

**RECOVERY OF INTEREST/FINANCING CHARGES DUE TO
PROLONGATION IN CONSTRUCTION CONTRACT**

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A project report submitted in partial fulfillment of the
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DEDICATION

To my beloved Parents and sisters
Thank you for your support and confidence in me.

.....Thanks for everything.

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

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ABSTRACT

It is a common occurrence for construction contracts to be delayed for one reason or another. This may be due to neutral event that beyond the control of the contracting parties or due to some act of prevention that cause by the employer or its authorized agent. In some circumstances, contractor requires more working capital and longer duration to accomplish the project is both increased and had to deployed over a longer period of time. As a result, when the project is prolonged, the contractor has to necessarily sustain cost of his working capital to ensure the contract can be fulfilled over the additional period of delay. Under the general principle of common law, financial loss in the form of interest charges is not recoverable without any express contractual or statutory provisions except claim under special damages. Since there are no express provision under the contract, can the additional interest/financing charges incurred recoverable under 'loss and/or expense' provision? Hence, this research is conducted to reducing the uncertainty and difficulties in the event of recovery of interest/finance charges in the event the project is prolonged and additional working capital is required to sustain the project. This study classified as doctrinal research is an essentially a library-based study. It was found that interest which contractor has suffered during the period between the loss and/or expense being incurred and the making of an application for reimbursement is recoverable. It is also important to serve a notice to the contract administrator to inform the disruption of the regular progress of the work under loss and/or expense clause in the successful recovery of interest/financing charges.

ABSTRAK

Ia merupakan kejadian lazim bagi kontrak pembinaan tertangguh akibat pelbagai sebab. Ini mungkin disebabkan kejadian alam semulajadi yang tidak dapat dikawal oleh mana-mana pihak di dalam kontrak atau diakibatkan tindakan yang diambil oleh pihak majikan atau agen yang diberi kuasa. Dalam sesetengah keadaan, modal yang berlebihan diperlukan oleh kontraktor dan jangkamasa yang lebih panjang untuk menyempurnakan projek tersebut telah meningkat dan jangkamasa yang diperlukan telah dipanjangkan. Akibat daripada pemanjangan jangkamasa projek itu, kontraktor terpaksa membiayai kos modal kerja bagi memastikan kontrak itu dapat disempurnakan bagi mengatasi penangguhan yang berlaku. Berdasarkan prinsipal 'Common Law', kerugian dalam bentuk faedah pinjaman dikenakan adalah tidak dapat dituntut jika tidak tertera di dalam kontrak atau berasaskan undang-undang kecuali tuntutan kerosakan keutamaan. Memandangkan ia tidak tertera di dalam kontrak, adakah lebihan faedah pinjaman yang dikenakan boleh dipulihkan di bawah proviso 'Kerugian dan Perbelanjaan'? Kajian ini dijalankan bagi mengurangkan keraguan dan masalah dalam tuntutan faedah pinjaman disebabkan oleh penagguhan projek dan modal tambahan diperlukan untuk menanggung projek tersebut. Kajian ini dijalankan menerusi analisis laporan undang-undang. Didapati bahawa faedah yang ditanggung oleh kontraktor dalam tempoh antara bermulanya kerugian dan perbelanjaan dan permohonan bagi tuntutan boleh dipulihkan. Selain itu, kepentingan notis pemberitahuan kepada pentadbir kontrak bagi memaklumkan gangguan kerja di bawah proviso kerugian dan perbelanjaan bagi memastikan keberhasilan tuntutan faedah pinjaman.

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LIST OF ABBREVIATIONS

AC	Law Reports: Appeal Cases, House of Lords
All ER	All England Law Reports
App. Cas.	Appeal Cases
B & C	Court of King's Bench
BLR	Building Law Reports
CIDB	Construction Industry Development Board Malaysia
CIDB 2000	CIDB Standard Form of Contract for Building Works (2000 Edition)
Con LR	Construction Law Reports
ER	English Report
Eq.	Law Reports: Equity
Exch	Law Reports: Court of Exchequer
HL	House of Lords
IEM	The Institution of Engineers, Malaysia
IEM 1989	IEM Standard Conditions of Contract, 1989
ISM	The Institution of Surveyors, Malaysia
JCT	Joint Contracts Tribunal
JCT 63	JCT Standard Form of Building Contract, 1963
KB	Law Reports: King's Bench Division
Lloyd's Rep	Lloyd's List Reports
LR	Law Reports
MLJ	Malayan Law Journal
PAM	Pertubuhan Arkitek Malaysia
PAM 98	PAM Standard Conditions of Contract, 1998
PAM 2006	PAM Standard Conditions of Contract, 2006

