

ISSUES RELATING TO CONTRACT ADMINISTRATOR'S INSTRUCTIONS

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ABSTRACT

Contract Administrator is an employer's agent who is engaged primarily to ensure that the works are executed effectively and economically but he is not a party to a construction contract and has no authority to instruct contractor. Thus, express provisions are included in the contract to give contract administrator power to issue instructions to contractor. Contract administrator's instruction is very important in a construction contract and due to its importance, any issues relating to the instructions may lead to many disputes in construction contract. Therefore, this research seeks to identify issues that commonly arise relating to contract administrator's instructions. An analysis of four selected legal cases is conducted to review the facts and the decision of the courts on the matters of contract administrator's instructions. From the analysis, it is found that the issues that commonly arise relating to contract administrator's instructions are non issuance of instructions, incomplete instructions, instructions are outside the scope provided by the contract and informal instructions. Therefore, parties in a construction contract must be aware of these issues in order to reduce or eliminate the effects that might occur due to it.

ABSTRAK

Pentadbir kontrak adalah agen kepada majikan yang mana tujuan utama perantikannya adalah untuk memastikan kerja dapat dijalankan dengan efektif dan ekonomik, namun pentadbir kontrak bukan pihak yang berkontrak dan tidak mempunyai kuasa untuk memberi arahan kepada kontraktor. Oleh itu, beberapa peruntukan telah dimuatkan di dalam kontrak untuk memberi kuasa kepada pentadbir kontrak untuk memberi arahan kepada kontraktor. Arahan pentadbir kontrak adalah sangat penting dalam kontrak binaan dan disebabkan oleh kepentingan ini, isu-isu yang berkaitan dengan arahan pentadbir kontrak akan menyebabkan berlakunya pelbagai masalah di dalam kontrak binaan. Oleh itu, kajian ini dijalankan dengan tujuan untuk mengenalpasti isu-isu lazim yang sering timbul berkaitan arahan pentadbir kontrak. Analisis terhadap empat kes undang-undang yang terpilih telah dijalankan untuk meninjau fakta-fakta dan keputusan hakim berkaitan arahan pentadbir kontrak. Berdasarkan analisis, isu-isu lazim yang sering timbul berkaitan dengan arahan pentadbir kontrak adalah arahan tidak dikeluarkan, arahan tidak lengkap, arahan diluar bidang kuasa yang diperuntukkan oleh kontrak dan arahan tidak formal. Kesimpulannya, pihak-pihak yang terlibat dalam kontrak binaan haruslah berwaspada terhadap isu-isu ini agar kesannya dapat dikurangkan atau dielakkan.

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London Borough of Hillingdon v Cutler [1967] 2 All ER 361

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LIST OF ABBREVIATIONS

All ER	All England Law Reports
BLR	Building Law Report
Ch	Cases in Chancery
CLR	Commonwealth Law Reports

CHAPTER 1

INTRODUCTION

1.1 Background of research

Contract Administrator is an employer's agent who is engaged primarily to ensure that the works are executed effectively and economically.¹ He owes a duty to discharge his responsibility fairly and professionally towards the contracting party. However, he is not a party to a construction contract and has no authority to instruct contractor. Thus, express provisions are included to give contract administrator power to issue instructions to contractor and contractor is required to comply with that instruction.

In *Merton LBC v Stanley Hugh Leach*² and *London Borough of Hillingdon v Cutler*³, it was held that once a contractor receives an instruction he is bound to comply forthwith as soon as he reasonably can. The extent of compliance depends on whether

¹ Chow Kok Fong (1980) *The Law Relating to Building Contracts: Cases & Materials*. Quins Pte. Ltd. Singapore

² (1985) 32 BLR 51

³ [1967] 2 All ER 361

the instruction is written or oral. PAM 2006 provides that if written instruction is given, contractor must comply with it within 7 days and PWD 203A provides that if an oral instruction is given, superintending officer must then issue a written instruction within 7 days from the date of such oral instruction is given. Subsequently, contractor must comply with the instruction within 7 days after receipt of the written notice.

Failure by the contractor to comply with the instruction will entitled contract administrator on behalf of the employer to take remedial actions. Firstly, it may be treat as fundamental breach and as a consequence, the contract will be terminated and damages will be claimed. Secondly, the contractor's employment will be determined under determination clause and finally, another contractor will be employed to complete the work.

