

NOTICE OF INTENTION TO CLAIM FOR LOSS AND EXPENSE

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## **DEDICATION**

**This thesis is dedicated to...**

My wife **Kasmia Mangati**, My sons **Adi Amru, Muhammad Saad**, My daughters  
**Mia Hanisah, Mia Husna** and all my family members, teachers and lecturers....

**“May Allah guide us to the right path.....”**

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Bismillahirrahmanirrahim, In the Name of Allah the most Gracious and Most Merciful and Peace be upon to Rasullulah S.A.W.

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## **ABSTRACT**

Any event which disturbs and prolongs the project time or causing the project cost increase will make the aggrieved party to claim for loss and expense. Notification is one of the problems identified in managing claim for loss and expense in Malaysia construction industry. Before the claim to be successful the aggrieved party must follow the precondition or clause provision as stipulated in the conditions of contract. The purpose of this study are to identify the issues pertaining to notice of intention to claim for loss and expense claim and to identify judicial decision of defective notice of intention to claim for loss and expenses in construction contract. This research was conducted based on data analysis from judicial decision. International cases and local cases have also been reviewed. Lexis Malaysia web site was used as the research instrument. Thirteen (13) related cases pertaining notices on loss and expense issues have been analysed. The finding from the research shows that there are four (4) main issues usually brought to the judicial decision. The very pertinent issues are failure to the contractor submitting the notices within the time stipulated, secondly issue pertaining notice procedure, thirdly the ambiguity of the clauses itself especially for bespoke or tailored agreement and fourthly the duty of care issues by the contract administrator. This research also has found out that the judicial decision is not in uniformity in making the decision pertaining defective notices. Assessing notice of event for loss and expense also is the most critical part and this research found that claim have been rejected because of not following notice requirement. It is important for the construction industry players and contract practitioners to be well versed in the issues which are brought to the judicial decision. Contract administrator must has a higher understanding how to handle early notice when disrupted event occur and dealing with loss and expense claim fairly and proper manner.

## ABSTRAK

Sebarang peristiwa yang menyebabkan gangguan dan pemanjangan tempoh projek atau menyebabkan kos projek meningkat akan menyebabkan pihak yang terkilan menuntut kerugian dan perbelanjaan tambahan. Notis merupakan salahsatu masalah yang dikenalpasti dalam pengurusan tuntutan kerugian dan perbelanjaan tambahan dalam industri pembinaan di Malaysia. Sebelum tuntutan boleh direalisasikan, pihak yang terkilan perlu mematuhi prasyarat atau peruntukan klausa sebagaimana yang dinyatakan dalam syarat-syarat kontrak. Tujuan kajian ini untuk mengenalpasti isu-isu berhubung notis tujuan tuntutan kerugian dan perbelanjaan tambahan dan mengenalpasti apakah keputusan kehakiman terhadap kecacatan dalam notis tujuan tuntutan kerugian dan perbelanjaan tambahan dalam kontrak pembinaan. Kajian ini dibuat berdasarkan analisis data kes-kes yang telah diputuskan dimahkamah. Kes-kes dalam dan luar negara telah di analisa. Laman web Lexis Malaysia telah digunakan sebagai medium kajian. Tigabelas (13) kes berkaitan notis tuntutan kerugian dan perbelanjaan telah dikenalpasti dan dianalisa. Penemuan daripada kes-kes yang telah dianalisa menunjukkan terdapat empat (4) isu utama yang dipertikaikan di mahkamah untuk diputuskan. Isu utama ialah apabila kegagalan kontraktor mengemukakan notis dalam masa yang ditetapkan, isu kedua berkenaan prosidur notis, ketiga, berlakunya kesamaran pada klausa terutama perjanjian yang tidak menggunakan borang kontrak piawai dan keempat isu berhubung tanggungjawab sebagai pentadbir kontrak. Daripada kajian ini juga mendapati terdapat beberapa perbezaan berhubung keputusan kehakiman dalam isu kecacatan notis tuntutan. Menilai notis dari tarikh peristiwa untuk tuntutan kerugian dan perbelanjaan adalah merupakan perkara utama yang juga menjadi punca tuntutan kerugian dan perbelanjaan tambahan di tolak disebabkan tidak mematuhi kehendak notis. Sangat penting untuk pemain industri dan pengurus kontrak pembinaan memahami isu-isu yang telah dibawa ke mahkamah untuk diputuskan. Pengurus kontrak mestilah mempunyai kefahaman yang tinggi bagaimana untuk menangani notis awalan apabila peristiwa gangguan berlaku dan menangani tuntutan kerugian dan perbelanjaan seadil-adilnya dan sebaik mungkin.

