

**EMPLOYER'S RIGHTS AND CONTRACTOR'S LIABILITIES IN RELATION TO
CONSTRUCTION DEFECTS AFTER FINAL CERTIFICATE**

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To my beloved father, mother,
sister and Chee Siong

Thank you for your support, guidance and everything.

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ABSTRACT

Most of the standard forms of contract contain provisions dealing with defective works. Defective works could be in the forms of design fault, defective building materials or bad workmanships. Any defects, shrinkages or other faults arising during construction and defects liability period due to defective materials or workmanship must be put right by the contractor at his own expense. The contract administrator will usually mark the end of the defects liability period with the issue of a further certificate, known as a Certificate of Making Good Defect. Subsequently, final certificate will be issued to the contractor stating amount finally due to him. Generally, final certificate will discharge the contractor's liability for the defective works and the cost for remedying them. Employers will need to be wary as they can preclude the employer from claiming damages from the contractors for defects which appear after the issue of the final certificate. However, court will generally not regard a certificate as being final except where very clear words are used in the contract. This research intends to identify the legal position of the construction contract parties in relation to their rights and liabilities in defects after the issuance of Final Certificate. This research was carried out mainly through documentary analysis of law journals and law reports. Result shows that there are four circumstances to be considered when determining the liability of defects after final certificate, namely by referring to the conclusiveness evidence, consequential damages/loss, patent defects and fraud/concealment.

ABSTRAK

Kebanyakan borang kontrak standard mengandungi peruntukan mengenai kerja-kerja cacat. Kecacatan kerja adalah kesalahan reka bentuk, bahan binaan atau kemahiran kerja. Segala kecacatan, kekurangan atau kesalahan yang muncul semasa pembinaan dan tempoh liabiliti kecacatan yang disebabkan oleh kecacatan bahan atau kemahiran kerja mesti dibetulkan oleh kontraktor dengan perbelanjaannya sendiri. Pentadbir kontrak akan menandakan akhirnya tempoh liabiliti kecacatan dengan perakuan siap memperbaiki kecacatan. Kemudian, perakuan muktamad akan dikeluarkan dengan menyatakan jumlah akhir yang dijangka untuk kontraktor. Secara umum, perakuan muktamad akan melepaskan liabiliti kontraktor untuk kerja-kerja cacat dan kos untuk memperbaikinya. Majikan perlu berhati-hati kerana ini boleh menghalang majikan daripada menuntut ganti rugi daripada kontraktor jika kecacatan berlaku selepas perakuan muktamad. Bagaimanapun, mahkamah tidak akan menganggap satu perakuan sebagai satu keterangan yang tidak boleh dipertikaikan kecuali perkataan yang jelas digunakan dalam kontrak. Kajian ini bertujuan untuk mengenalpasti kedudukan sah pihak-pihak kontrak pembinaan berkaitan dengan hak-hak dan liabiliti dalam kecacatan kerja yang berlaku selepas pengeluaran perakuan muktamad. Kajian ini telah dijalankan dengan menganalisis laporan undang-undang. Keputusan menghasilkan empat keadaan yang dipertimbangkan dengan liabiliti kecacatan kerja selepas perakuan muktamad, iaitu dengan merujuk kepada bukti jilid, kerosakan/kerugian akibat, kecacatan jenis 'latent' dan penipuan/penyembunyian yang jelas.

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CHAPTER 1

INTRODUCTION

1.1 Background Studies

Construction in Malaysia spans a wide spectrum of activities stretching from simple renovation works for private homes to massive construction projects. Every such building activity may create its own unique set of requirements and circumstance. The different sectors including employer groups, contractors, suppliers, manufacturers, professionals have their own interests which are very often divergent and competing in nature.¹

Most formal building or engineering contracts contain an initial express obligation of the contractor in some such words as to “carry out and complete the works in accordance with the contract”. This is, in fact a dual obligation that is, both to carry out and to complete the works.² The contractor’s basic obligation, so far as the standard of work is concerned, is to comply with the terms of the contract. This includes both express terms (such as the requirement of contract that work shall be of

¹ Sundra Rajoo. “The Malaysian Standard Form of Building Contract (the PAM 1998 Form).” 2nd Edition. (Malayan Law Journal Sdn Bhd, 1999). pp. 3

