

**TERMINATION OF CONTRACTOR WHEN TIME IS OF THE  
ESSENCE IN CONSTRUCTION**

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**TERMINATION WHEN TIME OF THE ESSENCE IN  
CONSTRUCTION**

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requirements for the award of the degree of  
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*To my beloved parent, wife and my family members  
for their endless love, care and support.....*

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## **ABSTRACT**

The phrase 'Time is of the essence' in a contract shows that time for performance is an essential condition of the contract. If a party fails to perform his obligation timely as stipulated the other party may either treat the contract as repudiated or terminate the contract. Construction contracts normally contain dates for commencement and completion that make time is of the essence of the contracts. In addition they also contain extension of time and liquidated damages clauses. The issue is then whether or not the employers may terminate the contracts in the event that the contractors fail to complete their works within the time stipulated. The methodology adopted in this research is case law based. There is no limitation as for the court cases referred to in terms of type of projects as long as they relate to contractor's breach of time for performance and the employer's right to terminate the contract. The cases were extracted from the Malayan Law Journal using the Lexi-Nexis database. Six related cases were shortlisted and analysed. The findings show that an employer may validly terminate the contract if he can show that time remains the essence of the contract at the time the termination is exercised and he complies with the conditions and procedures as stipulated in the contract.

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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
Const LR	Construction Law Reports
FMSLR	Federated Malay States Law Reports
HL	House of Lords
PWD	Public Works Department
KB	King Bench
Lloyd's Rep	Lloyd's List Reports
LR	Law Reports
MLJ	Malayan Law Journal
PAM	Pertubuhan Arkitek Malaysia
PC	Privy Council
PWD	Public Work Department (Malaysia)
QB	Queen Bench
SCR	Session Cases Report
SLR	Singapore Law Report
WLR	Weekly Law Report

## **TIME OF ESSENCE IN CONSTRUCTION.**

### **CHAPTER ONE**

#### **1.1 Background study.**

It is often said that for a building or construction project, there are three objectives which the owner of the project is aiming<sup>1</sup>. These are, in no order of priority or importance, cost, quality and time<sup>2</sup>.

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<sup>1</sup> Eggleston B. (1997), *Liquidated Damages And Extensions Of Time In Construction Contracts*, 2nd edition. London: Wiley-Blackwell.

<sup>2</sup> *Ibid* n.1

Time is an important part in construction contract. There are provisions in construction contracts, for example, that the contractor must complete the project<sup>3</sup>, that the engineer or the architect or the s.o. must furnish the necessary drawings and information to the contractor, and that the employer must pay the Contractor, all before a certain date. All these provisions carry with them their respective legal implications and consequences. The main obligation of the contractor is to complete the project within certain time or date and the contractual consequences which may follow if he does not.

Clause 21.1 of PAM stipulated that the contractor must complete the work.

*... complete the same on or before the Date for Completion stated in the Appendix...*

clause 38(b) of PWD 203A which states:

*... complete the Works on or before the Date of Completion as stated in the Appendix...*

and clause 23.1 of JCT 98, which states:

*... regularly and diligently proceed with the same and shall complete the same on or before the Completion Date...*

Contracts of all kinds commonly specify dates for the performances of some obligations (Wallace, 1995). In building contracts, stipulations as to the time to delivery of the completed building become an essential condition of the agreement (Guest, 1975). It is usual to state the date by which completion is required, as can be seen in Clause 39 of PWD 203A. Even where no precise date has been included in the contract itself, a court may be persuaded to imply a term for completion by a certain date, on the ground that the parties must have intended this, as seen in *Bruno Zornow (Builders) Ltd v Beechcroft Developments Ltd*. The contractor's obligation

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<sup>3</sup> Oon Chee Khen (2003), Extension Of Time And Liquidated Damages In Construction Contracts.

to complete the works by the completion date is, like all such obligations, backed up by legal sanctions. Under certain types of contract (for example contracts for the sale of perishable goods), time is expressly or impliedly “of the essence”. Consequently, the employer’s remedy for any lateness in performance or completion will be an award for damages for breach of contract (Murdoch and Hughes, 2000).

