phase.

In the absence of an express contractual right of terminations , it is implied that the appointment of Contract Administrator will last until all the contract work is completed. Premature dismissal by the employer will constitute a breach of contract for which damages may be claimed. However the personal nature of the contract will also terminate upon the death, insanity or other permanent disability of the contract administrator.

The authority of the Contract Administrator to bind the employer by acting as his agent depends as between those parties on the terms of the contract under which the Contract Administrator is appointed. As between the employer and the contractor, the Contract Administrator may also bind the employer by acting within his ostensible authority.

The extent of which will depend largely upon the terms of the construction contract. In general, Contract Administrator will have no implied authority to commit the employer to contracts with sub-contractors or suppliers, to vary or waive the terms of the any contract, to vary the contract works, to order as extras work which is included in the contract, or to warrants the accuracy of plans, specifications or quantities or the practicability of proposed methods of work.

Issuance of various types of certificates by the Contract Administrator when he is satisfied with the completion of the contractor's work under the contract. The purpose of the certification procedure is normally either to express formal approval of work or to trigger an obligation to pay money.

As the employer will not usually possess the technical knowledge necessary in order to determine whether or not the contractor has observed the contract specifications, certificates will be issued by the Contract Administrator (CA) and will usually express his definite approval of the work.

The issuance of the appropriate certificate by the Contract Administrator as the Certifier must be in line with the contractual time line for example progress payment via interim certificate of payment, Certificate of Non Completion (CNC) when the date for completion is reached to trigger onset of Liquidated Ascertained Damages (LAD).

The certificates are regard as the *Doctrine of Substantial Performance*⁶ they act as the confirmation of contractual status of an item ,works or event. Therefore the Contract Administrator (CA) is required to be fair and reasonable to both employer and contractor in assessing their work. Any decision may be challenged if the requirement is not met.⁷

In order to prove that Contract Administrator's wrongful certifying the certificate is very serious negligence in construction contract , it can be referred to the case of *Sutcliffe v Thackrah* ,⁸ the House of Lords considered a claim by an employer against the architects who, during the course of the works issued interim certificates to the builders. In this case the architect apparently over-valued a series of certificates and the employer duly paid the contractor. The builders failed to complete the work satisfactorily and were removed from site and another builder completed the work at a higher cost.

The original builder went into liquidation before the job was completed, with the result that the employer could not recover the money that had been overpaid. The employer brought an action against the architects in negligence and for breach of duty. The architect was accordingly liable to compensate the employer for the money lost.

⁶ Chong Thaw Sing, FCI Arb, Seminar paper on Certification in Malaysia, 26 June 2010

⁷ Nigel M. Robinson ,Construction Law In Singapore and Malaysia ,Second Edition,2000.

⁸ (1974) AC 727

The House of Lord held that; The architect was not immune from liability for that negligence. Lord Morris of Borth expressed the position thus;

“.....The duties involved that the architect would act fairlyin ensuring that the provisions of the building contract were faithfully carried out. He was to exercise his care and skill in so ensuring. But his function differed from that of one who had to decide disputes between a building owner and a contractor.....The circumstances that an architect in valuing work must act fairly and impartially does not constitute him either an arbitrator or a quasi arbitrator..”

This seminal English case of *Sutcliff v Thackrah*⁹ deemed that the Architect as the Contract Administrator is liable in damages if causes loss to his Employer by failure to take due care or to exercise reasonable professional skill in carrying out his duties.

The decision in the Sutcliffe case is of considerable interest in examining the practical implications of a duty of care in respect of certification. The responsibility of the contract administrator must notify the quantity surveyor in advance of any work which is not properly executed , so that it can be excluded from the quantity surveyor’s valuation.

The duty of care a Contract Administrator owes to employer applies not only to certification but also decision making functions. Even though the Contract Administrator has been given a wide authority to act on behalf of the client, his authority is actually must be expressly empowered by the condition of the contract itself.

The Contract Administrator’s decisions and certificates bind both the Employer and the Contractor .Improper or negligent certification may result in the Contractor suffering financial losses.

⁹ (1974) AC 727

This could arise where the Architect under certifies the Interim Payment Certificates and Final Certificates, certifies late or fails to certify them at all, or when he does not certify the Certificate of Practical Completion or Certificate of Making Goods Defects, or certifies them late, or he issues the Certificate of Non-Completion erroneously causing the Employer to deduct monies from sums otherwise due to the contractor. Thus, based on the above case, this research is attempted to identify the Contract Administrator's liability in certification.

