

LAW OF RESTITUTION IN MALAYSIAN CONSTRUCTION CONTRACT

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Dedicated to my family members.

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## ABSTRACT

Construction contracts normally set out conditions and procedures that contractors should comply with when claiming payments. For example, for claiming payment for additional work, the contractor must submit the written instruction and the notice to claim as condition precedent. Employers may refuse to make payment when these requirements are not fulfilled. The main issue is whether the employer is allowed to benefit from the contractors' works without paying for them. In other words does the principle of restitution or unjust enrichment applicable in the construction contract? The objective of this research is to identify whether the law of restitution, specifically the principle unjust enrichment, applies to the construction contract. The approach adopted in this research is documentary analysis of case law in Malaysian construction industry. The relevant cases were extracted from Lexis Malaysia online database, and other sources as well. The finding is that the courts in Malaysia have applied principles of law of restitution and unjust enrichment in construction contracts. There are three constitutive elements for the establishment of the unjust enrichment. The first element is that whether the defendant is enriched and received a benefit. The second element is whether the benefit received is at the expenses of the plaintiff, where it suffered a loss regarding monetary or suffer an "accusation of wrongdoing or breach of duty" against the plaintiff. The third element is whether the retention of the benefit actionably unjust according to the existing case law, which brings the valid legal grounds for the reversal of the benefit received. In conclusion, the Malaysian courts have consistently allowed contractors to recover their payments for additional works and do not allow employers to benefit the works without having to pay for them.

## ABSTRAK

Kontrak pembinaan biasanya menetapkan syarat-syarat dan prosidur bagi kontraktor untuk mengikut bagi menuntut pembayaran. Contohnya, untuk menuntut pembayaran bagi kerja-kerja tambahan, kontraktor mesti menghantar arahan bertulis untuk menuntut bagi syarat terdahulu. Majikan mungkin akan enggan membuat pembayaran jikalau syarat tersebut tidak dapat memenuhi. Isu penting ternyata jikalau majikan akan mendapatkan kebaikan daripada kontraktor dan tidak membuat bayaran. Kajian ini bertujuan untuk mengenal pasti sama ada undang-undang restitusi (pengembalian) ataupun “unjust enrichment” dapat digunakan dalam kontrak pembinaan. Kes undang-undang berdasarkan industri pembinaan di Malaysia telah digunakan dalam penyelidikan ini. Analisis dokumentari berdasarkan undang-undang restitusi dan unjust enrichment telah diberi tumpuan. Kes-kes mahkamah yang berkaitan telah dipakai daripada *Malayan Law Journal* dan sumber-sumber yang lain. Terdapatlah tiga unsur konstruktif telah dibenarkan bagi menentukan “unjust enrichment”: (1) sama ada defendan telah diperkaya dan telah menerima manfaat; (2) sama ada manfaat yang diterima adalah pada perbelanjaan plaintif, di mana ia telah mengalami kerugian dari segi kewangan atau mengalami “tuduhan salah laku atau pelanggaran kewajipan” terhadap plaintif; dan (3) sama ada pengekalan manfaat tersebut adalah tidak adil dari segi undang-undang oleh kerana kesediaan undang-undang kes yang membolehkan keputusan untuk memperbalikkan manfaat yang diterima. Konklusinya, mahkamah-mahkamah Malaysia telah memberi sumbangan bagi kontraktor untuk memulihkan pembayaran yang sepatutnya didapati daripada kerja-kerja tamabahan telah disampaikan bagi majikan, dan tidak memberikan majikan dalam mendapatkan kebaikan daripada tidak membuat bayaran balik bagi kontraktor.

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## LIST OF ABBREVIATIONS

AC	-	Appeal Cases
All	-	Australian Law Librarian
All ER	-	All England Law Reports
BLR	-	British Law Reports
CB	-	Common Bench Reports
CIDB	-	Construction Industry Development Board
CLR	-	Commonwealth Law Reports
ConLR	-	Construction Law Reports
EG	-	Estates Gazette (UK)
ER	-	English Reports
EWHC	-	High Court of England and Wales Decisions
I.L.R	-	International Law Reports
Ibid	-	Ibiden (in the same)
MLJ	-	Malayan Law Journal
PAM	-	Pertubuhan Arkitek Malaysia /Malaysian Institute of Architects
PWD/JKR	-	Public Works Department/Jabatan Kerja Raya
SCR	-	Supreme Court Reports
SLR	-	Singapore Law Reports
UTM	-	Universiti Teknologi Malaysia
WLR	-	Weekly Law Reports

## **CHAPTER 1**

### **INTRODUCTION**

#### **1.1 Background of Study**

There was a question that the contractor entitled to claim from the employer for additional works that had been done throughout the construction project? The answer was very straight forward as specified in provisions in the standard form of contract.