Failure to meet time for performance may attract sanctions ranging from repudiation to damages, liquidated or unliquidated: failure to meet times for payment may result in determination or payment of interest; failure to give notices on time most commonly leads to a loss of entitlements; and failure to undertake administrative duties frequently attracts no sanction at all. Much depends upon the intentions of the parties, their conduct in connection with the contract and the particular terms and conditions of the contracts<sup>4</sup>.

A problem for the non-lawyer is that legal terminology provides little assistance in pointing to the consequences of breach<sup>5</sup>. Thus in *Wickman Machine Tools v. Schuler* (1972) it was said:

*‘If a term is described as a “condition” there is a strong indication that the parties intended any breach, however small, to be repudiatory, but the description is not conclusive and yields to the discovery of the parties’ intentions as disclosed by the contract read as a whole. Conversely the use of the word “warranty” to describe a term is not conclusive that that term is not a condition.’*

In *Anson’s Law of Contract*, in considering the traditional approach of the courts to the terms of a contract, describes conditions and warranties in this way:

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<sup>4</sup> Eggleston B. (1997), *Liquidated damages and extensions of time in construction contracts*, 2nd edition. London: Wiley-Blackwell.

<sup>5</sup> *Ibid* p.1,n.1

*'If the parties regarded the term as essential, it is a condition: any breach of a condition entitles the innocent party, if he so chooses, to treat himself as discharged from further performance of the contract. He can also claim damages for any loss sustained by the fact that the contract has not been performed. If the parties did not regard the term as essential, but as subsidiary or collateral, it is a warranty; its failure gives rise to a claim for such damages as have been sustained by the breach of that particular term, but the innocent party is not entitled to treat himself as discharged. The classification of a term as being either a "condition" or "warranty" will therefore determine the legal remedies available to the innocent party in the event of its breach.'*

Keating, Furst & Ramsey (2000),<sup>6</sup> has provided that if a term is described as a "condition" there is a strong indication that the parties intended that any breach, however small it is to be repudiatory, but the description is not conclusive and yields to the discovery of the parties' intentions as disclosed by the contract read as a whole. Conversely the use of the word "warranty" to describe a term is not conclusive that term is not a condition.<sup>7</sup> Further explained by Lord Denning further explain that in the case of *Wickman Machine Tools v. Schuler*<sup>8</sup>,

*"the word "condition of this agreement," used in connection with the number of visits to be made by a sales representative, had an ordinary meaning as a term of the contract and breach did not free the other party from its obligations."*

As describe by *Eggleston B. (1997)*, When used in a contractual context the phrase takes on a more precise meaning. It is not then a matter of completing as

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<sup>6</sup> Keating D., Furst S. & Ramsey V. (2000). *Keating on Building Contract* (7 edition). Sweet & Maxwell.

<sup>7</sup> *Ibid*, n.2

<sup>8</sup> [1972] 2 All ER 1173, [1972] 1 WLR 840, CA.

soon as possible; it is a matter of completing by a specified date<sup>9</sup>. In short when time is of the essence in a contract failure to complete by the specified date is a breach of a condition entitling the innocent party to treat the contract as repudiated<sup>10</sup>.

Under what circumstances can time be held to be of the essence of a contract? According to Chow (2004), in *United Scientific Holdings Ltd v Burnley Borough Council*<sup>11</sup>, the House of Lords, citing with approval a statement on the position in *Halsbury's Laws of England* (4th Ed), ruled that time should not be held to be of the essence unless the following conditions are present:

1. The parties must have expressly stipulated in the contract that conditions as to time should be strictly complied with

2. The nature of the subject-matter of the contract and the surrounding circumstances demonstrate that time should be considered to be of the essence.

3. The party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence

Section 56 (3) of Contract Act 1950 states the effect of acceptance of performance at time other than agreed (the completion date which is also the essence of the contract) upon, which reads:

*If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed,*

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<sup>9</sup> Ibid p1.n.1

<sup>10</sup> Ibid p1.n.1

<sup>11</sup> [1977] 2 All ER 62, HL, [1978] AC 1050 (HL),

*the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so.*

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so. Continuing, the contract exists but time ceases to be of the essence and become at large. Consequently he cannot claim liquidated damages under the contract unless there is a provision as to the extension of time. However, this cessation can be revived and so time can be restored to be the essence by the innocent party serving a notice to the party in default giving a new date of completion. If this is done, there would be a date from which liquidated damages could be calculated (Sinnadurai, 1987).

