

DE MINIMIS PRINCIPLE AND CERTIFICATE OF PRACTICAL
COMPLETION

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*Thank you so much to my beloved parents Mamat bin Yahya and
Nor' Aini bt Mohd Yahya, my siblings and Muhammad
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ABSTRACT

When a contractor thinks that his work has reached completion, he will notify the contract administrator for inspection. Thereafter the contractor administrator issues the Certificate of Practical Completion (CPC), provided that the defects are “minor” and contractor gives undertaking to rectify them. Standard forms of contract generally regard CPC can be issued notwithstanding there are works of very minor nature uncompleted. However there is no explanation on minor defects in the standard forms. As such, there is a question on the extent on the nature of minor defects that is allowed for the issuance of CPC. Contract administrator normally exercises his discretionary in issuing the certificate and it is always a question of fact and degree whether the defects are minor or otherwise. This issue of whether the defects are minor or major can give rise to disputes between the employer and the contract administrator on his behalf and the contractor. Therefore the aim of this research is to propose a checklist to determine whether the defects are minor or *de minimis* prior of the issuance of CPC. The scope of this research is limited to the cases related defects and practical completion in construction contracts. This research is conducted through the analysis of law cases reported in the Malayan Law Journal (MLJ/ MLJU) and English cases that are retrieved from Lexis Malaysia online database and literature. There are eleven cases retrieved and analysed in this research. The methodology used in this research involved four stages commencing from the initial stage until the conclusion and recommendation. The cases analysed based on the facts, the issues and the judgements. Based on the analysis, there are four items in the checklist that a contract administrator should observed when making decision whether or not to issue the CPC. The items are: one, the minor defects must not prevent the use of the project for the intended purpose; two, the contractor must be able to be carried out the rectification within the defects liability period; three, the cost of rectification must be within the outstanding retention fund or the performance bond; and four, the services such as water and electricity has been completed.

ABSTRAK

Apabila kerja oleh kontraktor telah siap, kontraktor akan memaklumkan kepada arkitek tentang penyiapan kerja tersebut untuk pemeriksaan kerja. Kontraktor akan dianugerahkan Sijil Penyiapan Kerja dengan syarat bahawa kecacatan pada kerja tersebut adalah dalam kategori “kecacatan kecil” dan kontraktor akan membaiki kecacatan tersebut. Dalam industri pembinaan, kerja pembinaan boleh dikatakan telah mencapai tahap penyiapan praktikal walaupun masih lagi terdapat kecacatan kecil yang masih perlu dibaiki oleh pihak kontraktor. Namun begitu, di dalam borang standard kontrak tidak ada menerangkan secara jelas tentang kecacatan kecil yang dibenarkan bagi penyiapan kerja. Maka, wujudnya persoalan ciri-ciri kecacatan kecil yang dibenarkan untuk mendapatkan sijil penyiapan kerja praktikal. Oleh itu, pentadbir kontrak haruslah menggunakan budi bicara dalam mengeluarkan sijil penyiapan di mana wujud persoalan di mana kecacatan tersebut adalah kecil atau sebaliknya. Keadaan ini boleh mewujudkan pertelingkahan antara kontraktor dan klien kerana penerangan mengenai sejauh mana kecacatan tersebut adalah kecil tidak dinyatakan dengan jelas. Kajian ini adalah bertujuan bagi mencadangkan senarai semak bagi menentukan sama ada kecacatan yang berlaku pada bangunan tersebut adalah kecacatan kecil bagi menentukan penyiapan kerja bagi bangunan tersebut. Skop kajian ini adalah terhadap kes-kes yang berkaitan dengan kecacatan kerja dalam kontrak pembinaan sahaja. Data bagi kajian ini adalah daripada Lexis Nexis, MLJ, MLJU dan kes-kes luar negara. Terdapat 11 kes dalam kajian ini yang telah dianalisis. Terdapat 4 fasa dalam kajian ini bermula daripada kajian awalan sehingga kesimpulan dibuat. Berdasarkan kajian ini, terdapat beberapa cadangan daripada kes mahkamah dalam menentukan sama ada kecacatan yang berlaku adalah kecil atau pun kecacatan besar. Antara aspek yang boleh di guna bagi menentukan kecacatan tersebut adalah kecacatan yang berlaku tidak menghalang klien untuk menduduki bangunan tersebut untuk tujuan yang ditetapkan, tempoh membaiki kecacatan, analisis senarai kecacatan, kos membaiki kecacatan dan servis seperti air atau elektrik telah disediakan.