1.2 Problem Statement

According to *Nigel (1996)*, an administrative authority exercising decision making powers that significantly affect the rights and interests of other parties does not enjoy an unfettered discretion, whether his authority derives from statute or from contract, he is required to act fairly, and his decision may be brought to court by an aggrieved party.

A certificate could only be considered wrong and may be challenged if:

- (i) It is wrong on the summary shown on the form for example in payment certificate where the summary shown on it was arithmetically incorrect;
- (ii) It is not issued by the authorised person or in the authorized manner;
- (iii) It has been the subject of improper interference or fraud.

Error in the summary be it the sum shown in the certificate or the period approved for Extension Of Time (EOT) can be refer to cases *Lojan Properties v Tropicon Contractors*¹⁰, the contractor brought court proceedings against the employer who had failed to honor twelve interim certificates.

¹⁰ [1989] SLR 610

Disputes between the parties relating to the issue of interim certificates by the architect similarly illustrate in *Lubenham Fidelities and Investments Co Ltd v South Pembrokes District Council*¹¹ and *Master Plumbers Sdn Bhd v Kemajuan Amoy Sdn Bhd*¹². The issue of an interim certificates is always a condition precedent to the right of the contractor to be paid.

Similarly in *L' Grande Development v Bukit Cherakah Development Sdn Bhd*¹³, six interim certificates certified by the contract administrator become due because it is subjected to the final measurement of the actual work that the plaintiff may able to claim at the end of the contract by a final certificate.

Disputes over the Penultimate Certificates and Final Certificates, cases can be refer as in *Hiap Hong & Co Pte Ltd v Hong Huat Co Pte Ltd*¹³ and *James Png Construction Pte Ltd v Tsu Chin Kwan Peter*.¹⁴ The cases will be analyse to identify and determine how final is the Final Certificates and is there any scope to change the certification. The particular requirements are expressly spelt out in terms of the conditions of contract in PAM 2006, JKR 203(A) and CIDB 2000.

The certificate is also wrongful if it is not certify by the authorised person .Therefore the appointment of the Contract Administrator need to be carefully look into as it is clear from the decided cases that the plaintiff employer can pursue architect or engineer in negligence or breach of duty; *Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd*.¹⁵

11 [1086]33BLR39

12 [2009]9 MLJ519

13 [2007]4MLJ 518

14 {1991}1MLJ449

15 [1987]2MLJ 332

In a recent case for negligent design, supervision and certification against the architect arising from the collapses of the Stadium Terengganu roof and the Jaya Supermarket Building in 2010.¹⁶ As a principal submitting person and notional leader of the building team, the Architect in the first instance and without investigations, will always be deemed to be at fault as the Contractor who is responsible for the cause of the collapse.

The Architect /Engineer as the Contract Administrator (CA) have an important role to employer as an agent whom he is retained and paid and on the other hand he has a quasi certifier role between the two parties to the contract. Therefore the ethical aspect of certification in contract administration will be discussed in my thesis paper.

The standard of reasonable skill and care is expected of a professional Contract Administrator. The Architect /Engineer as the Contract Administrator has to exercise his professional skill in a fair and unbiased manner when for example ,issuing payment certificates or deciding upon and granting extensions of time.

A certificate will become the subject of improper interference or fraud when the CA has the intention to interfere with the performance of the contract. CA as the certifier has the responsibility to assess the completion of work or non completion of work before the Certificate Of Practical Completion (CPC) or Certificate Of Non Completion (CNC) can be issued or delays whether it is an excusable, compensable or inexcusable delay before Extension Of Time (EOT) can be considered.

In the case of *Royal Brompton Hospital NHS Trust v Hammond and others (Taylor Woodrow Construction (Holdings) Ltd Pt 20 defendant*¹⁷ , disputes were on variation, delay and the CA , the architect were wrongly negligent in granting time extensions.

¹⁶ Warta LAM Desember 2010

¹⁷ [2001]EWCA Civ 206,76 Con LR 148

*Invar Realty Pte Ltd v JDC Corporation*¹⁸, dispute was over liquidated damages and issuance of Certificate Of Practical Completion.

The problem statement above shows that there are cases due to many wrongful doings of the contract administrator in certification. I want to do this research so that this knowledge will benefit the professional as the contract administrator (CA) and to the contractor so that they will not suffer because of the wrongful certification.

