

**EQUITABLE REMEDY: INJUNCTION**

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**EQUITABLE REMEDY: INJUNCTION**

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requirements for the award of the degree of  
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**DEDICATION**

To my beloved  
father and mother  
brother and sister  
Kah Lun

.....**Thank you for everything**

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## ABSTRACT

Damages are always the usual remedy when there is a breach of contract. However, due to the limited effectiveness of the remedy of damages in some cases, it caused the development of equity, and subsequently equitable remedies. Injunction is one of the equitable remedies and it is regarded as extraordinary. It is made available only in limited circumstances. Therefore, this master project intends to identify what circumstances, which is limited, that injunction will be available to the parties in a building contract. This project is carried out mainly through documentary analysis of law journals, such as Malayan Law Journal, Singapore Law Report, Building Law Report, etc. Due to time constraint, questionnaire survey or interview is not carried out. Results show that there are 11 circumstances in which the injunctions (prohibitory, mandatory and Mareva injunctions) will be available to the parties and 4 circumstances in which injunction would not be available to the parties in a building contract (as provided in Chapter 4). Rhind J in the case of *Concorde Construction Co Ltd v Colgan Co Ltd* [1984] 29 Build LR 120 mentioned that the judge will *ordinarily* grant injunction “as of course” in certain familiar situations which keep recurring. Since the circumstances discussed are the situations which had occur for the past few 10 years, therefore, it is hoped that it would provide a guideline to parties in a building contract when they could succeeding in applying injunction if they resort to it.

## ABSTRAK

Ganti rugi adalah remedi yang biasa dituntut oleh pihak apabila berlakunya pecah kontrak. Disebabkan keberkesanan ganti rugi dalam sesetengah kes, wujudnya pembangunan peraturan ekuiti dan seterusnya remedi yang berdasarkan ekuiti. Injunksi adalah salah satu remedi yang berdasarkan ekuiti and ia dikatakan sebagai remedi yang luar biasa. Injunksi hanya boleh dikeluarkan oleh mahkamah dalam keadaan yang terhad. Jadi, projek sarjana ini bertujuan untuk mengenalpasti keadaan yang terhad ini di mana injunksi boleh dikeluarkan untuk pihak kepada sesuatu kontrak pembinaan. Projek ini dijalankan melalui analisis dokumen, iaitu laporan undang-undang seperti *Malayan Law Journal*, *Singapore Law Report*, *Building Law Report*, dan sebagainya. Disebabkan masa yang terhad diperuntukkan untuk menyiapkan project ini, kajian borang selidik dan temuramah tidak dijalankan. Kajian ini menunjukkan bahawa terdapat 11 keadaan di mana injunksi (injunksi prohibitori, mandatori dan *Mareva*) boleh dikeluarkan dan 4 keadaan di mana ia tidak boleh dikeluarkan untuk pihak kepada sesuatu kontrak pembinaan (seperti yang diterangkan dalam bab 4). Rhind J dalam kes *Concorde Construction Co Ltd v Colgan Co Ltd* [1984] 29 Build LR 120 pernah mengatakan bahawa hakim akan mengeluarkan injunksi “*as of course*” dalam keadaan yang sentiasa berlaku. Jadi, projek ini diharapkan boleh menjadi satu panduan kepada pihak kontrak pembinaan semasa mereka ingin memakainya memandangkan keadaan yang dibincangkan pernah berlaku dalam beberapa puluh tahun kebelakangan ini.