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CHAPTER 1

INTRODUCTION

1.1 Introduction

According to the definition of “defect” in Article 7 in condition of contract, PAM 2006, the word ‘defects’ can be defined as defects, shrinkages or other faults due to materials or workmanship not in accordance with the Contract and Nominated Sub-contract and/or due to any faulty design (if any) undertaken by the Contractor and Nominated Sub-contractor¹.

According to English Law, there is no standard definition that explain the meaning of ‘defect’ Referring the case of *Yarmouth v France*², ‘defect’ is describe as ‘anything which unfit for its intended use or not fit to purpose.it is built when used in a reasonable way.. There are certain degrees of seriousness in defect as demonstrated in construction practical. Some of the defect might not be sufficiently serious to impede practical completion and the defects are addressed in the snagging defect list.

¹ Article 7 (x), PAM 2006

² [1887] 19 QB D 647

Sweet (1993), defines defects in construction as a failure of a building component to be erected as in the intended purpose. In building contract context, defects mean work or project which is to fulfil the quality and requirement as per specified in the contract.

Completion and hand over stage in construction phase are stage where the parties are likely to dispute to each other. During the stage, the success criteria of the project are tested. When employer fund in the construction project, the quality is one of the main concern besides cost and time factor. The constructed project can be a project on building a hotel, school, bridge or house. Normally, the employer will have to pay close attention either the project is value for money or not.

Normally, after the works has been completed or almost completed as described under the contract, the contract administrator will inspect and certify the works as practically completed.³ Practical completion is referred to as 'substantial completion' on some forms of contract. Though, as for PAM 2006 in clause 15.1(a)⁴ “the Works are practically Completed when: in the opinion of the Architect, the employer can have full use of the Works for their intended purposes, notwithstanding that there may be works and defects of a minor nature still to be executed and the Contractor has given to the Architect a written undertaking to make good and to complete such works and defects within a reasonable time specified by the Architect;

There are several principle effect follows after the architect issued the practical completion certificate. Half of the retention money retained by the employer to ensure that the contractor carried out the work will be released. Secondly, it shows that the end of the liability of the contractor to pay damages for late completion Liquidated damages is damages derived from the breach of contract by the contractor that has to be paid by the contractor to the client. Generally the breach is caused by

³ <http://www.designingbuilding.co.uk> retrieved on 5 July 2016.

⁴ Clause 15.1(a), PAM 2006

contractor where he failed to complete the work before or on the completion date. After Certificate of Practical Completion is being issued, it signify defects liability period has started. The client takes possession of the works for occupation once the certificate of practical completion has been issued,⁵.

1.2 Problem Statement

Completion of the project is a very important matter to both employer and contractor as it shows that the end of the construction phase. The term “completion” marks a defined milestone in the progress work under the contract and also the fulfilment of the contractor’s obligation under the contract.⁶ Practically, in our construction industry, as stated in most of standard form of contract, the works can be regarded as practically completed notwithstanding there are works of very minor nature still need to be completed⁷

Pursuant to PAM 2006 in clause 15.1(a) *“the Works are practically Completed when: in the opinion of the Architect, the employer can have full use of the Works for their intended purposes, notwithstanding that there may be works and defects of a minor nature still to be executed and the Contractor has given to the Architect a written undertaking to make good and to complete such works and defects within a reasonable time specified by the Architect;*

⁵ Murdoch, J. & Hughes, W. (2000), *Construction Contracts : Law and Management*, 3rd Edition, London

⁶ Harbans Singh, K. S. (2003), *“Engineering and Construction Contracts Management: Post Commencement Practice”*, Lexis-Nexis, Singapore,

⁷Clause 15, PAM 2006 and Clause 39.5 PWD 203 A

However there is no explanation on minor defects in the standard form. As such, there is a question on the extent on the nature of minor defects that is allowed for the issuance of Certificate Practical Completion. The condition where there are minor defects in the works can bring into situation where disputes can arise.