1.3 Objective of Research

From the problem statement, the following is the objective of the study:-

- (i) To identify the liability of Contract Administrator in certification.

1.4 Scope and Limitation of Research

The main thrust of this dissertation is on determining the liabilities of the Contract Administrator (CA) and authority of CA in certifying certificates based on provisions provided in standard form building contract namely PAM, PWD203A and CIDB2000 which is widely used in Malaysia construction industry. Court cases also will be referred in order to identify the limitation of CA's authority in issuing Certificates. The scope of this study will be confined to the following areas:

- (i) Only construction cases will be discussed in this research;
- (ii) Contract Administrator's liability in contract and tort;
- (iii) Cases related in construction defects brought in England, New Zealand, Australia, Canada, Singapore and Malaysia;

- (iv) Standard form of contracts commonly referred to and examine are PAM 1998, PAM 2006, PWD Form 203A , IEM ,CIDB ,Std Form of building contract;
- (v) Acts –Architect Act 1967, Street Drainage and Building Act 1974, Uniform Building By –Laws 1984,National Land Code 1965,Town & Country Planning Act 1976 ,Arbitration Act 2005 and Arbitration Procedure & etc.

1.5 Significant Of the research

This research is very important in order to the Contract Administrator (CA) to know the impact of the wrongful certifying action as the certifier and aware of what its legal rights and the obligations cast on the CA either at general law or by the express terms of the contract that will governs the Contract Administrator's certifying function.

Furthermore, this research also gives some guideline to the Contract Administrator on their duties and the extent of the protection the Contract Administrator will receive under the contract and in respect to the exercise of the power to issue certificates under the contract.

Thus, this research is perhaps would contribute towards enhancement of the Contract Administrator's knowledge regarding their liability to third party under law of tort. This research is also important to the contractor as a basis to determine the wrongful certify Certificates obtained from CA can be challenged or not.

1.6 Research Methodology

In pursuance of the aim or objective as stipulated above, the primarily methods that have used to complete this project are research by literature review.

Sources for literature review are from books, journals, newspaper article, lecturer notes and magazines. These sources provide lots of data that can help to identify the issue, it will involves reading on various sources of material such as journals,articles, seminar papers, court cases ,previous research papers as well as websites.

All these reading sources can be obtained at the internet sites that are related to this dissertation and library; Perpustakaan Sultanah Zanariah , UTM , Perpustakaan Darul Hikmah UIA, and Perpustakaan UM . Analysis of cases collected from Malayan Law Journal (MLJ),Lexis Nexis.

The introduction stage of this research started with the overall overview of issues on wrongful certifying by the contract administrator as a certifier in Chapter 1. This is followed by an extensive Literature Review on the professional role , responsibilities ,duties and liabilities of the Architect/ Engineer as the Contract Administrator under topic professional liability as in Chapter 2. In Chapter 3, general view on type of Certificates, and the case laws related to each type of Certificates in the Building Contract.

After the data collection stage, the following stage is the data analysis stage as in chapter 4. In this analysis will be focus on the contract administrator's negligence for wrongful certification and cause of action for actionable interference with a contract might be available to aggrieved employer and contractor. The data analyses results make from the judicial decisions as reported in law reports and further explore related cases.

This study also will be focus on what circumstances that the contract administrator is liable or not liable towards those wrongful certifying action.

Finally as in chapter 5, present the conclusion of research.