At common law, the contractor's obligation to complete the works by the specified date is removed if the employer delays the contractor in the execution of the works. When the specified completion date no longer applies, time is said to be "at large", and the contractor's obligation is merely to complete the works within a reasonable time. A fundamental point is that the time for completion can only be extended where the contract permits, and strictly in accordance with the contract provisions (Murdoch and Hughes, 2000). It is a common belief in the construction industry that extensions of time are solely for the benefit of the contractor. At face value by giving the contractor more time to complete the works and by reducing his liability for liquidated damages they do appear to be one-sided. It is not the contractor who has most need of extension of time provisions, it is the

employer. A string of well documented cases from *Holme v Guppy*<sup>12</sup> to *Rapid Building v Ealing*<sup>13</sup> confirm that the courts will not uphold liquidated damages where the employer has prevented completion on time unless there is express provision in the contract to extend time for the employer's default (Eggleston, 1992).

*"Time is of the essence"* generally carry far less weight in construction contracts. The reasons include the distinctive nature of construction contracts, the fact construction contracts typically contain internal remedies addressing delay and because of the disproportionate effect of the remedy as compared to the breach, particularly when a building contract is partially preformed. As further described by Eggleston B<sup>14</sup>:

*"where perhaps all that can be said is that time will not normally be of the essence in a construction contract which contains extension of time and liquidated damages provisions, but if the contract additionally contains an express statement that time is of the essence, the employer may have a stronger defence to any legal challenge on action taken arising from determination of the contract."*

In any event, there are practical problems for the employer in treating time to be of the essence in a construction contract, since the right to terminate does not arise until the completion date, whilst the obligation to make interim payments continues up to that date notwithstanding the employer's eventual likely loss.

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<sup>12</sup> (1838) 3 M&W 387.

<sup>13</sup> (1984) 29 BLR 5.

<sup>14</sup> Eggleston B. (1997), *Liquidated damages and extensions of time in construction contracts*, 2nd edition. London: Wiley-Blackwell.

## 1.2 Problem Statement

Discharge by performance is the usual method for the discharge of a contract. Parties to a contract are bound by an obligation and they must 'either perform, or offer to perform, their respective promises, unless the performance is dispensed with or excused' under the law<sup>15</sup>. When the parties have carried out exactly what they have undertaken to do, there is a complete discharge but if only one party performs his part of the bargain, he alone will be discharged. As a general rule, performance must be strictly in accordance with the terms of the contract unless the parties have agreed otherwise<sup>16</sup>.

Section 40 of the Contract Act 1950 further provides:

*When a party to a contract refused to perform, or disabled himself from performing, his promise in its entirety, the promise may put an end to the contract, unless he has signified, by word or conduct, his acquiescence in its continuance.*

As a general rule, a promisor must be prepared to perform his obligations at the time and place at which he has undertaken to do. If a promise is to be performed on a certain day and the promisor has not undertaken to perform it without application by the promisee, 'it is the duty of the promisee to apply for performance at a proper place and within the hours of business'<sup>17</sup>. The question of what is a proper time and place are, in each particular case, a question of fact. On the other hand, when a promise is to be performed on a certain day, and the promisor has undertaken to perform it without any application by the promisee, 'the promisor may perform it at any time during the usual hours of business on the day and at the

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<sup>15</sup> Contract Act 1950 S.38 (1)

<sup>16</sup> Beatrix Vohrah & Wu Min Aun. [2004]. "*The Commercial Law Of Malaysia*". Malaysia: Pearson Malaysia Sdn Bhd.

<sup>17</sup> Contract Act 1950 S.49

place at which the promise ought to be performed'<sup>18</sup>. Where no time is fixed for performance and an application by the promisee is not required, the promise 'must be performed within a reasonable time'<sup>19</sup>. The question of 'what is a reasonable time' is, in each particular case, a question of fact<sup>20</sup>.

Is time for performance a condition of the contract? It depends on the express implied term of the contract. Section 56 (1) of the Contract Act is the most often invoked provision of the Contract Act dealing with time. Section 56 of the Contract Act is provided as follows:

***Section 56 (1):***

*When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.*

Contrarily, the contract does not become voidable but entitle compensation in Section 56(2) contract act

***Section 56 (2):***

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<sup>18</sup> Ibid S. 48

<sup>19</sup> Ibid S. 47

<sup>20</sup> Beatrix Vohrah & Wu Min Aun. [2004]. Ibid.