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**LIST OF ABBREVIATIONS**

AC	Law Reports: Appeal Cases
All ER	All England Law Reports
AMR	All Malaysia Reports
App Cas	Appeal Cases
Build LR	Building Law Reports
Cal LR	California Law Review
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
Const LR	Construction Law Reports
ER	Equity Reports
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
Lloyd's Rep	Lloyd's List Reports
LR	Law Reports
MLJ	Malayan Law Journal
PAM	Pertubuhan Arkitek Malaysia
PC	Privy Council
QB	Queen Bench

SCR	Session Cases Report
SLR	Singapore Law Report
WLR	Weekly Law Report

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# Chapter 1

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## CHAPTER 1

### INTRODUCTION

#### 1.1 Background Studies

Remedy is defined in the Oxford Law Dictionary as: “*any the methods available at law for the enforcement, protection, or recovery of rights or for obtaining redress for their infringement*”. Therefore, when there is infringement, or rather breach of contract, remedies are always available to the innocent parties.<sup>1</sup>

In Malaysia, the law relating to remedies is found in various sources. Some are statutory<sup>2</sup>, and some are adapted from the common law being principles of the common law and equity.<sup>3</sup> Basically, those remedies found can be classified into: -

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<sup>1</sup> Martin, E., “A Dictionary of Law.” 5<sup>th</sup> Edition. (New York: Oxford University Press, 2003), pp. 423; Elliott, C. & Quinn, F., “Contract Law.” 4<sup>th</sup> Edition. (British: Longman, Pearson Education, 2003), pp. 263.

<sup>2</sup> See in particular the Contracts Act 1950 which came into force on 23 May 1950 and the Specific Relief Act 1950 which come into force on 4 July 1950.

<sup>3</sup> Section 3 of Civil Law Act allows application of common law and the rules of equity. During the period when then English courts were split into courts of common law and of equity, each branch developed different remedies. Even though the courts are no longer divided in this way, it is still convenient to distinguish between common law and equitable remedies, since their separate histories have led to different rules about when they will be applied.

- (1) Substitutionary remedies
- (2) Specific remedies

Substitutionary remedies occur when the plaintiff receives money as a substitute for the right, which was violated. On the other hand, specific remedies operate to restore to the plaintiff the exact item or state of being of which he was wrongfully deprived.<sup>4</sup> According to Professor Barenson (2002), these two types of remedies can be further divided into four major remedial categories, i.e. damages remedies, coercive remedies, declaratory remedies, and restitutionary remedies. However, most of the authors classified remedies under the following categories: -

1. Restitution – in a sense, the innocent party will unilaterally ‘rescinds’ the agreement at the point of breach and demands the return of money he has paid thereunder or the value of goods he has delivered or of such work as he has done.<sup>5</sup>
2. Financial remedies – this includes damages and quantum meruit. Damages is a remedy which intends to compensate the innocent party for loss caused by breach of contract, i.e. to put the innocent party in the same financial position as he would have occupied had the contract been performed while quantum meruit is payment for what the parties have done under the contract.<sup>6</sup>
3. Equitable remedies

Equitable remedies are defined in the Oxford Law Dictionary as: “*remedies granted by equity to redress wrong*”.<sup>7</sup> They are generally granted at the discretion of the Court<sup>8</sup> and they include specific performance and injunction.<sup>9</sup>

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<sup>4</sup> Prof. Berenson, “Remedies.” (US: Thomas Jefferson School of Law, summer 2002), pp. 1.

<sup>5</sup> Bockrath, J.T., “Contracts and the Legal Environment.” 6<sup>th</sup> Edition. (UK: McGraw Hill, 2000), pp. 86.

<sup>6</sup> Guest, A.G., “Anson’s Law of Contract.” 24<sup>th</sup> Edition. (London: Clarendon Press, Oxford, 1975), pp. 531; Barker, D. & Padfield, C., “Law Made Simple.” 11<sup>th</sup> Edition. (Great Britain: Made Simple Books, 2002) pp. 160 & 164.

<sup>7</sup> Martin, E., “A Dictionary of Law.” 5<sup>th</sup> Edition. (New York: Oxford University Press, 2003), pp. 178.

<sup>8</sup> As per Lord Chelmsford in the case of *Lamare v Dixon* [1873] LR 6 HL 414 at 423; Section 50, Specific Relief 1950.

