

INTERPRETING CONTRACTUAL PROVISIONS: EXTENSION OF TIME

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To Understanding

“The gem cannot be polished with friction, nor man perfected without trials”

- Chinese proverb

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Without doubt, this endeavour rates as one of the more mentally exhaustive trials in my life thus far, not for the lack of materials available or to the analysis of it but the sheer willpower needed to see this through.

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ABSTRAK

Projek-projek pembinaan yang memerlukan lanjutan masa adalah satu fenomena biasa di seluruh dunia. Sejumlah besar daripada projek-projek pembinaan tersebut menghadapi beberapa bentuk kelewatan semasa proses pembinaan dan oleh itu, masa untuk penyiapan akan biasanya dilanjutkan. Akan tetapi, persoalan matan adalah sama ada pemberian atau penafian permohonan lanjutan masa telah dipertimbangkan dengan betulnya berdasarkan latar belakang kontraktual pihak-pihak. Realiti ini dapat dijelaskan berdasarkan skop yang berbeza dan kerumitan kerja-kerja pembinaan yang dijalankan pada tahun-tahun kebelakangan ini. Permintaan yang semakin meningkat untuk bangunan atau struktur yang lebih rumit telah menyebabkan reka bentuk pembinaan menjangkau sempadan keperluan teknikal yang terlibat. Walaupun keperluan teknikal dalam industri pembinaan semakin meningkat pada tahun-tahun kebelakangan ini, pembangunan undang-undang berkaitan dengan permohonan lanjutan masa juga telah menyaksikan perkembangannya sendiri. Oleh itu, persoalannya adalah sama ada pembangunan undang-undang selaras dengan isu praktikal dan perniagaan semasa yang diperlukan dan dijangka daripada profesional pembinaan dan industri itu sendiri. Kertas ini akan mempertimbangkan pendekatan yang diambil dalam menggunakan lanjutan masa dan faktor-faktor yang terlibat. Ini semestinya memerlukan pemeriksaan prinsip-prinsip undang-undang dalam pentafsiran kontrak untuk memberi kedalaman yang diperlukan untuk analisis keseluruhannya. Selepas itu, skop lanjutan masa dalam projek-projek pembinaan akan dianalisis dari perspektif undang-undang dan perkembangan daripadanya dibentangkan melalui pembangunan kedua-dua undang-undang dan undang-undang kes. Tempoh rujukan di sini akan diambil daripada bidang kuasa Komanwel memandangkan pelbagai pendekatan dan undang-undang kes telah muncul dalam bidang ini.

ABSTRACT

Construction projects that require extensions of time is a common phenomenon throughout the world. A significant number of such construction projects encounter some form of delays in the process and hence, the time for completion would be typically extended. Yet, the pertinent question is whether such the granting or disallowance of such extension of time is properly considered in light of the contractual background. The reality of this could be somewhat explained by the differing scope and complexity of the construction works undertaken in recent years. Increasing demands for more ambitious buildings or structures has inevitably led to construction designs that push the boundaries of the technical requirements involved. While the technicalities in the construction industry have been increasing in recent years, the development of law with regards to the application of extension of time has witnessed its own progression. The question therefore is whether the legal development moves in consonance with the practicality and commerciality required and expected from the construction professionals and to the industry itself. This paper will consider the approach taken in applying extension of time clauses and the factors involved. This would necessarily require an examination of the legal principles in contractual interpretation to provide the necessary depth to the overall analysis. Thereafter, the scope of extension of time within construction projects will be analysed from a legal perspective and the progression thereof is charted through the development of both statutes and case law. The term of reference would primarily draw from the Commonwealth jurisdictions given the dearth of approaches and case law that have emerged from this area.