*If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure.*

A missed time deadline in a construction contract may well arise after substantial performance, leading to concerns of unjust enrichment. Accordingly, there may be reluctance in arriving at an interpretation that permits termination. This general approach in construction contracts and the reasoning behind that approach is reflected in the comments of I.N. Duncan Wallace<sup>21</sup>:

*However, in examining a contractor's obligation to complete his work to time, construction contracts differ very markedly from nearly all others in that the contractor can be expected to have expended very heavily in performing the contract prior, for example, to a relatively trivial delay after completion, and also that upon fixing of the work to the soil the property in it will have passed to the owner irrespective of the degree of payment, thus conferring a major and irretrievable benefit on the owner as against a possibly only minor or nominal loss suffered by him. No doubt for these reasons the courts have shown an exceptional assiduity in avoiding a time of the essence interpretation of the contractor's completion obligation in construction contracts, it would seem even in cases where express language has been used in the contract.*

The above comments appear consistent with the intention of the parties. For example, on the one hand, the parties would probably not expect the contract to be terminated where a contractor is a day late for some matter or the other on a contract of long duration, and, equally, on the other hand, probably not expect the contract to be terminated where the owner is a

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<sup>21</sup> Hudson's Building and Engineering Contracts, 11th ed. (London: Sweet & Maxwell, 1995) vol. II at p.1107

day late with a progress payment. More difficult are the cases of significant delay on a significant matter. Even then, however, it is suggested that the use of a general "time is of the essence" clause is ambiguous and therefore suspect.

In conclusion, the insertion of a clause declaring time to be of the essence in a construction contract, unlike its insertion in other contract forms, will not normally, in and of itself, allow the innocent party to rescind or terminate the contract for any breach of a time condition. In determining the party's intentions, the court will look to all the particular terms and circumstances and may well import little meaning to the "time is of the essence" clause.

### **1.3 Objective of study**

The objective of this study:

1. To identify the employer's right to terminate the construction contract in the event of breach relating to time.

### **1.4 Scope of study**

The approach adopted in this research is case law based. There are no limitations as for the court cases referred to in this study in terms of type of projects as long as the case is related to "employer's right to terminate a construction contract" and "breach relating to time". Types of contract involved include construction contracts (between employer and main contractor, and between main

contractor and subcontractor) and contracts of sales of goods and land. The standard forms of contract that will be referred to are:

1. Pertubuhan Arkitek Malaysia (PAM) (2nd Edition, 2006)
2. Public Works Department (P.W.D) Form 203A (Rev. 2007)
3. Construction Industry Development Board (CIDB) Standard Form of Contract for Building Works (2000 Edition)

## **1.5 Research Methodology**

In order to achieve the research objectives, a systematic process of conducting this study had been organised. Basically, this research process consists of five major stages, which involve identifying the research issue, literature review, data collection, data analysis, conclusion and suggestions.

### **1.5.1 Stage 1 : Identifying The Research Issue**

The research issue arises from the intensive reading of books, journals, articles and newspaper cutting which can easily be attained from the UTM library. From the research issue, the objectives of the study have been identified. This research is carried out to review the most frequent disputes associated with the determination of contract by employer in construction which are referred to the

court and the consequences of determination of contract by employer towards the parties involved in the contract.

The research issue arises from the intensive reading of books, journals, articles and newspaper cutting as well as discussion with the supervisors and lecturer to gather more knowledge and information in identifying the topic and the objective of the research. This research is carried out to review the most frequent disputes associated with the determination of contract by employer in construction which are referred to the court and the consequences of determination of contract by employer towards the parties involved in the contract.

### **1.5.2 Stage 2 : Literature Riview**

During this stage, various data, documentation and literature regarding the study field were collected in achieving the research objective. Data can be collected from primary data and secondary data. Generally, secondary data is collected from reading materials in printing form like references books, journals, newspaper, articles, research paper done by third parties as well as related websites. These sources are important to identify trends and developments over time in construction industry, as well as the general state of knowledge regarding the subject study in completing this literature review chapter.