However, the contractor's duty of compliance is subject to conditions and limitations whereby under certain circumstances, contractor may challenge contract administrator's instructions. Based on clause 2 of PAM 2006 and clause 5 of PWD 203A, the power of contract administrator to issue instructions is not absolute. His power is limited to those matters that are listed in the contract. If a contractor is suspicious of the contract administrator's power with respect to a particular instruction, he may notify in writing requiring him to specify the exact clause of the instruction under which the instruction is issued.

Under PWD 203A, contract administrator is known as superintending officer who is a government servant while under PAM 2006 he is known as an architect who is an employer's agent. Regardless the various terms to describe a contract administrator, his duty is still the same which is to carry out his work with 'reasonable care and skill'. In this case of his negligent in issuing valid, clear and precise instruction, it can cause employer to be liable to contractor.

PWD 203A and PAM 2006 provide provision empowering contract administrator's instructions. This provision sets out contract administrator's power to issue instructions and informs contractor on the particular clause an instruction is issued. It also specifies the modes instructions are to be issued and indicates the conditions for complying with the instructions. Accordingly, in the case of non-compliance with instructions, it stipulates the consequences.

In complying with instructions, it is important to know what counts as an instruction. Standard building contracts refer to instructions and whether they must be in writing or oral, how they may be confirmed and by whom, but contracts do not specify what constitutes an instruction. According to David Chappell (2006)⁴, usually, to qualify as a written instruction, there must be an unmistakable intention to order something and there must be written evidence to that effect. Not all written instructions are clear – some are decidedly vague.

Although an instruction may be implied from what is written down, it is safer from the contractor's point of view to ensure that the words clearly instruct. David Chappell (2007)⁵ emphasizes that contractors should not carry out instructions unless they are given by the contract administrator in writing or otherwise confirmed; empowered by the contract and identifiable as instructions.

⁴ Chappell, David (2006) *Construction contracts: questions and answers*. Taylor & Francis p 108

⁵ Chappell, David (2007) *Understanding JCT Standard Building Contracts*. Taylor & Francis p 63

1.2 Problem statement

Contract administrator owes a duty to discharge his responsibility fairly and professionally towards the contracting party. These features of contract administrator's position confer him a dual capacity which is as an agent to the employer and also a "quasi arbitrator". Thus, contract administrator needs to carry out his work with 'reasonable skill and care'⁶.

Accordingly, he is also expected to be an impartial interpreter of the contract documents and judge of project's participants' performance. It means that if disputes arise between the employer and the contractor, contract administrator cannot be a partisan. He is required to act impartially and in good faith. The fact that he is employed by one of the parties does not, in itself, disqualify him from undertaking this essential function⁷.

In order to fulfill his duties and responsibilities, a contract administrator needs to ensure the smooth progress of a contract work. This could be ensured by issuing required instructions which is empowered by the provisions in the contract. The instruction is issued by the contract administrator on behalf of the employer. It must be clear and precise to enable the contractor to act immediately towards it.

Contract administrator's power of instructions covers a wide, but not unlimited, range of situations.⁸ He is empowered to issue instructions which are necessary and supplementary to the carrying out and completion of the contract works. Accordingly, he

⁶ Ibid n 1

⁷ Walker, Nathan (1979) *Legal Pitfalls in Architecture, Engineering and Building Construction*. McGraw-Hill Book Company, United States

⁸ Robinson, M. Nigel (1996) *Construction Law in Singapore and Malaysia*. Butterworths Asia, Singapore

can only issue instructions where express power is given to him to do so. His instruction is very important in a construction contract. Issuance of the instruction aims to assist the contractor to complete the contract works.

To illustrate, in *Holland Hannen and Cubitts (Northern) Ltd v Welsh Health Technical Services Organisation*⁹, the plaintiffs were the main contractors for the erection of a hospital at Rhyl under JCT 63 (1969 revision). Crittalls, who were nominated subcontractors for the supply and installation of the window assemblies, began work in September 1973.

By January 1974 it was clear that the window assemblies were failing to keep rainwater out. In due course the judge held that the major reasons for the leaks were design defects although there were also defects in workmanship. Crittalls proposed remedial works which were discussed at site meetings. (Crittalls accepted that they would be liable either under the subcontract or under the direct warranty which they had given to the employer).

The architects took the position that the defects were due to bad workmanship and that Cubitts should put forward Crittalls' remedial proposals as their own. (Evidence at the trial showed that at another Welsh hospital being built at the same time with the same architect and same window subcontractor, a different main contractor had acceded to this course and a variation instruction had been issued). Cubitts took the position that the defects were due to faulty design and that it was impossible to complete the contract without a variation of design.