Under Clause 11.2 of PAM 2006 in which stated that “no variation order by the architect or subsequently sanctioned by him shall vitiate the Contract”. This clause empowers the Architect to authorise in writing any difference made which according to an instruction of the Architect, at which the change of work must relate to “the Works” in the contract as well as in contemplation of the parties. Without it shall be given the meaning that contractor may be lost in the right for claiming for the variation work as it was not ordered.

The case of “Sabah Shipbuilding Repairing & Engineering Sdn Bhd v. Pernas Hall Thermotank Engineering Sdn Bhd” further elaborates the above statement, where the plaintiffs had put up a claim on the variation of works carried out without the consent of both parties. The court had made a verdict, which set aside the summary judgment by Senior Assistant Registrar, where the plaintiffs were not able to show the variation works were according to Architect’s Instructions. The plaintiffs were not able to prove whether such instruction was given by the Architect, where there were provisions in the contractual



agreement for variation work was that it had to be Architect's Instruction to justify whether the new works had been instructed to contractor to perform. Such appeal was allowed in this case.

There was a recent case of "ID Engineering (M) Sdn Bhd v. Goldpage Assets Sdn Bhd", which the contractor was questioned whether there were Architect's Instructions issued upon for the contractor to carry on the Variation Orders works. However, the contractor was able to prove Architect's internal documents were supporting such Variation Orders works and were enough to justify the verification and acknowledgement by the Architect. Based on the two cases listed above, it explained that the contractor was able to claim the Variation Works, given that there was a valid documentary evidence to support such claim. On the other hand, when there was no such substantial evidence to prove by the contractor, the employer could have taken it as an advantage to not making any payment.

The contractor who performed the work can either seek for the amount as specified in the Contract or according to the law of restitution for the sake of claiming such work done to the employer. According to David Fung (1994), the concept of unjust enrichment, in which based on the restitution principles, could help to explain the underlying principle of Section 71 of the Contracts Act 1950. Section 71 stated that:

*“Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.”*

Law of Restitution considered as a legal remedy or equitable remedy. John Bourdeau defined “restitution” as “the relinquishment of a benefit or the return of money or other property obtained through an improper means to the person from whom the property was taken”. Unjust enrichment and quantum meruit are the legal remedies under the context of the law of restitution, in which the court would impose to the wrong-doers to return a payment that gained from the claimants. Unjust enrichment is one of the elements in quantum meruit claim.

The word “unjust” as defined by Oxford Dictionaries as “not based on or behaving according to what is morally right and fair”; whereas “enrichment” was “the action or process of improving, enhancing and making someone to be wealthy or wealthier”. The “unjust enrichment” is meant by “the retention of a benefit conferred by another, without offering compensation, where compensation was reasonably expected.” In layman terms, one person was “enriched” or in another word “gained” at the expenses of another party in which was in the opposite situation, and the law treated it as “unjust” situation. The law may reverse the benefit back to the claimant and thus restore the situation to a just and equitable state for both the contractor and employer. The law of restitution attempts to redress any unjust enrichment which one party may have gained the expense of another. As stated by Goff & Jones (2011):

*“Unjust enrichment is concerned with transfers of value between claimants and defendants, and the claim for unjust enrichment is not compensation claim for the*

*loss but recovery of a benefit unjustly gained by a defendant at the expense of the claimant.”*

The statement above explains unjust enrichment that it should be in the context of “restitution” or “restoration” instead of the term “compensation”. In the case of “Dream Property Sdn Bhd v Atlas Housing Sdn Bhd”, where the appellant has filed a case for unjust enrichment against the respondent. The Federal Court stated that the amount of unjust enrichment gained by the respondent was not the little costs of construction of the mall. It was the value of the enhancement, improvement or enrichment of the land. There were all at the appellant’s costs, effort and experience of the shopping mall.