### **1.5.3 Stage 3 : Data Collection**

After all the background and relevant issues in literature review were identified, legal cases based on previous legal cases which are related to the research issue will be collected from Malayan Law Journals via UTM library electronic database, namely Lexis-Nexis Legal Database.

#### **1.5.4 Stage 4: Research Analysis**

Once the previous related court cases under Malayan Law Journal are collected, the author will conduct case study on the related legal cases. The case study is started by carefully reviewing and clarifying all the facts of the cases. All of the cases will focus on two parts, disputes associated with the determination of contract by employer in construction which are referred to the court and the other is the consequences of determination of contract by employer towards the parties involved in the contract. After the author has focused on the issues presented by each case, discussion and comparison would be done. The author will compare and identify the most frequent disputes associated with the determination of contract by employer in construction which are referred to the court and also the consequences of the determination of contract towards the parties involved.

#### **1.5.5 Stage 5: Conclusion and Recommendations**

In the final stage, the whole process of the study will be reviewed to identify whether the objectives of the research has been achieved. The research findings then will be presented and further research will be recommended.

## **TIME OF ESSENCE IN CONSTRUCTION.**

### **CHAPTER ONE**

#### **1.1 Background study.**

It is often said that for a building or construction project, there are three objectives which the owner of the project is aiming<sup>1</sup>. These are, in no order of priority or importance, cost, quality and time<sup>2</sup>.

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<sup>1</sup> Eggleston B. (1997), *Liquidated Damages And Extensions Of Time In Construction Contracts*, 2nd edition. London: Wiley-Blackwell.

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Time is an important part in construction contract. There are provisions in construction contracts, for example, that the contractor must complete the project<sup>3</sup>, that the engineer or the architect or the s.o. must furnish the necessary drawings and information to the contractor, and that the employer must pay the Contractor, all before a certain date. All these provisions carry with them their respective legal implications and consequences. The main obligation of the contractor is to complete the project within certain time or date and the contractual consequences which may follow if he does not.

Clause 21.1 of PAM stipulated that the contractor must complete the work.

*... complete the same on or before the Date for Completion stated in the Appendix...*

clause 38(b) of PWD 203A which states:

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and clause 23.1 of JCT 98, which states:

*... regularly and diligently proceed with the same and shall complete the same on or before the Completion Date...*

Contracts of all kinds commonly specify dates for the performances of some obligations (Wallace, 1995). In building contracts, stipulations as to the time to delivery of the completed building become an essential condition of the agreement (Guest, 1975). It is usual to state the date by which completion is required, as can be seen in Clause 39 of PWD 203A. Even where no precise date has been included in the contract itself, a court may be persuaded to imply a term for completion by a certain date, on the ground that the parties must have intended this, as seen in *Bruno Zornow (Builders) Ltd v Beechcroft Developments Ltd*. The contractor's obligation

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<sup>3</sup> Oon Chee Khen (2003), Extension Of Time And Liquidated Damages In Construction Contracts.

to complete the works by the completion date is, like all such obligations, backed up by legal sanctions. Under certain types of contract (for example contracts for the sale of perishable goods), time is expressly or impliedly “of the essence”. Consequently, the employer’s remedy for any lateness in performance or completion will be an award for damages for breach of contract (Murdoch and Hughes, 2000).

Failure to meet time for performance may attract sanctions ranging from repudiation to damages, liquidated or unliquidated: failure to meet times for payment may result in determination or payment of interest; failure to give notices on time most commonly leads to a loss of entitlements; and failure to undertake administrative duties frequently attracts no sanction at all. Much depends upon the intentions of the parties, their conduct in connection with the contract and the particular terms and conditions of the contracts<sup>4</sup>.