² I. N. Duncan Wallace. “Hudson’s Building and Engineering Contracts.” 11th Edition. (Sweet & Maxwell, 1995) pp. 472

the standards described in the bills) and implied terms (such as the principle that all materials shall be of 'satisfactory quality').³

In a construction contract, a contractor undertaking to do work and supply materials impliedly undertakes⁴:

- a) to do the work undertaken with care and skill or, as sometimes expressed, in a workmanlike manner;
- b) to use materials of good quality. In the case of materials described expressly this will mean good of their expressed kind and free from defects. (In the case of goods not described, or not described in sufficient detail, there will be reliance on the contractor to that extent, and the warranty (c) below will apply);
- c) that both the workmanship and materials will be reasonably fit for the purpose for which they are required, unless the circumstances of the contract are such as to exclude any such obligation (this obligation is additional to that in (a) and (b), and will only become relevant, for practical purposes in any dispute, if the contractor has fulfilled his obligations under (a) and (b)).

The contractor's obligation only comes to an end when the Certificate of Practical Completion is issued. Only defects due to workmanship and materials not in accordance with the contract are required to be made good at the contractor's cost.

In the context of defective work, the express or implied obligation to carry out and complete the works in accordance with the contract imposes a continuity dual obligation, and not merely, as in other contracts for work and materials where work is not carried out on and fixed to the owner's land as it progresses, a single

³ Murdoch, J and Hughes, W. "Construction Contracts: Law and Management." (London: Spon Press, 2000) pp. 147

⁴ I. N. Duncan Wallace. *Supra* 2. pp. 519.

ultimate obligation to handover and deliver a final conforming product or article on completion.⁵ In addition to this principal express or implied obligation to complete, formal English-style contracts may make express reference to “substantial completion” or “practical completion”. These definitions are often used in formal contracts to denote the start of the maintenance or “defects liability” period and to secure the release to the contractor of the first portion of any “retention moneys”. In general, what is contemplated by these expressions is a state of apparent completion free of known defects which will enable the owner to enter into occupation and make use of the project, with the result that they will usually bring any possible liability of the contractor for liquidated damages for delay to an end. The scheme of this type of contract thus contemplates the commencement of a period when the owner enters into occupation but at the end of which any then known omissions or defects will be made good by the contractor.⁶

In most of the standard form of building or engineering contract, there are provisions dealing with defective works. Defective works could be in the forms of design fault, defective building materials or bad workmanships. In construction contracts, the works cannot be said to have been practically completed, if the work is so defective that it would prevent the owner from using the building as intended by the contract. For example, sub-clause 15.1 of PAM 1998 form of contract specifies that the works shall be deemed to be practically completed if the architect is of the opinion that all necessary works specified by the contract have been completed and the defects existing in such works are ‘de minimis’.⁷ Clause 45(a) of JKR 203 form of contract specifies that the contractor is responsible for any defect, imperfection, shrinkage, or any other fault which appears during the Defects Liability Period, which will be six (6) months from the day named in the Certificate of Practical Completion issued, unless some other period is specified in the Appendix.⁸ Similarly in CIDB 2000 form of contract, Clause 27.1 specifies that the contractor shall

⁵ I. N. Duncan Wallace. *Supra* 2. pp. 473

⁶ I. N. Duncan Wallace. *Supra* 2. pp. 474

⁷ Mohd Suhaimi Mohd Danuri. “The Employer’s Rights and the Contractor’s Liabilities in Relation to the Defects Liability Period.” (The Malaysian Surveyor. 39.1, 2005). pp. 54

⁸ Lim Chong Fong. “The Malaysian PWD Form of Construction Contract.” (Malaysia: Sweet & Maxwell Asia, 2004) pp. 105

complete any outstanding work and remedying defects during the Defects Liability Period.

Once the works have been practically completed and the Certificate of Practically Completion issued, the Defects Liability Period will begin. Any defects, shrinkages or other faults arising during this period due to defective materials or workmanship must be put right by the contractor at his own expense.⁹ For example, sub-clause 9(a) of PWD 203A requires the contractor to use materials and workmanships that comply with the specification, further, sub-clause 9(b) entitles the superintendent to instruct the contractor to demolish or open up the work done and the associated cost will be borne by the contractor if the works have not carried out in accordance with the contract.