TABLE OF CONTENTS

CHAPTER	TITLE	PAGE
	DECLARATION	ii
	DEDICATION	iii
	ACKNOWLEDGMENT	iv
	ABSTRAK	v
	ABSTRACT	vi
	TABLE OF CONTENTS	vii - viii
1	INTRODUCTION	1
	1.1 Introduction	1 – 3
	1.2 Problem Statement	4
	1.3 Aim and Objectives of Study	5
	1.4 Scope of the Study	6
	1.5 Significance of Study	7
	1.6 Research Methodology	8
2	INTERPRETATION OF CONTRACTS: LITERATURE REVIEW	
	2.1 Introduction	9 – 10
	2.2 Interpretation of Contracts: General	11 – 21
	2.3 Interpretation of Contracts: Malaysian Context	22 – 24
	2.4 Parole Evidence	25 – 31
	2.5 Extension of Time Clauses: General	32 – 41
	2.6 Summary	42
3	CONSTRUCTION CONTRACTS	
	3.1 Time for Completion: Introduction	43
	3.2 Section 47 of the Contracts Acts 1950	44 – 53
	3.3 Summary: Section 47	54
	3.4 Section 56 (2) and (3) of the Contracts Act 1950	55 – 57
	3.5 Selected Factors Affecting Delays	58 – 59
	3.5.1 Force Majeure	60 – 63
	3.5.2 Environmental	64 – 68

	3.5.3 Delay in Issuing Drawings or Instructions	69 – 72
3.6	Quantifying the Impact of Delays	73 – 81
3.7	Summary: Quantifying the Impact of Delays	82 – 83
3.8	Interpretation of Extension of Time Clauses	84 – 89
4	ANALYSIS AND DISCUSSION	
4.1	PAM Form of Contract	90 – 97
4.2	PWD Form of Contract	98 – 100
5	CONCLUSION AND RECOMMENDATION	
5.1	Conclusion	101 – 104
5.2	Recommendations	105
	REFERENCES	106

CHAPTER 1

INTRODUCTION

1.1 Introduction

Modern day construction projects are becoming increasingly complex in terms of designs and functions thereby pushing the envelope of engineering and construction methods to the brink of technical feasibility. Yet another aspect of modern day construction projects that has been increasingly emphasized is the requirement for environmental friendly materials and functions. Many governments and international bodies have pushed for a global benchmark in environmental friendly architectures and initiatives are given to those that incorporate these features into their construction projects. This places an even further burden on the engineering and construction methods or thinking to collate these requirements into an end product that satisfies both the client's requirement and the relevant authorities¹.

However, to suggest that this is merely an engineering or construction issue is insufficient. It must be noted that social, economic and political factors play a real role in the outcome of such projects. With a broad stroke of the brush, all these factors increases the technicalities involved in such construction projects exponentially given that the need to keep construction costs within budgetary

¹ Jong-Jin Kim, Brenda Rigdon, "*Qualities, Use and Examples of Sustainable Building Materials*" (University of Michigan, 1998)

requirements. The potential issues arising are multi-dimensional and this project is confined to the analysis of approaches taken in interpreting contractual provisions, the judicial impact of such interpretation towards the area of extension of time in construction projects.

While there is a replete of literature that comments on extension of time issues, what matters principally are the pronouncements or decisions reached by the judicial process, notably the Courts. It is perhaps obvious, but nonetheless important, to state that judicial decisions shape the directions in which the construction industry and the practices therein take. It is therefore significantly important that case law is examined in this context to convey the actual position of the law in respect of extension of time.

To begin with, the area on extension of time (“EOT”) cannot be analysed in isolation. Fundamentally, it is an issue of interpreting the agreement between the parties involved as the contractual provisions therein provides the legal framework in which factors affecting the allowance or denial of extensions of time. As construction projects become increasingly complex, delays become more of a question of when or how, rather than if. Inevitably when such delays occur, it may impact the timely completion of the said project and in such circumstances, monetary losses will typically ensue. To alleviate this problem, modern day construction contracts commonly include extension of time clauses to allow for this contingency and to provide for, *inter alia*, the procedures to request and obtain such extension of time, the calculation of liquidated damages and consequences of the delays arising.