“ the use of adjective ‘minor’ for the outstanding works and defects introduces another foreseeable area of disputes and possibly abuse in practices⁸”

It is proven based on several cases decided in the court regarding the minor defect in practical completion. One of the case is *H W Neville v William Press & Sons Ltd⁹*. In that case, Newey QC in hi view,

“ I think the word “practically’ completed in clause 15(1) gave the architect a discretion to certify that William Press had fulfilled its obligation under Clause 21(1) where very minor de minimis works had not been carried out, but if there were any patent defects in what William Press had done to architect could not have given a certificate of practical completion”.

In other cases, *Uniphone Telecommunication Bhd v Bridgecon Engineering Sdn Bhd¹⁰* where the purchaser of the house contended that the CPC issued was invalid. This is because the defects arises was very serious and not in cosmetic in nature. While, the developer alleged that the defects was only minor and does not prevent the purchaser to use the building for intended purpose.

⁸ Rajoo, S, The PAM Standard From of Building Contract , Lexis Nexis. P 233

⁹ [1981] 20 BLR

¹⁰ [2011] 5 MLJ 875

This condition shows that the contract administrator should properly inspect and distinguish the defect occur are allowed for certificate practical completion or not. Based on the court decision and industry practice, it is suggested that certificate practical completion still can be awarded although there are still very minor *de minimis* work still need to be carried out. Therefore, contract administrator should exercise his discretionary in issuing the certificate. It always being a question of fact and degree where the defects arises are minor defect or otherwise. Careful though and a standard checklist should be drafted in order to determine whether the defects fall within the minor defect based on *de minimis* principle¹¹.

1.3 Research Question

- I. What are the checklist to determine whether the defects are minor or *de minimis* prior of the issuance of the certificate practical completion.

1.4 Objective of the Research

Based on the problem statement above, the objective of this research is to propose a checklist to determine whether the defects are minor or *de minimis* prior of the issuance of certificate practical completion.

¹¹ Contract Killer – Part 4 (2008), Guidance on Practical Completion www.robinsimonllp.com retrieved on 15 July 2016.

1.5 Research Scope

The scope of this research will be limited to the followings:

- I. The cases in related defect and practical completion related to construction contract only.

- II. This study conducted through the court cases which is retrievable through Lexis Nexis, MLJ, MLJU, English cases and cases form the literature.

1.6 Significant of Research

This research is very important as it can be as a guideline or as an information to construction industry players mainly to the employer, contractor and also architect who are involve specifying what are the minor defects that warrants in issuance of Certificate of Practical Completion for the project.

Furthermore, this research perhaps could encourage the contractor to perform the construction work properly and avoid in creating major defect so that the project is said to be practically completed.

1.7 Research Methodology

This research will be based on the systematic process according to the subsequent stage in order to achieve the objective of the study. There are five (4) stages for this study which are initial study and literature review, data collection, data analysis and conclusion and recommendation.