The contract administrator will usually mark the end of the defects liability period with the issue of a further certificate, known as a Certificate of Making Good Defect. This record the contract administrator's opinion that defects appearing within the Defects Liability Period and notified to the Contractor have been duly made good. The contractor is then entitled to the remainder of the retention money. This last portion of the retention is the amount finally due to the contractor. It is the contract administrator's obligation to issue the Final Certificate that signifies his satisfaction with the work.

⁹ Murdoch, J and Hughes, W. *Supra* 3. pp. 184

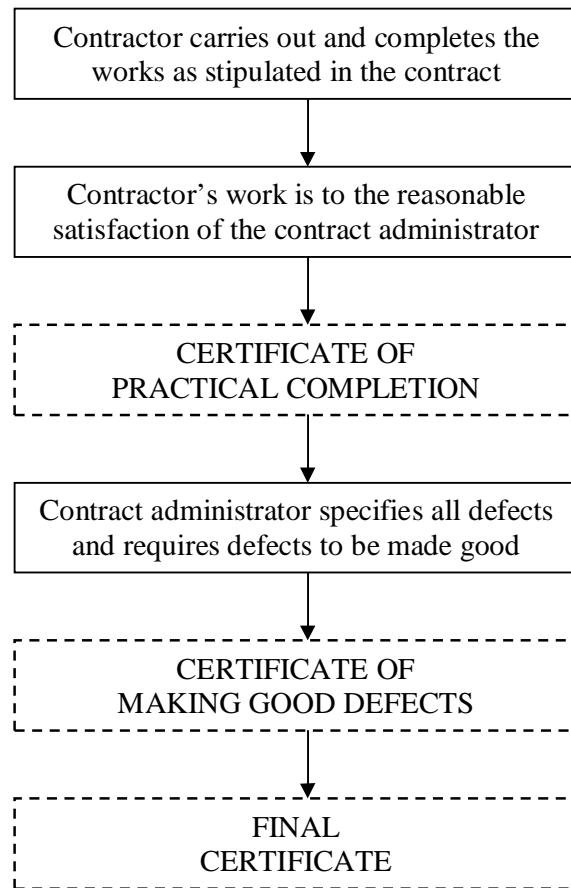


Figure 1.1 Practical Completion and Defects Liability¹⁰

1.2 Problem Statement

In Malaysia, section 74(3) of Contracts Act 1950 (Revised 1974) provides that the innocent party is entitled to get compensation for the failure of the defaulting party to discharge the obligation created by the contract. Therefore, the failure of the contractor to rectify the defects appear during Defect Liability Period (DLP) as required by the contract would constitute a breach of contract that entitles the employer to be remedied in the forms of damages. If the contractor has failed to rectify the defects as instructed by the contract administrator, the owner is entitled to

¹⁰ Sundra Rajoo. *Supra* 1. pp. 147

appoint another contractor and recover the cost of rectifying the defects to the original contractor.¹¹

However, Employers will need to be wary of Final Certificates as they can preclude the Employer from claiming damages from the Contractor for defects which appear after the issue of the Final Certificate. Generally, a Final Certificate will be binding and conclusive and cannot be opened up except in the cause of fraud. However, court will generally not regard a certificate as being final except where very clear words are used. Therefore, the conclusiveness of the Final Certificate depends upon the terms of the particular contract.¹²

Both PAM 1998 (Clause 30.8) and JKR 203 (Clause 49) form of contract states that “*No certificate...shall be considered as conclusive evidence as to the sufficiency of any work, materials or goods to which it relates*” This clause primarily states that none of the certificates issued under the contract would be treated as conclusive evidence as to the sufficiency of any work done, or material or goods supplied, which is the subject matter of the certificate. The contents of the certificates will not be final and binding in any dispute between the parties either in arbitration or in court. In other words, all certificates can be opened up, reviewed and revised by the arbitrator or the court.¹³

However, the provision in the CIDB 2000 form of contract is different with PAM 1998 and JKR 203. Clause 43.2 of CIDB 2000 states that the Final Certificate, unless either party commences any mediation, arbitration or other proceedings within 30 days after such certificate, shall be conclusive evidence that the works are executed to the reasonable satisfaction of the Superintending Officer and/or Employer.