⁹ (1981) 18 BLR 80

It was held that by their failure to issue a variation order, the architects had made it impossible for Cubitts and Crittalls to complete the contract work. Therefore, it is obvious that issuance of instructions by the contract administrator is very important in a construction contract. As in this case, non issuance of instruction had made it impossible for the contractor and the subcontractor to complete the contract work.

Hence, it is believe that issues relating to contract administrator's instructions may lead to many disputes in construction contract. So, parties in a construction contract must be aware of the issues so as to reduce or eliminate the consequences that might occur due to it. In order for them to be aware of the issues relating to the contract administrator's instruction, this research seeks to identify the issues.

1.3 Objective of research

The objective of this research is to identify issues that arise relating to contract administrator's instructions.

1.4 Scope of research

This research aims to identify the issues that arise relating to contract administrator's instructions. Therefore, literature review and provisions relating to contract administrator's instructions based on the standard forms of contract in Malaysia

will be explained thoroughly in the next chapter. These standard forms of contract are PAM 2006, PWD 203A and CIDB 2000.

Accordingly, in achieving the objective of this research, four legal cases were analyzed and discussed. However, none of them were local legal cases but the provisions relating to the contract administrator's instructions empowered by the standard forms of contract of that particular countries are similar to those provided by the Malaysian standard forms of contract and therefore, can be applied to the Malaysian construction industry.

1.5 Significance of research

Although fully finalized information is available for incorporation into the contract documents, it will still be necessary, from time to time, for the contract administrator to issue further instructions, details and drawings. These are collectively known as contract administrator's instructions. Contractor must comply with all instructions issued to him by the contract administrator in regard to any matter in respect of which the contract administrator is expressly empowered by the provisions to issue instructions.

Therefore, it is essential for instructions to be clear and precise and, where revised drawings are issued, the date and reference of the particular revision should be specifically referred to. Instructions emanating from other members of the design team must not be given directly to the contractor but must be issued to him via the contract administrator as contract administrator's instructions.

Any issues arise relating to the instructions may lead to many disputes. So, awareness towards these issues is compulsory to the parties in a construction contract. By identifying the issues that commonly arise relating to contract administrator's instructions, this research is looking forward to reduce and eliminate disputes that might occur due to the issues.

1.6 Research methodology

Research process and method of approach is vital to exercise as guidelines in preparing the research so that the research could be done in an organized way to achieve the research objective. Figure 1.1 shows the flow chart of the research methodology used for this research. The research process generally consists of 4 stages as described below:

1.6.1 First Stage

Identify research issue is the initial step in this research methodology process. Subsequently, in order to get an overview towards the research issue, literature review and discussion were carried out. These two steps require lots of references which include journals, articles, seminar papers, legal cases, previous research papers as well as online e-databases from UTM library's website. Once a complete understanding towards research issue had been achieved, research objective and scope were identified. Accordingly, research outline were prepared.

1.6.2 Second stage

In this second stage of research methodology process, there are two steps that were carried out which are data collection and information recording. All collected data and information were systematically recorded. Basically, there are two types of data:

a) **Primary data**

Most of the primary data were collected from Lexis Nexis database. The primary data that were used in this research are legal cases.

b) **Secondary data**

Sources of secondary data were from books, articles and seminar papers.

1.6.3 Third stage

Here, all collected data, information, ideas, opinions and comments were arranged, analyzed and interpreted systematically. The method of data analysis used in this research is documentary analysis. This stage is also known as the heart of the research as the purpose of this stage is to achieve the objective of the research.

1.6.4 Fourth stage

This is the final stage in the research methodology process. Here, conclusion was prepared and recommendations were suggested. The conclusion determines the achievement of the research objective. The recommendations that were suggested aim to provide a better solution towards the issues arise in the research topic. Finally, checking process was carried out throughout the whole research.

