

LIMITATION PERIOD IN LATENT DEFECTS

MAZUAN BIN LIN

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*With love to my wife, Lily, my children, Adam, Nyanyah, Kasih and Orkid,
as well to my father, Hj Lin bin Abdullah and my seven siblings.*

*In loving memory of my mother, Allahyarhamah Meriam binti Ngah Jeboh,
the very first person who taught me the importance of education.*

*In honor of En. Jamaludin Yaakob, a construction law mentor to many
and with thanks
to all lecturers and my classmates for making each class a new adventure.*

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ABSTRACT

Under traditional contract, a contractor is responsible for the quality of material and workmanship either being expressed in the contract document or by implication. Contractors often believe that the latent defects is no longer their responsibility after the job is handed over to the employer or subsequent owner. On the part of employer or subsequent owner, the action taken against the contractor sometime was already too late since it may take year for them to discover the latent defects that occur. Much worse, an employer or subsequent owner does not realise the duration given to him under the statute to take an action. Once claimed barred by the statute, the contractor is no longer liable to the employer or subsequent owner. The objective of this study is to determine the recoverability of damages for latent defects caused by contractor under traditional contract. The research is done by analysing the law cases involved with limitation period and latent defects. Based on the research, it was found that if the aggrieved party wish to bring an action under the law, claim under contract and tort shall be brought six (6) years from the cause of action accrues. The cause of action for contract start from the date of breach, if it involved fraud, the right of action shall not start until the fraud is discovered. As for claim founded under tort, there are three (3) possible date of accruals which are, one, the installation date of the defective works; two, the date latent defect discovered or; three, the date of actual damage. As long as it is still within these duration, the employer or subsequent owner may pursue claims against the contractor for damages, provided the defects are as a result of the contractor's breach of contract.

ABSTRAK

Di bawah kontrak tradisional, kontraktor adalah bertanggungjawab ke atas kualiti bahan binaan dan mutu kerja sama ada dinyatakan di dalam dokumen kontrak atau secara tersirat. Kontraktor sering mempercayai bahawa kecacatan tersembunyi bukan lagi menjadi tanggungjawab mereka selepas kerja itu diserahkan kepada majikan atau pemilik berikutnya. Di pihak majikan atau pemilik pula, terdapat tindakan yang diambil terhadap kontraktor yang sudah terlewat kerana ia mungkin mengambil masa bertahun bagi mereka untuk menemui kecacatan tersembunyi yang berlaku. Lebih buruk, majikan atau pemilik tidak menyedari tempoh yang diberikan kepada mereka di bawah undang-undang untuk mengambil tindakan. Setelah tuntutan dihalang oleh had masa, majikan atau pemilik tidak lagi boleh membuat sebarang tuntutan terhadap kontraktor. Objektif kajian ini adalah untuk menentukan sama ada tuntutan ganti rugi masih boleh dilakukan bagi kecacatan tersembunyi yang disebabkan oleh kontraktor di bawah kontrak tradisional. Kajian dilakukan melalui analisis terhadap kes-kes perundangan melibatkan had masa dan kecacatan tersembunyi. Berdasarkan kajian ini, didapati bahawa sekiranya pihak yang terkilang ingin membawa tindakan di bawah undang-undang, tuntutan di bawah kontrak dan tort boleh dibawa enam (6) tahun daripada punca tindakan terakru. Punca tindakan bagi kontrak bermula dari tarikh pelanggaran atau jika terlibat dengan penipuan, hak tindakan tidak akan bermula sehingga penipuan itu ditemui. Bagi tuntutan yang diasaskan di bawah tort, terdapat tiga (3) tarikh kemungkinan punca tindakan terakru (1) tarikh pemasangan kerja-kerja yang cacat; (2) tarikh kecacatan tersembunyi ditemui atau; (3) tarikh kerosakan sebenar terjadi. Selagi ia masih dalam tempoh ini, majikan atau pemilik boleh meneruskan tuntutan terhadap kontraktor bagi ganti rugi, dengan syarat, kecacatan diakibatkan daripada pelanggaran kontrak oleh kontraktor.

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- Baxall Securities Ltd v Sheard Walshaw Partnership [2002] EWCA Civ 9.
- Beaman v A.R.T.S. Ltd. [1949] 1 KB 550
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Pirelli General Cable Works v Oscar Faber & Partners [1983] 1 All ER 65

Prosperland Pte Ltd v Civic Construction Pte Ltd [2004] 4 SLR 129

Robinson and PE Jones (Contractors) Ltd [2011] EWCA Civ 9

Rumbelows Ltd v Firesnow Sprinkler AMK and Installations Ltd [1982] 19 BLR 25

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LIST OF ABBREVIATIONS

ABBREVIATION	FULL NAME
AC	- Appeal Court
All ER	- All England Report
BLR	- Business & Legal Reports
CLJ	- Cambridge Law Journal
EGLR	- Estates Gazette Law Reports
<i>et al.</i>	- et alii (Latin meaning "and others")
etc	- et cetera
EWCA Civ	- Court of Appeal Civil Division
FBA	- Federal Bar Association
i.e.	- In example
Ibid	- Ibidem (Latin meaning "in the same place")
J	- Judge
LJJ	- Lord Justices of Appeal
Ltd	- Limited
MBI	- Majlis Bandaraya Ipoh
MLJ	- Malayan Law Journal
PWD	- Public Work Department
Q.B.D	- Queen's Bench Division