<sup>9</sup> Guest, A.G., “Anson’s Law of Contract.” 24<sup>th</sup> Edition. (London: Clarendon Press, Oxford, 1975), pp. 531.

Specific performance is a decree of the court directing that the contract shall be performed specifically, that is, according to its terms. The elaborate provisions governing the decree are enacted in several sections of the Specific Relief Act.<sup>10</sup>

Injunction, on the other hand, is called “Preventive Relief” as defined in Part III of Specific Relief Act 1950. Section 50 of Specific Relief Act 1950 classify injunction as either “temporary” or “perpetual” injunction.<sup>11</sup> However, there are other classifications such as interlocutory injunctions, quit time injunctions, Mareva injunctions and mandatory injunctions, which are commonly used nowadays.<sup>12</sup>

Since injunction is an equitable remedy, it is conditioned upon the inadequacy of remedial alternatives.<sup>13</sup> However, in certain circumstances, a court may even deny in granting an injunction even though plaintiff’s legal remedy is inadequate.<sup>14</sup> This is where the court exercises its discretionary power.<sup>15</sup> Furthermore, it is trite law that an injunction will not be issued by the court in order to secure the provision of certain services or works, which the court cannot effectively superintend or supervise.<sup>16</sup>

Despite the facts that there are lots of rules and laws governing the granting of injunction, injunction can be granted by the court when the court thinks that it is proper and just to grant it. However, if the court discovers later that the application for injunction was made on suppressed facts, or that the facts upon which the order was granted no longer exist, injunction can be varied or dissolved.<sup>17</sup>

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<sup>10</sup> Vohrah, B. & Wu, Min Aun, “The Commercial Law of Malaysia.” (Malaysia: Longman, 2004), pp. 179.

<sup>11</sup> Specific Relief Act 1950.

<sup>12</sup> Lee, Mei Pheng, “General Principle of Malaysian Law.” 4<sup>th</sup> Edition. (Ipoh, Malaysia: Penerbit Fajar Bakti Sdn Bhd, 2001), pp. 173.

<sup>13</sup> Prof. Berenson, “Remedies.” (US: Thomas Jefferson School of Law, summer 2002), pp. 20.

<sup>14</sup> *Georg v. Animal Defense League* [1950].

<sup>15</sup> Prof. Berenson, “Remedies.” (US: Thomas Jefferson School of Law, summer 2002), pp. 5.

<sup>16</sup> *Dowty Boulton Paul Ltd v Wolverhampton Corp* [1971] 2 All ER 277, [1971] 1 WLR 204; *AG v Colchester Corp* [1955] 2 QB 207, [1955] 2 All ER 124.

<sup>17</sup> Lee, Mei Pheng, “General Principle of Malaysian Law.” 4<sup>th</sup> Edition. (Ipoh, Malaysia: Penerbit Fajar Bakti Sdn Bhd, 2001), pp. 173.

## 1.2 Problem Statement

As discussed above, there are various types of remedies in the event of breach where injunction being one type of equitable remedies.<sup>18</sup> Prof Barensen (2002) had mentioned that it is an effective and powerful remedy wielded by the courts today on the fact that injunction is capable of being enforced through the court's contempt power.<sup>19</sup> In fact, it is also called coercive remedy where when a court renders an injunction, it orders the defendant to do,<sup>20</sup> or refrain from doing, some act<sup>21</sup>. A defendant who refuses to comply can be held in contempt and subjected to prison or fine.<sup>22</sup>

Despite the fact that it is the effective and powerful remedy, **injunction is regarded as extraordinary. It is made available only in limited circumstances.** Outside these circumstances, the victim of a default will have to rely on any rights he may have to withhold his own performance, terminate or claim compensation.<sup>23</sup>

Further to this, in relation to building contract, the normal remedy for breach of contract is the recovery of damages at common law, and not injunction.<sup>24</sup> This is because majority of issues and disputes in building contract involves money where the court contended that damages will be an adequate compensation in building contract.<sup>25</sup> For example, in respect of mandatory injunction, the court is reluctant to grant such injunction<sup>26</sup> to compel the contractor to build when the contractor stops work as damages may be an adequate remedy in the sense that the plaintiff can engage another builder.<sup>27</sup> Also, it would require supervision by the court.<sup>28</sup> In respect

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<sup>18</sup> Guest, A.G., "Anson's Law of Contract." 24<sup>th</sup> Edition. (London: Clarendon Press, Oxford, 1975), pp. 531.