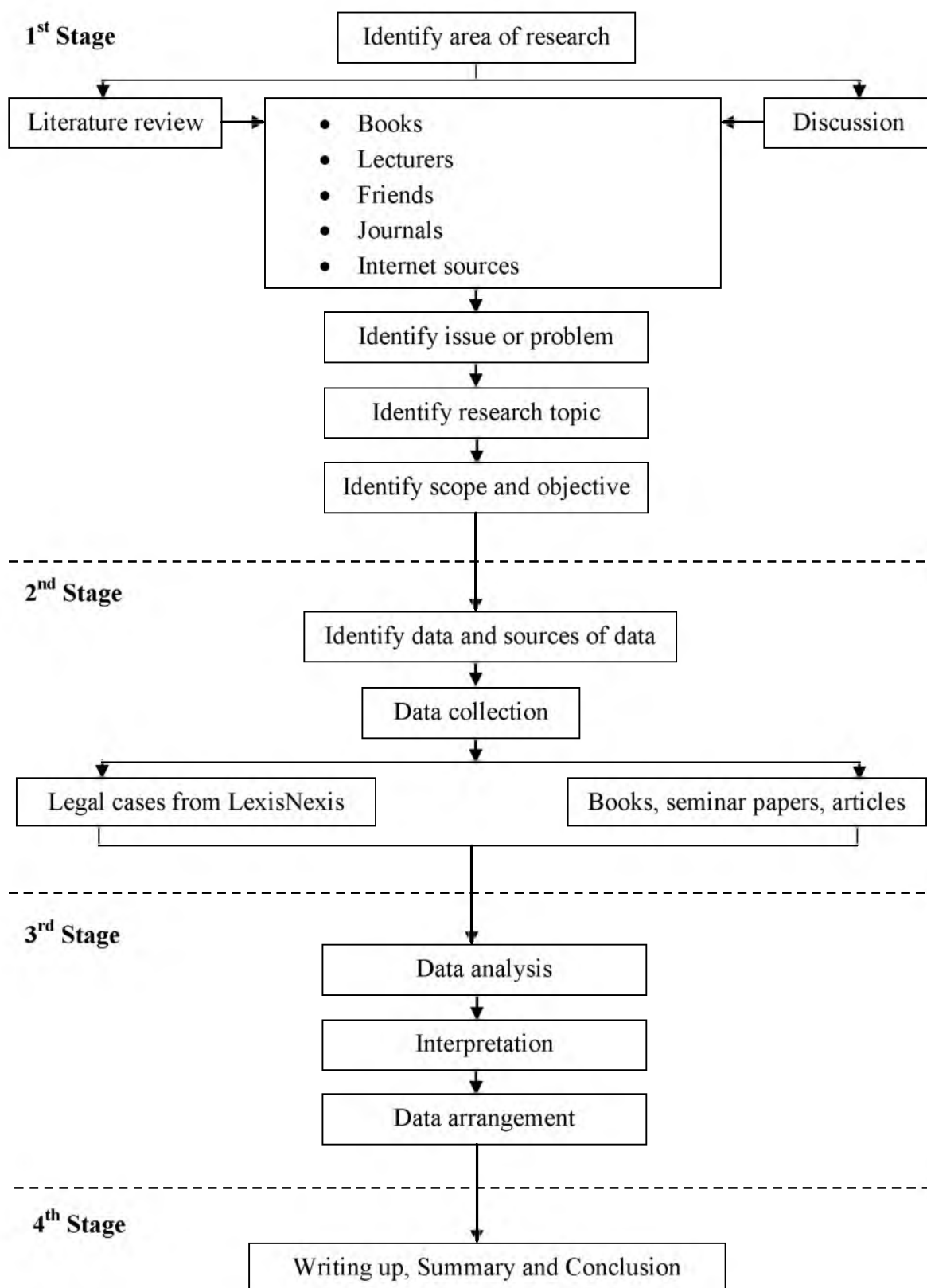


Figure 1.1: Research methodology

1.7 Chapter organization

There are four chapters in this research and the brief descriptions on each chapter are as follows:

1.7.1 Chapter 1: Introduction

This chapter presents the overall content of the whole research writing. It introduces the subject matter, problems that are purported to solve, objective of the research, limitation of research, significance of research, research methodology and also tentative chapter headings.

1.7.2 Chapter 2: Contract administrator's instructions

This chapter defines the contract administrator, his instructions, provisions empowering his instructions, forms of the instructions and other related matters. Reference to various standard forms such as PWD203A and PAM 2006 were referred to support the literature review.

1.7.3 Chapter 3: Issues that arise relating to contract administrator's instructions

This chapter analyzes selected legal cases which are related to contract administrator's instructions. The analysis focused on the issues that arise relating to contract administrator's instructions.

1.7.4 Chapter 4: Conclusion and recommendations

This final chapter concludes the whole research and some suggestions were suggested based on the research.

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