The doing of the act or delivery of the thing by the person (usually the plaintiff) was further elaborated in the case of “Siow Wong Fatt v Susur Rotan Mining Ltd & Anor” that the following elements must establish:

- 1. Such act or delivery of the thing must be lawful;*
- 2. Done for another person;*
- 3. Done with a non-gratuitous intent; and*
- 4. The opponent enjoys the benefit of the act or delivery*

Further to the above statement, Peter Birk (1989) explained that it was essential to determine that the claimant (plaintiff) was stressing:

- 1. Benefit received is consider as an enrichment to the defendant; or*
- 2. The defendant is benefited by the acquisition of a right (or release of an obligation) at the claimant’s expense. It seeks specific restitution of that right (or reinstatement of that obligation) in law.*

When the law of restitution comes about, unjust enrichment can only be established (before the contractor could have succeeded in the compensation claim) when the three constitutive elements were justified. The first element must be determined that the employer was enriched and received a benefit. Secondly, whether the benefit received was at the expenses of the contractor, where the latter had suffered a loss regarding monetary or suffer an “accusation of wrongdoing or breach of duty” against the contractor. Thirdly, whether the retention of the benefit actionably unjust according to the existing case law, which brings the valid legal grounds for the reversal of the benefit received. If the contractor was able to demonstrate there were the elements, as shown above, the restitution-based claim could have succeeded and was expecting to get paid for such act or delivery.

On the other hand, “quantum meruit” is another law of restitution, in which help to demonstrate the recovery on a contract that was meant as “implied in fact”. It was defined under Oxford Dictionaries as “reasonable sum of money to be paid for services rendered or work done when the amount due is not stipulated in a legally enforceable contract”.

The recovery in the context of quantum meruit shall be based on the agreement of the parties, in which there were being contractual in nature and should be sound in law. In the case of “Takenaka Corporation v ASM Development Sdn Bhd”, where quantum meruit should reimburse the plaintiff work under the second contract. The court had referred by Anthony May, quantum meruit is explained as:

*“Quantum meruit means ‘the amount he deserves’ or ‘what the job is worth’ and in most instances denotes a claim for a reasonable sum. A claim on a quantum*

*meruit basis cannot arise if there is an existing contract between the parties to pay an agreed amount.”*

H. Hugh McConnell further elaborates that a contractor must be able to show that the recipient (usually referred as the employer) had acquiesced (or accept something reluctantly but without protest) in the provision of services. Also, the contractor must show that the employer was aware that the provider (contractor) expected to be compensated as well as the action done by the employer was unjustly enriched thereby.

## **1.2 Statement of Problem**

If Contract is doing extra work, then is there by any way they can claim back the portion for the work done? However, the employer could have brought provisions as provided in the standard form of contract (e.g. under Clause 11.2 of PAM 2006 which stated that no Variation Order by the Architect or subsequently sanctioned by him should vitiate the Contract) to not making any payment to the Contract as it was not ordered. Thus, the work done would be considered “forfeited” from the contractor to employer. The above situation is merely a simple illustration to bring up the issue of the bad situation, it was a huge topic, and the answer is heavily dependent on particular facts in the case.

There is another situation where there is no binding letter of award or contract exist among the parties (among other things, the contractor and the employer), there could be an unfair or unjust position to have occurred when the contractor could have performed the work. Whenever there is injustice in the case, under the English Common Law, this is where “Law of Restitution” come about, in which the court could reverse the judgment against the owner, and order restitution to restore or return the benefit to the claimant.

## **1.3 Objective of the Research**

The main objective of this research is to identify whether the law of restitution, specifically the unjust enrichment, applies to the construction contract.

## **1.4 Scope of the Research**

The approach adopted in this research shall be documented cases in the context of Malaysian construction industry. Also, the documentary analysis will specifically focus on Law of Restitution and Unjust Enrichment. Relevant court cases will be taken from Malayan Law Journal and other sources as well. Also, the relevant provision as stated in Standard Forms of Construction Contract that had applied in Malaysia such as PAM Contract 2006, and other provisions that had indicated under Common Law.

## **1.5 Significance of the Research**

In the local context, there were many situations where the employer could have taken unfair advantage to the contractor, in which the latter could have had imperfect knowledge of the contractual and legal expertise as well as less bargaining power towards the paymaster. However, the contractor could be in a disadvantaged position when it comes to the situation where the work has been done, and they were still not get paid.

The purpose of this research is to justify the system of restitution law and the recommendations for the legitimate right for the contractor to demand the claim from the employer. The contractor to claim on the additional work done, where the situation happened is that the contractor was in “unjust” setting and the another (usually referring to the paymaster - employer) was “enriched”.