¹¹ Mohd Suhaimi Mohd Danuri. Supra 7. pp. 57

¹² Mallesons Stephen Jaques, 2003. “Defects Liability Period - an introduction. Asian Projects and Construction Update.”

http://www.mallesons.com/publications/Asian_Projects_and_Construction_Update/6881582W.htm

¹³ Lim Chong Fong. Supra 8. pp. 114

There is existence of problems arise in relation to the conclusiveness of the Final Certificate. The first is whether the Employer is prevented from recovering damages for any defects which appear after the issuance of the Final Certificate? The second is whether the contractor is liable for defects which come to light after the issuance of Final Certificate? And ultimately, whether the contractor or the employer is liable for defects which come to light after the issuance of Final Certificate?

In view of the above, it is important for the contracting parties in the construction industry, especially the clients and the contractors, to have a complete understanding to their rights and liability in relation to the defects which appear after the issuance of Final Certificate.

1.3 Objective of Research

From the problem statement above, this research is prepared with an objective:

- ✓ To identify the legal position of the construction contract parties in relation to employer's rights and contractor's liabilities in defects after the issuance of Final Certificate.

1.4 Scope of Research

Given the legalistic nature of this research, the approach adopted in this research is based on case-law. The scope of this research will cover the following areas:

- a) Only construction cases will be discussed in the research.
- b) Court cases referred in this research include Malaysia, Singapore, and English cases.
- c) Standard forms of contract commonly referred to and examined in this research are Pertubuhan Arkitek Malaysia (PAM) (2nd Edition, 1998), Public Works Department (P.W.D) Form 203A and Construction Industry Development Board (CIDB) Standard Form of Contract for Building Works (2000 Edition).

1.5 Importance of Research

This research will deal closely with specific issues or problems arise between the contract parties with regards to construction defect after expiry of Defect Liability Period (DLP). The author aims to assist both clients and contractors in the construction industry to understand their rights and liability in relation to defects which come to light after the issue of the Final Certificate. This research is also to increase the awareness of the construction parties about their legal position in the liability of defect, so that unnecessary disputes can be avoided and assuring project success and tie-up a better relationship among the contractual parties.

1.6 Research Methodology

In order to achieve the research objectives, a systematic process of conducting this research had been organised. The detail methodology is divided into several essential steps as described below (see figure 1.2 also).

Firstly, initial literature review was done in order to obtain the overview of the concept of this topic. Discussions with supervisor, lecturers, as well as course mates, were held so that more ideas and knowledge relating to the topic could be collected. The issues and problem statement of this research will be collected through books, journal, cases, articles and magazines. The objective of this research will be formed after the issue and problems had been identified.

The next stage is the data collection stage. After the research issue and objectives have been identified, various documentation and literature review regarding to the research field will be collected to achieve the research objectives. Generally, primary data is collected from Malayan Law Journals and other law journals via UTM library electronic database, namely Lexis-Nexis Legal Database. The secondary sources include books, articles, seminar papers, newspaper as well as information from electronic media database on the construction contract law. These sources are important to complete the literature review chapter.

After the data collection stage, the author will analyse all the collected cases, information, data, ideas, opinions and comments. This is started with the case studies on the related legal court cases. The analysis will be conducted by reviewing and clarifying all the facts and issues of the case.

The final stage of the research process mainly involved the writing up and presenting the research findings. The author will review the whole process of the

research with the intention to identify whether the research objectives have been achieved. Conclusion and recommendations will be made based on the findings during the stage of analysis.