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## **LIST OF ABBREVIATIONS**

AIAC	-	Asian International Arbitration Centre
A. I	-	Architect Instructions
CA's	-	Contract Administrator
EOT	-	Extension of Time
EWHC	-	England and Wales High Court
JCT	-	Joint Contract Tribunal
MLJ	-	Malayan Law Journal
PAM	-	Pertubuhan Arkitek Malaysia
PD	-	Project Director
PWD	-	Public Work Department
SO	-	Superintending Officer

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## CHAPTER 1

### INTRODUCTION

#### 1.1 Problem Background

The aim of a claim is to prove on the balance of probabilities that there is an entitlement under the contract and/or at law. For it to succeed, the facts of the events need to be presented logically and be substantiated. The contract must be examined in light of the law to determine whether the events give cause to entitlement. On the other hand, if there are some fault or weakness, it could give rise to arguments on why such events should not affect the cause. In summary, the essential of a valid claim must include the cause, effect, entitlement and substantiation.<sup>1</sup>

In PWD Form 203A (Rev 1/2010) and PWD Form DB (Rev.1/2010) Condition of Contract there are few provisions to be the ground for the contractor to claim for loss and expense as summarized below:

- 1) By reason of directions given by the S.O/P.D; (Clause 43.1 (d) for 203A/ Clause 49. 1 (b) for DB Form).
- 2) By reason S.O/P.D Instructions; (Clause 43.1 (e) for 203A/ Clause 49.1 (d) for DB Form.)
- 3) By reason contractor not received instruction, decisions, information, concurrence or consent from the P.D; (Clause 43.1(f) for 203A/Clause 49.19 (f) for DB Form).

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<sup>1</sup> Sundra Rajoo, Harban Singh KS (2017) Construction Law in Malaysia (5th Reprint). Subang Jaya, Selangor: Sweet & Maxwell Asia, page 498.

4) By delay on the part of artist; (Clause 43.1 (h) for 203A/Clause 49.1 (h) for DB Form.)

5) *By reason of suspension.* (Clause 43.1 (C) for 203A/ Clause 49.1 (j) for DB Form.)

Besides of that, most conditions of contract contain provisions which require the contractor to give notice of delay or of its intention to claim additional payment under the terms of the contract. It is usual for the contract to specify that notice should be given within reasonable time, but or within specified period of the event or circumstance causing delay or giving rise to claim may be used.

The court has to consider the meanings of various terms and they have often been faced with the argument that the giving of notice was a conditions precedent to the contractor's right under the contract.<sup>2</sup> PWD Form DB (Rev.1/2010) Clause 50.1 Conditions of Contract specified that:

*“if the contractor intends to claim any additional payment pursuant to any clause of this contract, the contractor shall within sixty (60) days of the occurrence of such event or circumstances or instructions, give notice in writing to the P.D of his intention for such claims.”*

Furthermore Clause 50.3 specified:

*“if the contractor fails to comply with clause 50.1 and clause 50.2, he shall not be entitled to such claim and the Government shall be discharged from all liability in connection with the claim.”*

In PWD Form 203A (Rev.1/2010) Clause 44.1 Conditions of Contract specified that:

*‘If at any time during the regular progress of the Works or any part thereof has been materially affected by reason of delays as stated under clause 43.1 (c), (d),*

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<sup>2</sup> Reg Thomas (2001) Construction Contract Claims (2nd Edition). Great Britain: Palgrave, page 26.