A problem for the non-lawyer is that legal terminology provides little assistance in pointing to the consequences of breach<sup>5</sup>. Thus in *Wickman Machine Tools v. Schuler* (1972) it was said:

*‘If a term is described as a “condition” there is a strong indication that the parties intended any breach, however small, to be repudiatory, but the description is not conclusive and yields to the discovery of the parties’ intentions as disclosed by the contract read as a whole. Conversely the use of the word “warranty” to describe a term is not conclusive that that term is not a condition.’*

In *Anson’s Law of Contract*, in considering the traditional approach of the courts to the terms of a contract, describes conditions and warranties in this way:

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<sup>5</sup> *Ibid* p.1,n.1

*'If the parties regarded the term as essential, it is a condition: any breach of a condition entitles the innocent party, if he so chooses, to treat himself as discharged from further performance of the contract. He can also claim damages for any loss sustained by the fact that the contract has not been performed. If the parties did not regard the term as essential, but as subsidiary or collateral, it is a warranty; its failure gives rise to a claim for such damages as have been sustained by the breach of that particular term, but the innocent party is not entitled to treat himself as discharged. The classification of a term as being either a "condition" or "warranty" will therefore determine the legal remedies available to the innocent party in the event of its breach.'*

Keating, Furst & Ramsey (2000),<sup>6</sup> has provided that if a term is described as a "condition" there is a strong indication that the parties intended that any breach, however small it is to be repudiatory, but the description is not conclusive and yields to the discovery of the parties' intentions as disclosed by the contract read as a whole. Conversely the use of the word "warranty" to describe a term is not conclusive that term is not a condition.<sup>7</sup> Further explained by Lord Denning further explain that in the case of *Wickman Machine Tools v. Schuler*<sup>8</sup>,

*"the word "condition of this agreement," used in connection with the number of visits to be made by a sales representative, had an ordinary meaning as a term of the contract and breach did not free the other party from its obligations."*

As describe by *Eggleston B. (1997)*, When used in a contractual context the phrase takes on a more precise meaning. It is not then a matter of completing as

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<sup>6</sup> Keating D., Furst S. & Ramsey V. (2000). *Keating on Building Contract* (7 edition). Sweet & Maxwell.

<sup>7</sup> *Ibid*, n.2

<sup>8</sup> [1972] 2 All ER 1173, [1972] 1 WLR 840, CA.

soon as possible; it is a matter of completing by a specified date<sup>9</sup>. In short when time is of the essence in a contract failure to complete by the specified date is a breach of a condition entitling the innocent party to treat the contract as repudiated<sup>10</sup>.

Under what circumstances can time be held to be of the essence of a contract? According to Chow (2004), in *United Scientific Holdings Ltd v Burnley Borough Council*<sup>11</sup>, the House of Lords, citing with approval a statement on the position in *Halsbury's Laws of England* (4th Ed), ruled that time should not be held to be of the essence unless the following conditions are present:

1. The parties must have expressly stipulated in the contract that conditions as to time should be strictly complied with

2. The nature of the subject-matter of the contract and the surrounding circumstances demonstrate that time should be considered to be of the essence.

3. The party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence

Section 56 (3) of Contract Act 1950 states the effect of acceptance of performance at time other than agreed (the completion date which is also the essence of the contract) upon, which reads:

*If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed,*

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<sup>9</sup> Ibid p1.n.1

<sup>10</sup> Ibid p1.n.1

<sup>11</sup> [1977] 2 All ER 62, HL, [1978] AC 1050 (HL),

*the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so.*

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so. Continuing, the contract exists but time ceases to be of the essence and become at large. Consequently he cannot claim liquidated damages under the contract unless there is a provision as to the extension of time. However, this cessation can be revived and so time can be restored to be the essence by the innocent party serving a notice to the party in default giving a new date of completion. If this is done, there would be a date from which liquidated damages could be calculated (Sinnadurai, 1987).

At common law, the contractor's obligation to complete the works by the specified date is removed if the employer delays the contractor in the execution of the works. When the specified completion date no longer applies, time is said to be "at large", and the contractor's obligation is merely to complete the works within a reasonable time. A fundamental point is that the time for completion can only be extended where the contract permits, and strictly in accordance with the contract provisions (Murdoch and Hughes, 2000). It is a common belief in the construction industry that extensions of time are solely for the benefit of the contractor. At face value by giving the contractor more time to complete the works and by reducing his liability for liquidated damages they do appear to be one-sided. It is not the contractor who has most need of extension of time provisions, it is the

employer. A string of well documented cases from *Holme v Guppy*<sup>12</sup> to *Rapid Building v Ealing*<sup>13</sup> confirm that the courts will not uphold liquidated damages where the employer has prevented completion on time unless there is express provision in the contract to extend time for the employer's default (Eggleston, 1992).