<sup>19</sup> Prof. Berenson, "Remedies." (US: Thomas Jefferson School of Law, summer 2002), pp. 4.

<sup>20</sup> Such injunction is called mandatory injunction.

<sup>21</sup> Such injunction is called prohibitory injunction.

<sup>22</sup> *William Jacks & Co Sdn Bhd v Chemquip (M) Sdn Bhd* [1994] 3 MLJ 40.

<sup>23</sup> Beale, H., "Remedies for Breach of Contract." (London: Sweet & Maxwell, 1980), pp. 125-126.

<sup>24</sup> Samuels, B. M., "Construction Law." (US: Prentice Hall, 1996), pp. 19.

<sup>25</sup> *Ibid.*

<sup>26</sup> Which would be tantamount to a decree of specific performance.

<sup>27</sup> Asif Tufal, "Remedies for breach – Equitable Remedies." (Law Teacher.net, 2004). pp. 1.

of prohibitory injunction, the court had refused to grant such injunction in the case of *Arab Malaysian Corp Builders Sdn Bhd & Anor v ASM Development Sdn Bhd*<sup>29</sup> on the ground that the application in the case was an action for money and not falling under the Specific Relief Act.

Therefore, it is clear from the above discussion that damages are always the main remedy for the parties in building contract in the event of breach<sup>30</sup>, while the equitable remedy, i.e. **injunction is exceptional, extraordinary and less common. It is made available only in limited circumstances.**<sup>31</sup> *But, what are those circumstances?* Also, the question of “*Whether injunction should be granted in this case?*” is one of the most popular questions asked by judges when assessing the remedy (injunction) for parties in a building contract, such as the Abdul Malek J in *Kong Wah Housing Development Sdn Bhd v Desplan Construction Trading Sdn Bhd*<sup>32</sup>, Peh Swee Chin J in *Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd*<sup>33</sup>, Abdul Malik Ishak J in *Vistanet (M) Sdn Bhd v Pilecon Civil Works Sdn Bhd*<sup>34</sup> and so on. Hence it is important and necessary for us to understand the circumstances, which are limited, that will be available to the parties to a building contract. With the knowledge, parties in the building contract would have little idea on how could succeed in the application for injunction and when they can apply for injunction. Thus, the above-mentioned question forms the basis for this research which intends to identify the closest answers of it.

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<sup>28</sup> The supervision will be difficult as it requires continuous supervising of building work and the building specifications are often too imprecise; Paterson, J., Robertson, A. & Heffey, P., “Principles of Contract Law.” 2<sup>nd</sup> Edition. (Melbourne: Thomson Law Book Co., 2005), pp. 477.

<sup>29</sup> [1998] 6 MLJ 136.

<sup>30</sup> Samuels, B. M., “Construction Law.” (US: Prentice Hall, 1996), pp. 19.

<sup>31</sup> Beale, H., “Remedies for Breach of Contract.” (London: Sweet & Maxwell, 1980), pp. 125-126; Paterson, J., Robertson, A. & Heffey, P., “Principles of Contract Law.” 2<sup>nd</sup> Edition. (Melbourne: Thomson Law Book Co., 2005), pp. 477.

<sup>32</sup> [1991] 3 MLJ 269.

<sup>33</sup> [1988] 2 MLJ 261.

<sup>34</sup> [2005] 6 MLJ 664.