It was hoped to provide a resolution to the construction practitioner in Malaysian construction industry by developing this profile in the non-payment and other payment disputes that are “pandemic” in the construction sector itself. It is necessary for the construction practitioners and lawmakers to seriously look into the payment issues that are kept on increasing in the market.



## **1.6 Research Methodology**

A systematic research process had been utilised. The study contains of five processes, there are: -

1. Identification of the research issue and literature review
2. Collection of data
3. Analysis of research data
4. Generation of conclusion and recommendation

### **1.6.1 Identification of the Research Issue and Literature Review**

The first stage is to identify the area of study and research issue, in this case, the Law of Restitution. Literature review was done to obtain the overview of the particular research topic. It involved reading published materials like articles, journals, seminar papers, related case laws as found in Malayan Law Journal (Lexis Nexis) and other relevant research materials. Then, the next step is to come out with a suitable objective and to design a scope of the study.

### **1.6.2 Collection of Data**

Secondly, it is important to develop the research design and data collection before proceed with the analysis of data. The main purpose of research design is to determine the necessary data to be collected and the method to obtain it. The data will be gathered through the documentary study on the available court cases or Malayan Law Journals from Lexis-Nexis website. The data can also be collected from published resources, for example, books, journals, articles, the various standard form of contract and related statutory acts are essential sources in collecting primary and secondary data. Data collection stage is a crucial stage where it leads the researcher towards achieving the main objectives.

**Table 1.6.2: Searching Hits for Case Law of Unjust Enrichment in Lexis-Nexis Malaysia**

<b>Item</b>	<b>Keywords</b>	<b>Searching Hits</b>
	<u>Malayan Law Journal Reports</u>	
1	Unjust	1199
2	Enrichment	145
3	Unjust Enrichment	122
4	Unjust Enrichment + Construction	56
5	Unjust Enrichment + Building Contract	8
	<u>Malayan Law Journal Unreported</u>	
6	Unjust	1239
7	Enrichment	254
8	Unjust Enrichment	226
9	Unjust Enrichment + Construction	109
10	Unjust Enrichment + Building Contract	9
	<u>Journal Publication</u>	
11	Unjust	165
12	Enrichment	23
13	Unjust Enrichment	20
14	Unjust Enrichment + Construction	12
15	Unjust Enrichment + Building Contract	2

Table 1.6.2 shows the keywords searching hits which is used for searching case laws in Lexis-Nexis Malaysia, which the above searching hits help to narrow down the numbers of case laws available in Malaysia. Therefore, it helps in limiting the scope of the research.

The searches began with three different sources in which was available in the Lexis-Nexis Malaysia website, and there are Malayan Law Journal (MLJ) Reports, Malayan Law Journal Unreported (MLJU) Reports and Journal Publications. There are many cases can be found under the search term of “unjust” and “enrichment”. There are thousands of results for “unjust”, which there are 1199 results in MLJ, 1239 results in MLJU and 165 publications available.