*"Time is of the essence"* generally carry far less weight in construction contracts. The reasons include the distinctive nature of construction contracts, the fact construction contracts typically contain internal remedies addressing delay and because of the disproportionate effect of the remedy as compared to the breach, particularly when a building contract is partially preformed. As further described by Eggleston B<sup>14</sup>:

*"where perhaps all that can be said is that time will not normally be of the essence in a construction contract which contains extension of time and liquidated damages provisions, but if the contract additionally contains an express statement that time is of the essence, the employer may have a stronger defence to any legal challenge on action taken arising from determination of the contract."*

In any event, there are practical problems for the employer in treating time to be of the essence in a construction contract, since the right to terminate does not arise until the completion date, whilst the obligation to make interim payments continues up to that date notwithstanding the employer's eventual likely loss.

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<sup>12</sup> (1838) 3 M&W 387.

<sup>13</sup> (1984) 29 BLR 5.

<sup>14</sup> Eggleston B. (1997), *Liquidated damages and extensions of time in construction contracts*, 2nd edition. London: Wiley-Blackwell.

## 1.2 Problem Statement

Discharge by performance is the usual method for the discharge of a contract. Parties to a contract are bound by an obligation and they must 'either perform, or offer to perform, their respective promises, unless the performance is dispensed with or excused' under the law<sup>15</sup>. When the parties have carried out exactly what they have undertaken to do, there is a complete discharge but if only one party performs his part of the bargain, he alone will be discharged. As a general rule, performance must be strictly in accordance with the terms of the contract unless the parties have agreed otherwise<sup>16</sup>.

Section 40 of the Contract Act 1950 further provides:

*When a party to a contract refused to perform, or disabled himself from performing, his promise in its entirety, the promise may put an end to the contract, unless he has signified, by word or conduct, his acquiescence in its continuance.*

As a general rule, a promisor must be prepared to perform his obligations at the time and place at which he has undertaken to do. If a promise is to be performed on a certain day and the promisor has not undertaken to perform it without application by the promisee, 'it is the duty of the promisee to apply for performance at a proper place and within the hours of business'<sup>17</sup>. The question of what is a proper time and place are, in each particular case, a question of fact. On the other hand, when a promise is to be performed on a certain day, and the promisor has undertaken to perform it without any application by the promisee, 'the promisor may perform it at any time during the usual hours of business on the day and at the

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<sup>15</sup> Contract Act 1950 S.38 (1)

<sup>16</sup> Beatrix Vohrah & Wu Min Aun. [2004]. "*The Commercial Law Of Malaysia*". Malaysia: Pearson Malaysia Sdn Bhd.

<sup>17</sup> Contract Act 1950 S.49

place at which the promise ought to be performed'<sup>18</sup>. Where no time is fixed for performance and an application by the promisee is not required, the promise 'must be performed within a reasonable time'<sup>19</sup>. The question of 'what is a reasonable time' is, in each particular case, a question of fact<sup>20</sup>.

Is time for performance a condition of the contract? It depends on the express implied term of the contract. Section 56 (1) of the Contract Act is the most often invoked provision of the Contract Act dealing with time. Section 56 of the Contract Act is provided as follows:

***Section 56 (1):***

*When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.*

Contrarily, the contract does not become voidable but entitle compensation in Section 56(2) contract act

***Section 56 (2):***

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<sup>18</sup> Ibid S. 48

<sup>19</sup> Ibid S. 47

<sup>20</sup> Beatrix Vohrah & Wu Min Aun. [2004]. Ibid.

*If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure.*

A missed time deadline in a construction contract may well arise after substantial performance, leading to concerns of unjust enrichment. Accordingly, there may be reluctance in arriving at an interpretation that permits termination. This general approach in construction contracts and the reasoning behind that approach is reflected in the comments of I.N. Duncan Wallace<sup>21</sup>:

*However, in examining a contractor's obligation to complete his work to time, construction contracts differ very markedly from nearly all others in that the contractor can be expected to have expended very heavily in performing the contract prior, for example, to a relatively trivial delay after completion, and also that upon fixing of the work to the soil the property in it will have passed to the owner irrespective of the degree of payment, thus conferring a major and irretrievable benefit on the owner as against a possibly only minor or nominal loss suffered by him. No doubt for these reasons the courts have shown an exceptional assiduity in avoiding a time of the essence interpretation of the contractor's completion obligation in construction contracts, it would seem even in cases where express language has been used in the contract.*