### **1.3 Objective of Research**

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

1. To identify the circumstances that injunction will be available to the parties in a building contract.

### **1.4 Scope of Research**

The following are the scopes for this study: -

1. Only cases related to building contract will be discussed in the study.
2. The circumstances discussed are those arising thereunder, in connection therewith and related to the building contract.

### **1.5 Importance of Research**

The importance of this study is to give an insight of the equitable remedy, i.e. injunction, available to the parties in a construction industry. After this study, the parties will know when the injunction will be available to them. Both the successful and unsuccessful applications for injunctions will be discussed in order to be guidelines for parties when they resort to injunction.

## **1.6 Research Process and Methods of Approach**

Research process and method of approach will be used as guidelines so that the research could be done in a systematic way to achieve the research objective. The research process generally consists of 4 stages, i.e. 1<sup>st</sup> stage: initial study and fixing research topic, objective, scope and outline, 2<sup>nd</sup> stage: data collection and recording, 3<sup>rd</sup> stage: data analysis and interpretation and 4<sup>th</sup> stage: writing. The following will be the research process and the methods of approach used for this research (refer to figure 1.1).

### **1.6.1 1<sup>st</sup> Stage**

First stage of research involves initial study. Two approaches will be used in the initial study, i.e. discussion with friends and lecturers regarding what research topic can be done, and initial literature review to get idea of the research topic. After the initial study, the rough idea of the research topic is obtained. The objective and scope of the research are fixed then. Further to this, 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.

### **1.6.2 2<sup>nd</sup> Stage**

During this stage, data collection can be started. There are two types of data being collected, namely primary data and secondary data. Data will be collected mainly through documentary analysis. Important data found will be recorded systematically.

### **1.6.2.1 Primary Data**

Primary data collected mainly from Malayan Law Journal, Singapore Law Report, Building Law Report, Construction Law Report and other law journals. It is collected through the LexisNexis law database. All the cases relating to the research topic will be collected. Next, those cases will be sorted according to different fields such as cases relating to construction industry, shipping industry, manufacturing industry, etc. Then, those cases will be sorted again to building contract cases, cases relating to land matters, etc. Important cases will be used for the analysis at the later stage.

### **1.6.2.2 Secondary Data**

Secondary data is data obtained from research done by third parties other than the writer. Sources of secondary data consist of books, act, articles and seminar papers. These sources are important to complete the literature review chapter.

#### **(a) Books**

Books are the main secondary data sources. Books relating to equitable remedies and injunction will be read and understand to know in depth the theories relating to the research field. All the relevant books will be obtained from the library of University of Technology Malaysia.

#### **(b) Seminar Papers And Articles**

Seminar papers and articles will be the sources to strengthen the theories found in books.