What type of losses suffered is not exhaustive in this industry and still developing but typically, it would include wide-ranging site overheads such as rental(s) or maintenance fees, bank guarantee fees, salaries for professionals and workmen, insurance policies coverage and loss of profits that an aggrieved contractor may have suffered where the works have been delayed.

Given the nature and scope of losses that could be potentially incurred in a construction projects, it is imperative that the completion date or the extended completion date is determined in a manner that is accounts for all the factors

involved but at the same time, simple and clear for all to understand and accept. The challenge lies in the determination of such new or extended completion as there are many determining factors in calculating or computing the extension of time in construction projects and at times, factors such as soil conditions, inclement weather or quality of workmanship and materials, legal opinion on certain aspects often involve a degree of value judgments. Therefore, the mechanism or model involved for computing or determining the factors involved becomes equally challenging and in many cases, been subjected to legal scrutiny.

The inclusion of extension of EOT clauses is for the benefit of the client/employer as the client/employer would be prevented from enforcing their rights under the contract if the fault was occasioned by the client themselves. The origins and evolution of this position will be examined throughout this paper.

Furthermore, the importance for understanding the area of EOT cannot be overstated. Disputes resolutions mechanisms such as arbitration and adjudication focus heavily on the determination of extension of time as the outcome thereof is indicative of the entitlement and of the quantum of compensation.

1.2 Problem Statement

Case law has left the determination of EOT as a “question of fact”, which in turn, leaves that determination to the Court. Statutory provision such as *section 47 of the Contracts Act 1950* is equally silent. What factors does the Court then take into account to determine the validity of the EOT that has either been granted or denied and how is time assessed when considering such claims? In some cases such as *Syarikat Tan Kim Beng & Rakan-Rakan v Pulai Jaya Sdn Bhd*², the Court was satisfied in leaving this determination to the expert, typically the architect, and relying on his/her judgment to arrive at a conclusion. This is unsatisfactory as it makes the determination of time and hence EOT arbitrary and completely within the domain of experts and bearing in mind that the rules of interpretation in the Malaysian context is further subject to the legislative provisions of the *Evidence Act 1950*.

² [1992] 1 MLJ 42

1.3 Aims and Objectives of the Study

This master project aims to:-

- (a) evaluate the case law on the approach taken in interpreting contractual terms, the legal factors that ought to be considered in relation to time, the early trends of extension of time clauses, both from common law and contractually and the current approaches in evaluating extension of time applications;
- (b) evaluate the contemporary legal issues arising from extension of time clauses which includes;
 - (i) the models used in computing delays in construction projects; and
 - (ii) the judicial reception of these models;
- (c) present/state the current legal position on interpreting extension of time clauses.

1.4 Scope of Study

This study will focus on case law that considers the various aids of interpretation and while previous studies or reference discussed the issue of interpretation on contracts, it is unclear which guidelines ought to apply in the context of EOT for construction projects.

The scope of this study will also encompass the factors affecting the calculation of delays and examining the circumstances in Malaysia especially with reference to the *Contracts Act 1950* which contains specific provisions dealing with time.

Lastly, a discussion will be made in this study to the standard forms of construction contracts in Malaysia, particularly to the Public Works Department and Pertubuhan Arkitek Malaysia forms.

1.5 Significance of Study

There is an increasing amount of literature that deals with the factual circumstances in dealing with extension of time in a construction project. The sophistication of technology has led to more complex programmes or devices that chart the progress of construction works. Yet, the parameters for determining EOT remains unclear and the statutory provisions under the *Contracts Act 1950* left this determination to the Courts without providing any clear guidelines.

It is hoped that this study will clarify the approach to judicial interpretation of contractual provisions and put forward a working framework in approaching contractual interpretation that could be applied objectively by both legal and non-legal professionals alike.

1.6 Research Methodology

In order to achieve the aims and objective of this master project, the approaches taken towards the analysis and discussion are based on:-

- (i) researching through various case law, literature review of articles, journals, books, conference papers and the like;
- (ii) analysing and applying the collected data and information to the standard forms of construction contracts leading to the conclusion and recommendation.

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