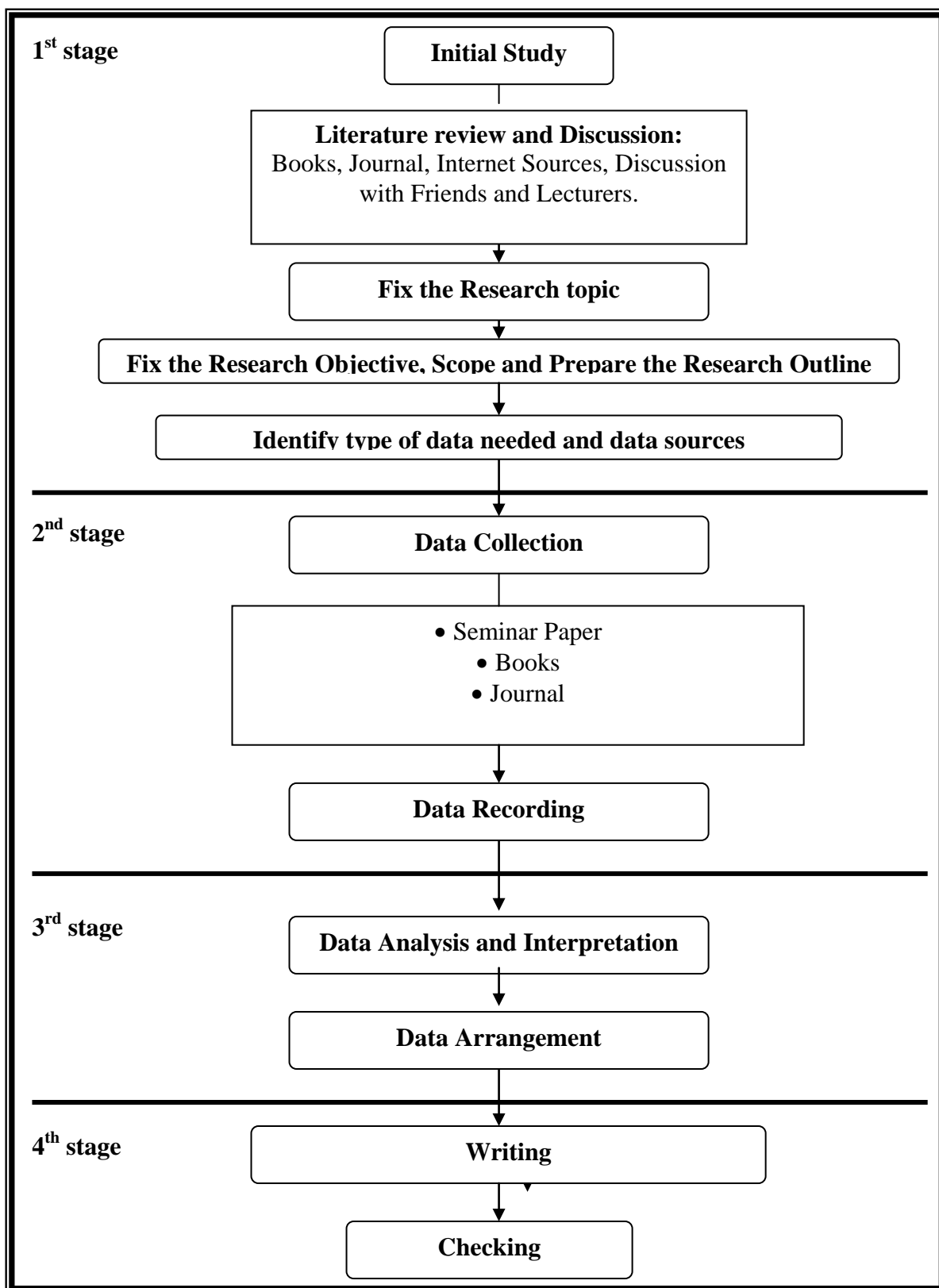


Figure 1.1: Research Process and Methods of Approach

1.7 Organisation of the report

The dissertation consists of five chapters. The brief descriptions of each chapter are as follows:

(i) Chapter 1: Introduction

This chapter presents the overall content of the whole project writing. It introduces the subject matter, the problems that are purported to solve. The objective is specified with an appropriate research method to achieve them;

(ii) Chapter 2: Roles of Contract Administrator

This chapter reviews the various definitions of liability and the different of liability under contract and tort. Also, highlights what are the extent of liability of the contract administrator as the certifier, standard of skill and care and limitation of actions of their liability. It starts with identify the nature of professions;

(iii) Chapter 3: Certificates issued in construction industry

This chapter with the overview the definition of certificate, types of certificates, nature of certificate, general causes of wrong certification, legal effect of the certificate, certificate as condition precedent to payment, certificate as condition not precedent to payment, interim certificate not conclusive, set-off, conclusiveness of final certificate and recovery of payment without certificate;

(iv) Chapter 4: Circumstances which determine the certificate is wrongful certified

This chapter analyses the results from the judicial decisions as reported in law reports and further explores related cases regarding the contract administrator's liability in certification and what are the implications to the action and the extent of damage to employer and contractor. Attempts were made to analyse the reported judicial decisions and to state the law there from. This would allow not only the law to be stated, but equally important, it allows the law to be assessed in relation to the facts as found by the court;

(v) Chapter 5: Conclusions

This chapter presents the conclusions for the overall dissertation.

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