QB	-	High Court (Queen's Bench Division)
QC	-	Queen's Counsel
RAIA	-	The Royal Australian Institute of Architects
rev	-	Revision
RHC 1980	-	Rules of High Court 1980
s	-	Section
S.C.R.	-	Supreme Court Reports
S.C.R.	-	Supreme Court Reports
S.J.	-	Summary Judgment
SLR	-	Singapore Law Reports
UiTM	-	Universiti Teknologi Mara
UKHL	-	United Kingdom House of Lords (UK parliament)
UTM	-	Universiti Teknologi Malaysia
v	-	Versus
WLR	-	Weekly Law Reports

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A	Extraction of Statutory of Limitation

CHAPTER 1

INTRODUCTION

1.0 Background

Construction contract sets out rights, duties and liabilities of the parties to the contract. Generally, Ficken (2006) specified that the obligation of the contractor is to construct in accordance with the drawings and specification within the specified completion date. Failing which, the contractor will be liable for the damages resulted from his failure. Chan (2002) also expressed in the same manner that in a traditional contract, the obligation of the contractor, in the execution of the works until completion obliges him to deliver the workmanship and materials as sought by the engineers and architect according to specification.

There is a huge misunderstanding among the contractors that their obligation under the contract is limited to the express provision under the contract only (Ojo, 2006). In fact, Simon (1979) stated that a lot of contractual liability may not be expressed but implied into the contract. As example, without an express provision, it

is the contractor's contractual liability that he is obliged to perform his work in a good workmanlike manner¹.

Frank E. and James A. (1988) specified that the responsibility, liability and obligation of the parties are not only within the contract as they are more inclusive and broader. The express provision may stipulate that the contractor is obliged to act reasonably but although without such express provision, the contract may still be implied by the law of torts.

However, despite the employer's requirement under the contract and the implication under torts, Harban (2003) said in practice, there will be bound to be latent defects in completed works and certain degree of the so-called trifling patent defects.

Based on the article by Pinsent Mason (2011), at the end of the contract, the contractor is still not release from his obligation under the contract until the time-barred during the end of the period called statutory limitation period. This is the period where the contractor maybe still liable for defects. According to Herriott J (2012), under the law, limitation period is the duration within which a contracting party may commenced the proceedings for breach of contract and duty of care.

It is important to understand exactly when the time limit start. Under the Limitation Act 1953, time starts to run from 'cause of action' which is six year from the date of accruals for actions relating to torts and contracts². The limitation in term of time can be extended by statute due to several factors e.g. fraud and fraudulent concealment³. Despite the time limit indicated under the statute, the question arise how long the employer or purchaser may recover damages arising from the latent defects cause by the contractor until the time barred.

¹ Duncan v Blundell (1820) 171 ER 749

² Section 6, Limitation Act 1953

³ Section 24 & 29, Limitation Act 1953

1.1 Statement of Issue/Problem Statement

Under construction contracts, contractor is responsible to rectify any defects which appear during Defect Liability Period at his own cost⁴. However, only patent defects may be discovered during this stage. There are defects that can only be discovered far after the contract ended which called as latent defects. This kind of defect may allow the employer to take legal action to claim from the contractor a damages, on condition that the defects are caused by breach of contract and the time was not barred (Frank E. and James A., 1988).

Ogalagu (2012) indicated the contractors is often believe that their liability is restricted to the express provision in the contract. Nevertheless, they also believe that upon the contract ended, it is the employer or subsequent owner who hold the liability effecting repairs of latent defects. This statement is supported by Robinson (1996) that the contractor tended to assume that they no longer liable for defects after the contract ended moreover the contract administrator is only empowered under the contract until the end of the defects liability period.

Duhaime (2012) stated that it would also be illogical to allow legal claims to exist forever. Therefore, a claim for breach of contract or tort for latent defects must be brought before the court within a certain period of time. This is called a limitation period and is usually set in a statute of limitations⁵. There was cases where an employer brought an action to the court against the contractor but was held too late⁶.

Should the aggrieved party wish to bring an action under the law, section 6(1)(a) of the limitation act 1953 provides that claim under contract and tort shall be brought six (6) years from the cause of action accrues. After the contract being

⁴ E.g. Clause 15.4 PAM 2006, Clause 48.1(a) PWD 203A (rev-2010)

⁵ E.g Malaysia: Limitation Act 1956

⁶ See Robinson and PE Jones (Contractors) Ltd [2011] EWCA Civ 9

completed, an employer may no longer giving instruction under the contract. The only option left is to bring an action under the contract or tort. The issue arose if the latent defects only discovered after 6 years from the completion of the project. Whether an employer still stand a chance to bring an action to the court of law after that period.