PAM/ISM 69 PAM/ISM Standard Conditions of Contract, 1969

PWD Public Work Department

PWD 203A (Rev.10/83) PWD Standard Form of Contract (With Quantities)

PWD 203A (Rev.2007) PWD Standard Form of Contract (With Quantities),
[Revised 2007]

QB Law Reports: Queen's Bench Division

SO Superintending Officer

WLR Weekly Law Report

CHAPTER 1

INTRODUCTION

1.1 Background

It is a common occurrence for construction contracts to be delayed for one reason or another. This may be due to neutral event that is beyond the control of the contracting parties or due to some act of prevention that is caused by the employer or its authorized agent.

Many contractors believe that the grant of any extension of time to their contract will lead to automatic entitlement to extra cost in form of direct loss/expense claims. This is a myth which has been dismissed by many authorities; a classic statement by Roger Knowles¹ which echoes the commonly held position in the following words:

... there is a common misconception in the construction industry that once an extension of time has been granted, there will be an automatic entitlement to the recovery of loss and expense. Under most standard forms of contract, the

¹ *Contractual Problems and Their Solutions*, (2nd Ed) at p 156.

entitlements to extensions of time and payment of additional cost or loss and expense are quite separate...

Most of the standard form of construction contracts currently in use contain 'Loss And/ Or Expense' clause (i.e. PAM 2006 clause 24.0) is to reimburse the Contractor for direct loss or expense or both which he has suffered or incurred as direct result of certain specified events and for which he is not reimbursed by payment made under any other provision of the Contract. It provides a mechanism for the settlement of the Contractor's monetary claims.

Malaysian Contracts Act 1950 in the form of Section 74 which reads:

- (1) When a Contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the Contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties know, when they made the contract, to be likely to result from the breach of it.
- (2) Such compensation is not to be given for any remote and indirect loss or damages sustained by reason of the breach.

1.2 Problem Statement

On one hand, under the general principle of common law, financial loss in the form of interest charges is not recoverable without any express contractual or statutory provisions except claim under special damages. House of Lords had laid this position in a classic case of *London, Chatham and Dover Railway v South*

1.3 Objective of the Study

The objective of this research is to identify the contractor's rights to claim for loss and/or expense to recover interest or finance charges incurred due to finance the prolongation.

1.4 Scope of the Study

The followings are the scopes of the study:

1. Contractual provisions in the major practicing forms of construction contract in Malaysia.
2. Identified legal cases reported in LexisNexis in relation to 'loss & expense claim' and 'recover interest' in the construction industry of Malaysia, United Kingdom and other Commonwealth countries will be used for discussion in this study.

1.5 Significance of Study

This study is expected to answer some of the uncertain issue that arises in the construction contract in relation of interests/ finance charges due to prolongation. Besides that, this study also could provide some information to industry player and clearer position when dealing with prolongation caused by employer (or its agent).

1.6 Research Process and Method of Approach

The process and method of approach act as guidelines so that the study could be done in a systematic way to achieve the research objective. The study process consists of 4 stages:-

Stage 1: initial study and finding the research topic, objective, scope and outline;

Stage 2: collecting data and research design;

Stage 3: analyzing and interpreting data; and

Stage 4: writing-up.

Stage 1: Initial Study and Finding the Research Topic, Objective, Scope and Outline

The initial stage of the research involves preliminary study which there are two approaches used i.e. discussion with friends and lecturers regarding what research area can be done. The idea of the research topic developed from initial literature review that being done. After the initial study, the rough idea of the research topic is formed. The issue has been clarified; objective and scope of the research are fixed then. Later, a research outline will be prepared in order to identify what kind of data will be needed in this research. Also, data sources will be identified as well.

Stage 2: Collecting Data and Research Design

During this stage, collection all relevant data and information to be done. Data will be collected mainly through documentary analysis. All collected data and

information are stored and sorted systematically. Data collected are mainly from the Malayan Law Journal, Singapore Law Report, Building Law Report, Construction Law Report and other law journals through the Lexis-Nexis online database. Besides that, other sources such as books (i.e. Law and Practice of Construction Contracts) also play important role in sourcing information. All the cases relating to the research topic will be sorted out from the database. Important cases will be collected and used for the analysis at the later stage.

Stage 3: Analyzing and Interpreting Data

This stage of research involves data analysis, interpretation and data arrangement. This process is to convert the data collected to information that is useful for the research. Arrangement of data tends to streamline the process writing of the paper.