*(e), (f) and (h), and the Contractor has incurred direct loss and/or expense beyond that reasonably contemplated and for which the Contractor would not be reimbursed by a payment made under any other provision in this Contract, then the Contractor shall within thirty (30) days of the occurrence of such event or circumstances or instructions give notice in writing to the S.O. of his intention to claim for such direct loss or expense together with an estimate of the amount of such loss and/or expense, subject always to clause 44.2 (Shall submit full particulars of all claims within ninety (90) days after practical completion.'*

Clause 77.1 PWD DB (Rev.1/2010) specified that:

*"Notices is any notice, approval, consent, request or other communication required or permitted to be given or made under this contract shall be in writing in Bahasa Malaysia or English Language".*

Clause 77.2 specified that such notice shall be effected by:

- (a) Hand delivery or courier and an acknowledged of receipt obtained;*
- (b) Leaving the notice at the registered office or site office of the Contractor in which case it shall be deemed to have been duly delivered; or*
- (c) Registered post in which case it shall be deemed to have been received seven (7) days after the date of posting.*

As referred to the clause, the common understanding used strict interpretation and most of the contract administrator will possibly denied the entitlement of claim by contractor if the contractors fail to give notice within stipulated time and stipulated requirement.

The question remarks, what type of notices and what extend of the notices and when the duration of notices pursuant to the event, circumstances and instruction shall be calculated whether the contractor is able or liable to provide an estimate within stipulated time given.

## 1.2 Problem statement

Notification is one of the problems identified in managing claim in Malaysia construction industries. Ambiguous procedures in notice preparation, poor communication or instruction to proceed with submitting the notice and insufficient time to thoroughly prepare the notice due to high workload as the major problems.<sup>3</sup> The notification process provides the notified party with the opportunity to review the condition and take action to resolve or mitigate its impact. Either the contractor or the project manager becomes aware of a claim event; the other party must be immediately notified. Claim notifications need to be done in writing and as detail as possible.<sup>4</sup>

In the preparation of supporting documents for claim notification, good documentation system and accurate site records are very important. Procedures of notice preparation need to be spelt out clearly and understood by the parties involved. In addition, site staffs need to have good communication skills so that proper instruction can be given, received and understood.<sup>5</sup>

Few cases can be studied pertaining to notices. In the case of *Kier Construction Ltd v Royal Insurance (UK) Ltd*<sup>6</sup> the insurance policy required the claimant to notify the insurer as soon as possible, if there was an occurrence such that in consequence a claim is to be made. The claim should have been made on 12 June 1989, but it was not submitted until 4 July 1989. The claimant lost his rights, as the notice was not served as soon as possible. *Hersent offshire SA and Amsterdamse Ballast Beton-Waterbouw BW Burmah Oil Tankers Ltd*<sup>7</sup> the contract stipulated that the notice must be sent to the Chief Executive of the authority by first class post, fax or by hand. A dispute arose in respect of the notice of delay and the likely effect on the completion date. The notice reported the delay and express an intention to submit

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<sup>3</sup> Nor Azmi Bakhary, Hamimah Adnan, Azmi Ibrahim (2014) A Study of Construction Claim Management Problems in Malaysia 2nd GLOBAL CONFERENCE on BUSINESS, ECONOMICS, MANAGEMENT and TOURISM, 30-31 October 2014, Prague, Czech Republic. Procedia Economics and Finance 23 (2015) 63 – 70 Available online at [www.sciencedirect.com](http://www.sciencedirect.com)

<sup>4</sup> Ibid (3)

<sup>5</sup> Ibid (3)

<sup>6</sup> (1992) Con LR 45

<sup>7</sup> (1978) 10 BLR 1

a claim. This did not meet the contractual obligation which required the actual claim to be submitted. He had failed to comply with the contract provisions with regard what should be included in the notice and hence lost the right to recover the sum.

In the case *Amec Process & Energy Ltd V.Stork Engineers and Contractors BV*<sup>8</sup>. It was held that the clause was not word with sufficient clarity to remove Amec’s right to claim damages for breach. The judge explains that, if a party to a contract is to be deprived of its right to recover damages for breach, the wording should be in clear, unambiguous terms.

Besides that, notice should be looked into interpretation of contract. Terms of contracts may be construed using the literal rule and purposive rule or business common sense rule. Few cases can be highlighted to make a comparison such as Table 1.1 below: -