1.2 Objective

The objective of the research is to determine the recoverability of damages for latent defects caused by contractor under traditional contract.

1.3 Scope of Research

The method used in this research is case law based. The dissertation focal point is to determine when does the cause of action accrues in latent defects claim. It is limited to the study in the areas of limitation law only.

The scope of this study will be confined to the following areas:

1. Latent defects
2. Traditional contract
3. Claim made under tort and contract
4. Cases related in limitation period from England, Singapore and Canada

The limit is set to traditional contract only in order to focus on the latent defects caused by workmanship and material only. It is crucial to narrow down the scope in order to eliminate the element of design which may mislead the result.

1.4 Significance

Poor understanding of the starting point of the limitation period has led to frustration amongst the various parties in construction contract when time is already barred. The purpose of this study is to give an insight into the issues regarding when the cause of action accrues as well as the point where the time is barred and the court reaction and its decision concerning the issue. It is hoped that the findings of this study will assist the players in the construction industry to understand the significance of the statutory limitation period, plus understand the period that they are still liable to the contract and put their best effort to adhere to the timeline.

1.5 Methodology

The outline process for research and the approach used is vital as a guiding principles for preparation of the research in order for the research to be executed systematically to reach the objective. Essentially, the process is consist of five (5) primary phases namely research issue identification, literature review, data collection, research analysis and lastly, the conclusion.

The early phase consist of the identification area of issues including the framework of the research objective. First, the concept outline for the topic will

through the preliminary literature review. The information can be obtained from various sources of reading materials such as varies from books, journals, website and even newspapers. After the formulation of the research objective, the scope of research and the limitations will be identified as well as the research title.

Throughout the Literature Review, gathering of various literature regarding the research area is the utmost important in order to achieve the research objectives. Data will be gathered primarily by documentary analysis. The gathered data and info will be systematically documented. Data will be gathered primarily from LexisNexis academic database. Important and significant cases will be gathered and utilised for the analysis at the subsequent phase. Furthermore, secondary data from books, journals, seminar handouts, newspapers and website articles are also beneficial. The books which significant for this research will be acquired from the university's libraries as well as other public library.

At data collection phase, the whole collection of data, ideas, info, comments and opinions will be organised and documented with systematic. Important and significant cases is gathered and utilised for the analysis at the later phase.

The fourth phase of research is the analysis. It includes data analysis, construal and data organisation. After the previous related court cases are gathered, review and clarification of the cases facts will be conducted. An attention will be given on the issue of this research. After issues being identified in each case, a critical analysis with detailed discussion and comparison will be conducted to reach the research objectives.

In the finale, there will be a discussion based on the findings from the previous phase to accomplish the goals or objective of this research and reach a conclusion.

1.6 Chapter Organisation

The following will provides an introduction to the structure of the thesis and the way it will be presented. It will described the chapters involved and a summary of sub-topic included in the chapters.

1.6.1 Chapter 1: Introduction

The first chapter will give an overview to the research topic and covered a few subtopics. The first subtopic is background of the study, followed by problem statement which stated the issues that will be discuss in the study. Then, the next subtopic covered on objectives of the research which stated the aims of the study; scope of the research; significance of the study and finally the research methodology that to be used during the process of research.

1.6.2 Chapter 2: Latent Defects

This chapter discuss on definition of latent defects, nature of defects, Defects in quality of materials, defect in standard of workmanship.

1.6.3 Chapter 3: Limitation period

Briefly, this chapter will be covered on definition of limitation period and cause of action. Later on, it will discuss on the accrual for cause of action and two tests that are widely used currently for tort which are the discoverability test and the date of actual damage test. It will also deliberate on concurrent rights in contract and tort and finally on Malaysian positions on cause of action for latent defects.

1.6.4 Chapter 4: Research Methodology

The second chapter will explain in detail on how the research methodology elaborated in Chapter 1 will be conducted in order to obtain all the information needed for this study. It will include the flow of the research as well as the keywords used to search the substance.

1.6.5 Chapter 5: Case Analysis

This chapter is an essential part of the research. Here, case law on limitation period shall be analysed and the results discussed in a logical qualitative analysis. The task is to ascertain whether the employer may recover damages in relation to latent defects caused by a contractor under a traditional contract.

1.6.6 Chapter 6: Conclusion

This chapter is the final part of the whole report and is a conclusion chapter. Briefly, this chapter will give a detail summary of the research finding to a logical conclusion of the previous chapter.

1.7 Conclusion

While this chapter is more of an introduction to the research topic, it also provides some background with regard limitation period and the liabilities of the contractor on the latent defects after the contract ended. It also described that claims founded on contract and tort have a limitation in term of duration where plaintiff may no longer bring their action to the court when the time barred. This chapter also elaborates the way the research will be conducted in order to meet the objective of the studies.

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