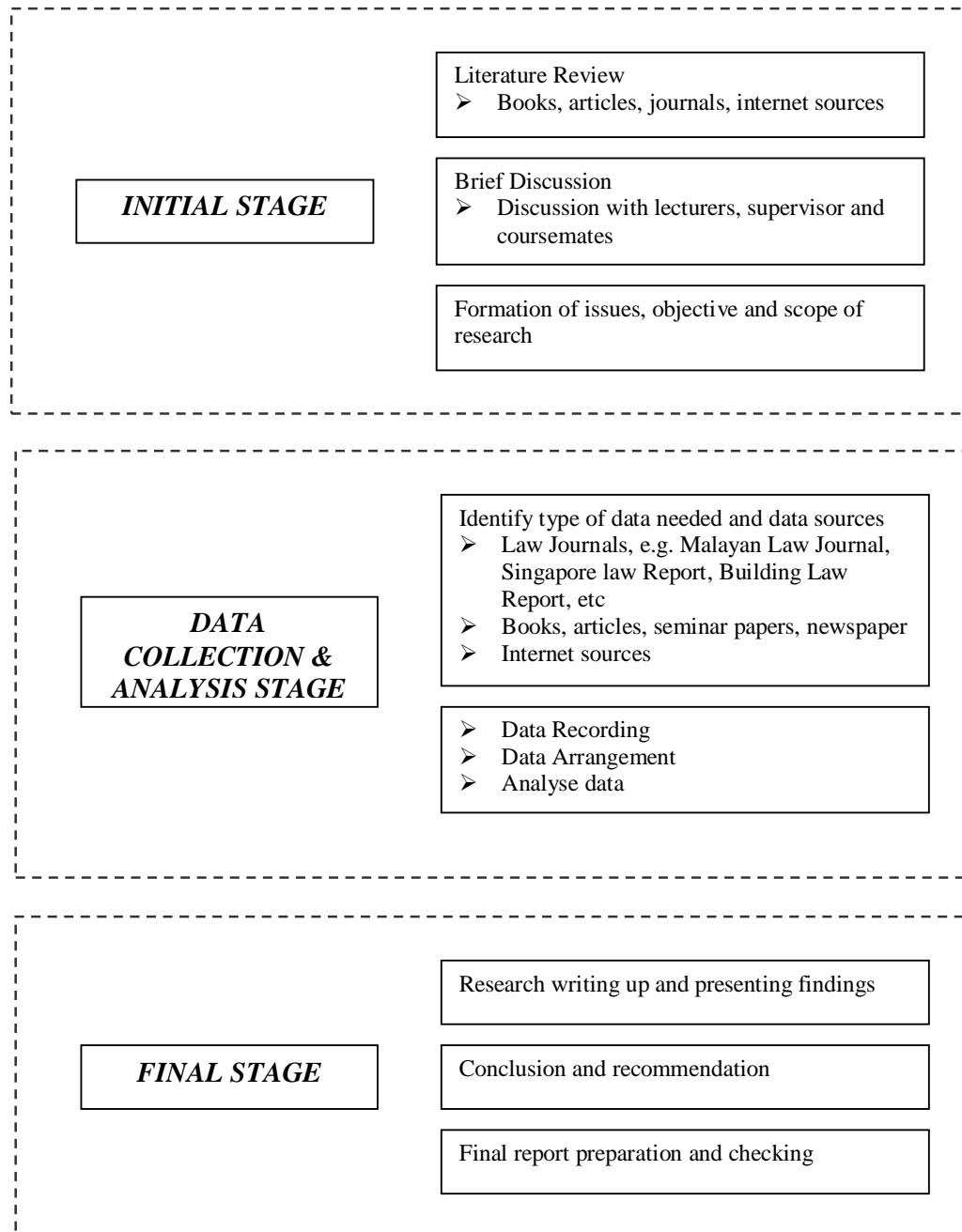


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AC	Appeal Cases, House of Lords
All ER	All England Law Reports
ALJR	Australia Law Journal Reports
AMR	All Malaysia Reports
BCL	Building and Construction Law Cases
BLR	Building Law Reports
Con LR	Construction Law Reports
CSOH	Court of Session (Outer House)
ER	Equity Reports
ICR	Industrial Cases Reports
ILR	International Law Reports
IR	Irish Reports
JP	Justice of the Peace / Justice of the Peace Reports
LIL Rep	Lloyd's List Reports
Lloyd's Rep	Lloyd's List Reports
MLJ	Malayan Law Journal
NSWLR	New South Wales Law Reports
QB	Law Reports: Queen's Bench Division
QSR	Queensland State Reports
SC	Session Cases
SCR	Supreme Court Reporter
SLR	Singapore Law Reports
WLR	Weekly Law Report