Table 1.1 Notice Cases

<p><b>1.</b> <i>Central Provident Fund Board v Ho Bock Kee</i><sup>9</sup></p>	<p><b>Court Held:</b> Notice of default transmitted by hand instead of registered post as stipulated in contract was invalid. Notice of default signed by the Superintendent Officer was also invalid as the Officer was not authorized to sign the notice of default under the contract. The position that non-compliance with any material aspect of procedural requirement in service of notice of termination to be consistent. In general, non-compliance to the procedural requirement in notification may invalidate the termination process.</p>
<p><b>2.</b> <i>Sunshine Fleet Sdn Bhd v Jabatan Kerja Raya Malaysia &amp; Anor (GM Healthcare Sdn Bhd &amp; Anor, third parties)</i><sup>10</sup></p>	<p><b>Court Held:</b> Judge Vazeer Alam stated that “<i>I am of the opinion that the duty of the court is to construe the words used in the contract to give business efficacy to the bargain between the parties, rather than to strike down the words as bearing no meaning. “the doctrine of purposive construction of contracts entails that in the construction of a contractual term there must be ascribed to the words a meaning that would make good commercial or business sense. In this regard, in present times when it comes to mode of service of notice or documents, there are various modes that can be described as having being done by recorded delivery.</i>”</p>

<sup>8</sup> [1999] EWHC 238

<sup>9</sup> [1981] 2 MLJ 162, CA

<sup>10</sup> [2018] 7 MLJ 530

It is concluded that when dealing with mode of service of notices the courts itself appear not uniform in their approach, whether to use literal rule of business common rule or purposive rule. So many questions are related to notices such as what kind of notice will be acceptable. Whether bare application will satisfy the requirement of any notices clause. Not all claims should be rejected due to shortfall of notice. Every claim shall be scrutinized deeply and not to deny directly and contract administrator must have a higher understanding.

### **1.3 Research Objective**

1. To identify issues pertaining notices for loss and expenses claim.
2. To identify judicial position of defective notice of intention to claim for Loss and expanses.

### **1.4 Scope of Study**

The main point of this research is to study issues of notices for loss & expenses claim. The research will be focusing on the term and conditions of contract related in standard form of contract used in Malaysia. Beside of that, JCT Form of contract also has been chosen to be a part of this research. Cases related were reviewed not only limited to Malaysian cases but also including the International cases.

### **1.5 Significant of Study**

Based on the findings of this research enable contract administrator to have a better understanding the express provisions of notices pertaining loss and expense claim. The findings can be used as the guidelines when evaluating the application of loss and expenses claim by the contract administrator.

## **1.6 Previous Research**

From the search of previous research its none of any researcher extensively study with regard to this topic. The topics below are the previous research which was identified and scrutinize,:-

- a) Direct loss and expense relating to remoteness of damages (2006).
- b) Evidence that are needed to claim for direct Loss and /or Expense (2008).
- c) Assessment of Loss & Expense for Extension of time (2014).
- d) Contemporaneous Record in construction claim (2017)

The problem statement, objective and significant of studies are obviously different with what being proposed in this research.

## **1.7 Literature review**

Literature review has been conducted from various source, from primary data and secondary data. Law journal from Lexis Malaysia website, Science Direct journal and Emerald Insight journal were most referred as the main sources of literature review. Two main focuses for literature review are to find the events related loss and expense in construction and secondly matters related to notices.

From the literature review it can be summarized that there are few categories of event as ground for contractor to claim for loss & expenses. The most important is extensive reading to various condition of contract such as PWD form of contract, PAM form, **JCT** and **AIAC** Condition of contract.

## **1.8 Research Methodology**

The research will be based on judicial analysis, how judicial interpretation has been made pertaining to notices especially for the loss and expense.

### **1.8.1 Research Design.**

A proper research methodology has been designed in order to get a proper structure and organized research and report writing. Research and report for this research can be divided into four stages and elaborated as followed:

#### **1.8.1.1 Initial study**

Initial study has been conducted from readings of various journals, articles, books and any relevant sources, seminar and also reading previous year Thesis. Condition of contract such as PWD form of contract, PAM form, AIAC and JCT Condition of contract have also been vetted in detail.

#### **1.8.1.2 Data Gathering**

The data have been gathered from Law Cases from related sources, secondary sources such as books, articles, local and international Law cases.

#### **1.8.1.3 Data Analysis**

Identified related cases have been explored and judicial decisions and judgment have been analyzed using descriptive technique. All related cases have



been reviewed emphasizing on the relevant matters and objectives of this research and the questions which were highlighted.

#### **1.8.1.4 Writing up and presentation of the research finding**

Writing up is the step to produce complete report as the written proof of the research. This process provides conclusion and recommendations based on findings from the analysis. Conclusion and finding have been summarised to match the objective of this research.

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