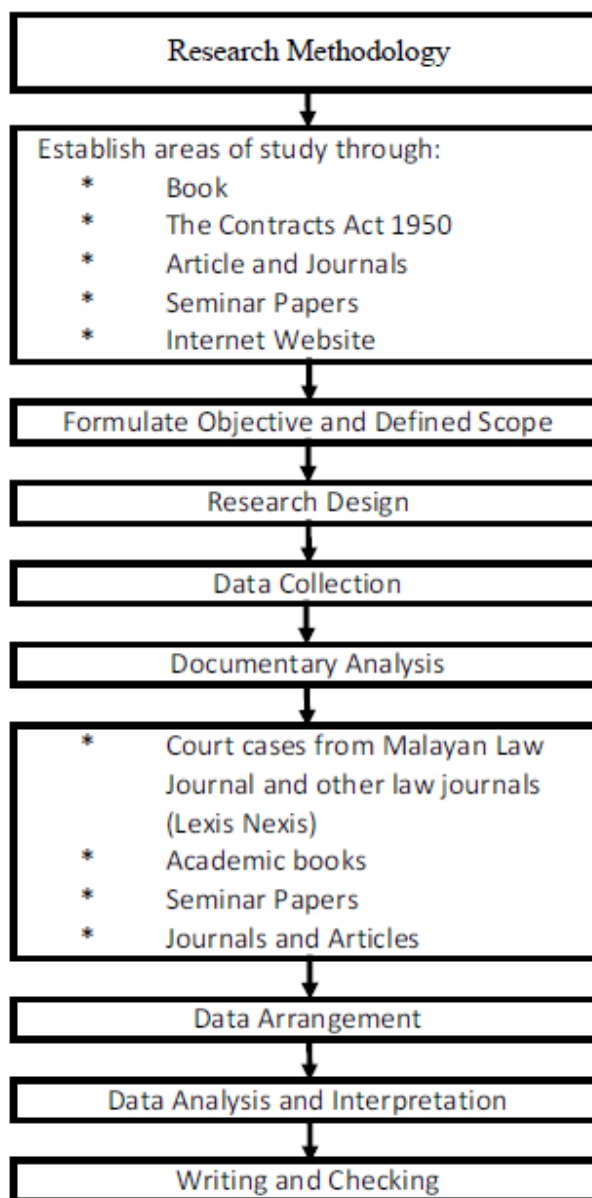
To narrow down the searches, the author had search within the results of “unjust enrichment”, in which it will be more accurate in the searching result. There are around 122 results in MLJ, 226 results in MLJU and 20 publications available in Lexis-Nexis Malaysia. Furthermore, the “construction” term was added to the search list, which the results were further narrowed down: 56 MLJ case laws, 109 MLJU case laws and 12 publications. It was followed by a more accurate exploration on “building contract” in which it will be more relevant to the subject of this research. Finally, it was sorted out that there are only 8 case laws as reported in MLJ, 9 case laws as published in MLJU and two publications available in Lexis-Nexis Malaysia.

### **1.6.3 Analysis of Research Data**

During this stage, the collected case laws and all the relevant information will be arranged and analysed and interpreted based on the literature review. The researcher will carefully consider the relevant case laws collected and will make particular attention to the cases

### **1.6.4 Generation of Conclusions and Recommendations**

This section is the final stage of the study where it involves mainly the write-up and checking of the writing. The conclusion will be made based on the findings during the stage of analysis. Essentially, the whole process of the study is reviewed to identify whether the research objective has been achieved.



**Figure 1.6.4: Research Methodology Flowchart**

## **1.7 Organization of Chapters**

This chapter is an introduction to the topics, problem statement, objectives and scope of research, the significance of research, research methodology and organisation of chapters. The chapters of the study have been organized in the following manner: -

- a) Chapter 1: Introduction
- b) Chapter 2: Law of Restitution
- c) Chapter 3: Issues Regarding the Law of Restitution in Malaysian Construction Contract
- d) Chapter 4: Analysis of Law Cases Related to Unjust Enrichment
- e) Chapter 5: Conclusion and Recommendation

### **1.7.1 Chapter 1: Introduction**

In Chapter 1, the research topic will be introduced. The subtopics in this introductory chapter shall be the background of the project, problem statement, objective, scope of the research, significance of the project as well as research methodology.

### **1.7.2 Chapter 2: Law of Restitution**

In Chapter 2, the law of restitution will be introduced and discussed in detail, for instance, the definition of the law of restitution as well as the general principle of the law of restitution under English Common Law. Also, unjust enrichment and quantum meruit will be further explained in this chapter. The chapter will be ended with a conclusion to the law of restitution under English Common Law.

### **1.7.3 Chapter 3: Issues Regarding the Law of Restitution in Malaysian Construction Contract**

In Chapter 3, the main focus of this research, which is the law of restitution, will be realigned into Malaysian construction context. Before the conclusion to be made for the law of restitution in Malaysian construction industry.

### **1.7.4 Chapter 4: Analysis of Law Cases Related to Unjust Enrichment**

In Chapter 4, the application of the law of restitution will be discussed in local (Malaysia) context. This chapter will include the documentary analysis of Malaysia's case laws regarding unjust enrichment that were available in Malayan Law Journal and other sources. After that, recommendations will be made known to the construction participants regarding the unfair advantage that existed in the local construction context. The chapter will be ended with a conclusion to the application of the law of restitution in Malaysian construction industry.



### **1.7.5 Conclusion and Recommendation**

In Chapter 5, the research finding will be surfaced, a general conclusion and recommendation will be made to the current construction setting. Undoubtedly, the constraint that could be occurred during the studies will be identified in this chapter. Due to the study constraint that might have faced during this research, suggestions will be proposed for the sake of future study. This chapter will be ended up with a general conclusion for the law of restitution in Malaysian construction industry.

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