The above comments appear consistent with the intention of the parties. For example, on the one hand, the parties would probably not expect the contract to be terminated where a contractor is a day late for some matter or the other on a contract of long duration, and, equally, on the other hand, probably not expect the contract to be terminated where the owner is a

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<sup>21</sup> Hudson's Building and Engineering Contracts, 11th ed. (London: Sweet & Maxwell, 1995) vol. II at p.1107

day late with a progress payment. More difficult are the cases of significant delay on a significant matter. Even then, however, it is suggested that the use of a general "time is of the essence" clause is ambiguous and therefore suspect.

In conclusion, the insertion of a clause declaring time to be of the essence in a construction contract, unlike its insertion in other contract forms, will not normally, in and of itself, allow the innocent party to rescind or terminate the contract for any breach of a time condition. In determining the party's intentions, the court will look to all the particular terms and circumstances and may well import little meaning to the "time is of the essence" clause.

### **1.3 Objective of study**

The objective of this study:

1. To identify the employer's right to terminate the construction contract in the event of breach relating to time.

### **1.4 Scope of study**

The approach adopted in this research is case law based. There are no limitations as for the court cases referred to in this study in terms of type of projects as long as the case is related to "employer's right to terminate a construction contract" and "breach relating to time". Types of contract involved include construction contracts (between employer and main contractor, and between main

contractor and subcontractor) and contracts of sales of goods and land. The standard forms of contract that will be referred to are:

1. Pertubuhan Arkitek Malaysia (PAM) (2nd Edition, 2006)
2. Public Works Department (P.W.D) Form 203A (Rev. 2007)
3. Construction Industry Development Board (CIDB) Standard Form of Contract for Building Works (2000 Edition)

## **1.5 Research Methodology**

In order to achieve the research objectives, a systematic process of conducting this study had been organised. Basically, this research process consists of five major stages, which involve identifying the research issue, literature review, data collection, data analysis, conclusion and suggestions.

### **1.5.1 Stage 1 : Identifying The Research Issue**

The research issue arises from the intensive reading of books, journals, articles and newspaper cutting which can easily be attained from the UTM library. From the research issue, the objectives of the study have been identified. This research is carried out to review the most frequent disputes associated with the determination of contract by employer in construction which are referred to the

court and the consequences of determination of contract by employer towards the parties involved in the contract.

The research issue arises from the intensive reading of books, journals, articles and newspaper cutting as well as discussion with the supervisors and lecturer to gather more knowledge and information in identifying the topic and the objective of the research. This research is carried out to review the most frequent disputes associated with the determination of contract by employer in construction which are referred to the court and the consequences of determination of contract by employer towards the parties involved in the contract.

### **1.5.2 Stage 2 : Literature Riview**

During this stage, various data, documentation and literature regarding the study field were collected in achieving the research objective. Data can be collected from primary data and secondary data. Generally, secondary data is collected from reading materials in printing form like references books, journals, newspaper, articles, research paper done by third parties as well as related websites. These sources are important to identify trends and developments over time in construction industry, as well as the general state of knowledge regarding the subject study in completing this literature review chapter.

### **1.5.3 Stage 3 : Data Collection**

After all the background and relevant issues in literature review were identified, legal cases based on previous legal cases which are related to the research issue will be collected from Malayan Law Journals via UTM library electronic database, namely Lexis-Nexis Legal Database.

#### **1.5.4 Stage 4: Research Analysis**

Once the previous related court cases under Malayan Law Journal are collected, the author will conduct case study on the related legal cases. The case study is started by carefully reviewing and clarifying all the facts of the cases. All of the cases will focus on two parts, disputes associated with the determination of contract by employer in construction which are referred to the court and the other is the consequences of determination of contract by employer towards the parties involved in the contract. After the author has focused on the issues presented by each case, discussion and comparison would be done. The author will compare and identify the most frequent disputes associated with the determination of contract by employer in construction which are referred to the court and also the consequences of the determination of contract towards the parties involved.

#### **1.5.5 Stage 5: Conclusion and Recommendations**

In the final stage, the whole process of the study will be reviewed to identify whether the objectives of the research has been achieved. The research findings then will be presented and further research will be recommended.

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