Stage 4: Writing-up

This stage is the final stage of the research process. It involves mainly the writing up and checking of the writing. Conclusion and recommendations will be made based on the findings during the stage of analysis.

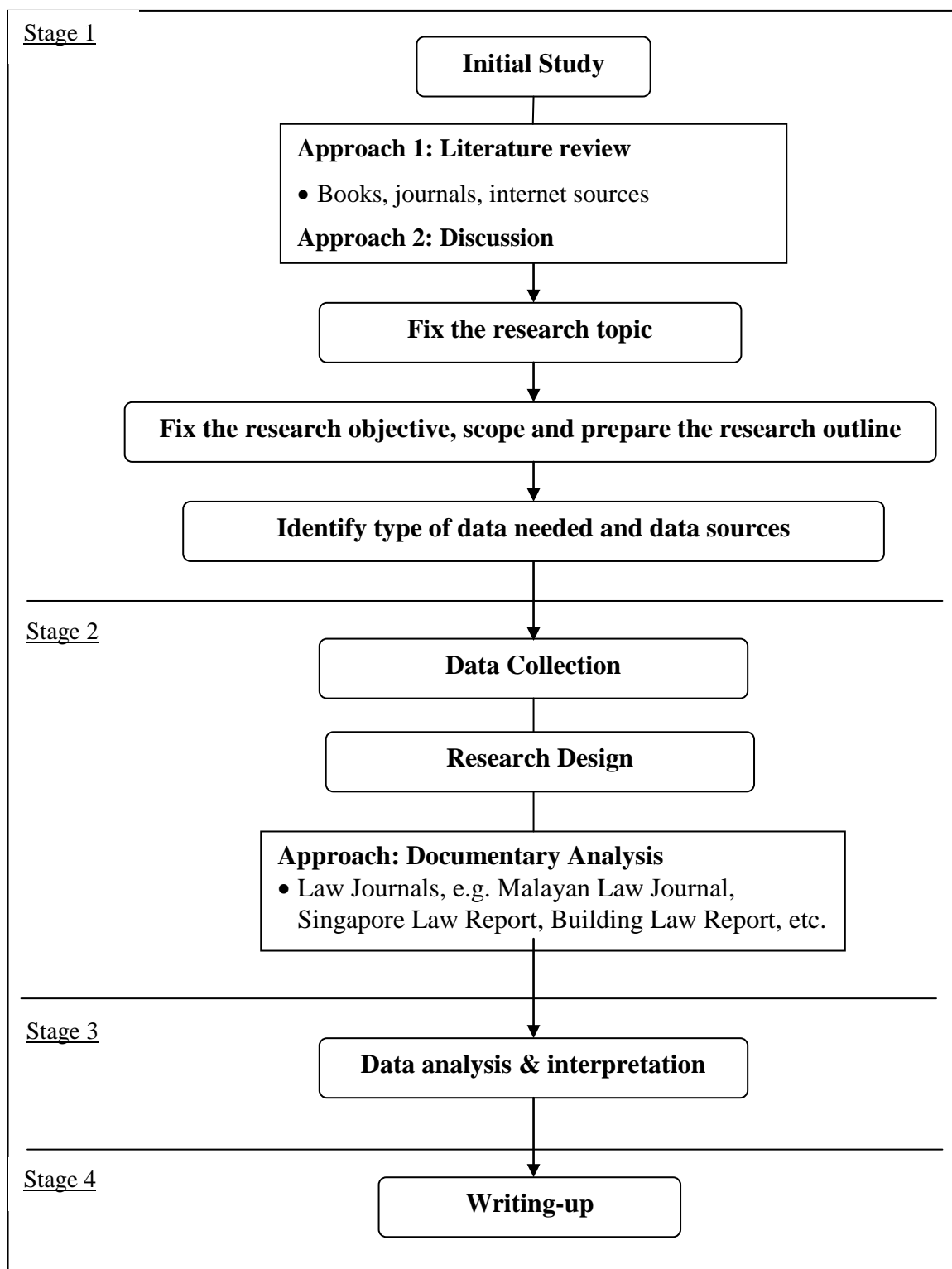


Figure 1.1: Flow Chart of Research Process and Method of Approach

1.7 Organisation of the Report

This thesis consists of five (5) chapters as below:-

Chapter 1: Introduction

Chapter 2: Interest/Finance Charges and Damages

Chapter 3: Provision of Definition of Interest/Finance Charges in Local
Forms of Construction Contract

Chapter 4: Recovery of Interest/Finance Charges in Construction Contract
From Legal Perspective

Chapter 5: Conclusion and Recommendations

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