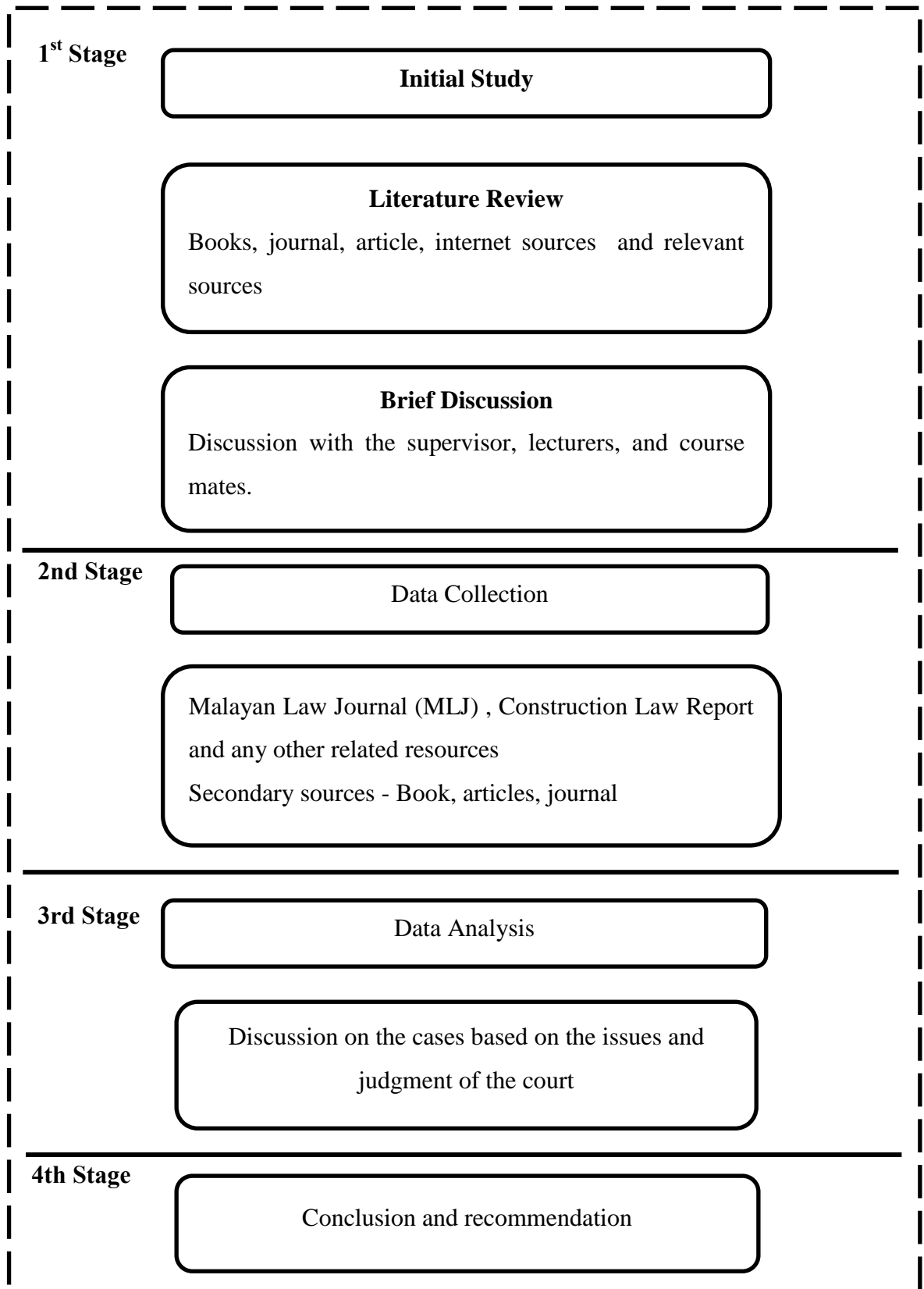


Figure 1.1 : Research Process

1.7.1 Initial Study

In this initial study, the background on the issues for the research will be determined through the reading and analysing the subject matter. Literature review will be carried out to study and understand the problem and overview of the topic which is regarding the minor defect and practical completion. The sources for the literature review will be collected from the books, journal, internet sources for the related matter.

Moreover, discussion with the supervisor, lecturers and friends were undertaken to get more ideas and knowledge on the topic of the research. After the issues has been identified, a better checklist relating to research objective, scope of the research, methodology of the research will be identified.

1.7.2 Data Collection

The main sources for the research were retrieved from the Malayan Law Journal (MLJ) via Lexis Nexis website through Universiti Teknologi Malaysia subscriber. All the collected data and information will be recorded. Besides the cases law from the Lexis Nexis, secondary data also have been collected from books, article, journal and others.

1.7.3 Data Analysis

Next stage is data analysis where in this phase after all the data have been collected, the cases will be review based on the facts of the case, the issues arises and the judgement form the court. The case analysis will be review in order to meet the objective of the research.

The writing up of the research will be organised and documented for the research. All the literature review and the data analysis will be arranged properly for the next stage which is conclusion.

1.7.4 Conclusion and Recommendation

This stage will be the final phase in the research process. The research will be reviewed wholly in order to determine whether the objective has been achieved or not Lastly, conclusion will be drawn based on the finding of the research and further recommendation will be suggested for the future research.

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