**(c) Act**

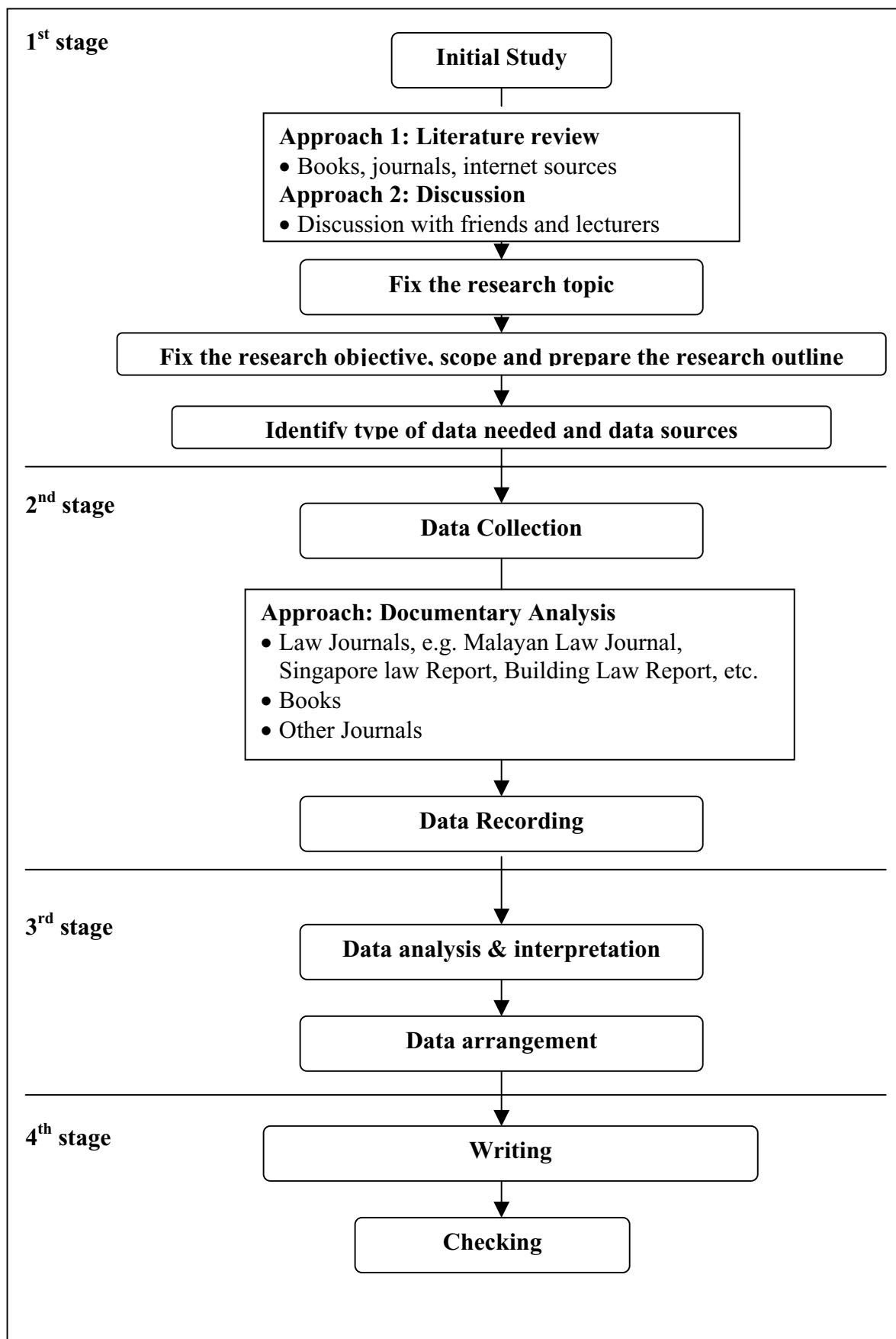
Act is an important source to support the literature review chapter and analysis done. Act used is mainly the Specific Relief Act 1950 (Act 137).

**1.6.3 3<sup>rd</sup> Stage**

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

**1.6.4 4<sup>th</sup> Stage**

4<sup>th</sup> stage of the research is the last stage of the research process. It mainly involves writing up and checking of the writing.



**Figure 1.1:** Research Process and Methods of Approach

## 5.5 Conclusion

As a conclusion for all, injunction is found to be an equitable remedy which is extraordinary. The right of injunctions is not naturally arisen from the building contract itself. It is the supplement remedy for the parties in the event of the inadequacy of other remedies such as damages, quantum meruit, etc. In fact, it is a remedy provided by the statutory<sup>298</sup> and is only available to parties when the circumstances show that it is just and convenience to do so.

In determining the question of “should an injunction be granted in this case”, it must first establish whether other legal remedies are inadequate the circumstances in that case. If the legal remedies are sufficient, injunction will be refused, and if the legal remedies are inadequate, injunction may be given. However, consideration must be made to where the balance of convenience lies with. Injunction will not be granted if it is found that its grant will cause hardship or inconvenience to the defendant. The research done which shows several circumstances that injunction will ordinary be granted may be some guidelines to parties in a building contract in finding the answer for the above question.

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<sup>298</sup> Specific Relief Act 1950.

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