ABSTRACT

In most contracts, the employers delegate the role of assessing the contractor’s application for extension of time to the Contract Administrators or Superintending Officers. In making any determination under a building contract, Contract Administrators or Superintending Officers have the duty to act fairly and reasonably on a rational basis. Any assessment they make must be based on reasons that can stand up to scrutiny by the other parties to the contract. They should carry out a detailed, logical and methodical analysis of the documents and other evidence submitted in support of the application for an extension of time. Failure to act fairly can lead to invalidation of their certificates. However, it is difficult to give the actual definition of ‘fair and reasonable assessment’ in granting extension of time. A dispute arises when there is an issue of determining whether the Contract Administrator or Superintending Officer acts correctly regarding the ‘fair and reasonable assessment’ in granting extension of time. The objective of this study is to identify how Superintending Officers or Contract Administrators approach their duties in assessing Extension Of Time fairly and reasonably. The approach adopted in this research is based on four case laws and five case studies in housing projects located in various areas in Pahang, hoping that the findings will assist the Superintending Officers or Contract Administrators to assess the Extension Of Time to contractors fairly and reasonably. However, an analysis of past courts’ judgments indicate no case law that clearly defines ‘fair’ and ‘reasonable’ assessment for granting extension of time, although the English case of John Barker Construction Ltd v London Portman Hotel Ltd (1996) 83 BLR 31, held that there was a guideline for the Superintending Officers or Contractor Administrators to act in a fair and reasonable way in assessing the contractor’s applications for extension of time.
ABSTRAK

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1.1 Introduction

A contractor is under strict duty to complete on time except to the extent that he is prevented from doing so by the employer or is given relief by the express provision of the contract. The effect of extending time is to maintain the contractor’s obligation to complete within a defined time and failure by the contractor to do so leaves him liable to damages, either liquidated damages or general, according to the term of the contract.

In the absence of the extension provisions, time is put at large by prevention and contractor’s obligation is to complete within a reasonable time. The contractor’s liability can then only be for general damages but first must be proved that he has failed to complete within a reasonable time. ¹

According Lim Chong Fong, the operation of clause 43 modifies the liability of the Contractor to complete the Works by the Date for Completion specified in the Appendix and to pay Liquidated and Ascertained Damages to the Government upon the failure of the Contractor to meet the deadline. It imposes a duty on the Superintending Officer to grant a fair and reasonable extension of time for the completion of Works in certain specified circumstances.

The period of work may be extended, subject to any extension of time granted by the architect for delays that are not the fault of the main contractor under the contract. When the contractor applies for an extension of time, it is often the case that the architect will take some time to review before making a decision or withhold the decision until the delay becomes apparent. In the absence of the instruction from the architect, the contractor cannot recover the cost of acceleration of the work to meet the completion date.

Therefore, contractors may take the risk of incurring liquidated damages for the delay rather than spend extra money on acceleration. It should also be noted that under no circumstances will the contractor be entitled to receive financial compensation from the employer for the delay itself, as time can be extended without increasing the overall cost of the contractor. The only entitlement for monetary compensation from the employer is for the direct loss and/or expense suffered by the main contractor as a direct consequence of the cause.

According to Entrusty Group, the evaluation to derive at the Extension of time entitlement (EOT) can indeed be a complex subject especially when there is more than one delaying events. Invariably, an evaluation of EOT will be made based on the

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2 Lim Chong Fong, “The Malaysian PWD Form Of Construction Contract”, (Sweet & Maxwell Asia, 2004), pp.92

3 Teresa Cheng, Evia Wong, Gary Soo, “Construction Law And Practice In Hong Kong”, (Sweet & Maxwell Asia, 2004), pp.344

on programmes submitted by the contractor (Kevin, 2005). Besides the programmes, the contractor is advised to provide relevant information related to delay such variations and architect’s instruction for references, towards consideration for EOT (Lim, 1998). Teresa Cheng views that being fair and reasonable is the measure of the extension of time to be granted to the contractor in relation to the causes(s) so submitted.

**1.2 Problem Statement**

In construction contract, time may be stated either by reference to specified date or by reference to a construction period. This practice has important repercussions for parties to the contract, as a failure to complete by the date stipulated may expose the contractor to claim for damages. Alternatively, where a liquidated damage clause is inserted, delay will make the contractor liable for certain liquidated amounts usually calculated at a daily or weekly rate in the contract itself.

It is important to all parties that the project be finalised by a specified date, the standard forms of contract now provide details on the issues of delay in completion and liquidated damages. The contract usually provides that the contractor can apply for extension of time due to certain matters but not the fault of the contractor, that the project is being delayed. The general procedure, for example, in clause 43 I.E.M Condition of Contract For Works Mainly Of Civil Engineering Construction’, the contractor shall use constantly his endeavours to prevent delay and shall do all that may reasonably be required to the satisfaction of the Engineer to

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7 Teresa Cheng, Evia Wong, Gary Soo, “Construction Law And Practice In Hong Kong”, (Sweet & Maxwell Asia, 2004), pp.350
proceed the works. The certificate issued by the Engineer under this condition shall be referred to as the “Certificate of Delay and Extension of Time”.

A grant of extension of time to the contractor will only be issued for the period of time which is found to come within the extension of time entitlements. At numerous stages through this process, disagreement can arise between the parties, and the potential for financial liability to the contractor at the end of the day makes the issue one on which parties are unhappy to compromise.

The issues can also become contentious because the decision as to whether or not to grant extension of time is generally placed in the hands of the architect. A contractor may be dissatisfied if there is a delay by the architect in dealing with his application for an extension, or having dealt with the application, coming to a decision which is unfavourable or not sufficiently favourable to the contractor.

The assessment of claims for extension of time is extremely complex. The Superintending Officer or Contract Administrator acts as independent adjudicator, and he must acts fairly, reasonably and impartially to both his employer and the contractor.

The main issue lies in the actual definition of ‘fair and reasonable assessment’ in granting extension of time. A dispute arises between the employer and the contractor when there is a reason to challenge the Contract Administrator’s or Superintending Officer’s ‘fair and reasonable’ assessment of extension of time.
1.3 Objective of the Study

The objective of the study is to identify how Superintending Officers or Contract Administrators approach their duty to assess Extension of Time fairly and reasonably.

1.4 Scope of the Study

The approach adopted in this research is based on case laws and case studies. The projects that will be investigated in this research are the housing projects i.e. Perumahan Warga Felda (PWF) at Felda Schemes. There are two on going projects which are located in Keratong 3 and Muadzam, Pahang and there were three completed projects located in Mempaga, Bukit Goh and Lepar Hilir. The studies are to identify how the Superintending Officers approach their duty to assess extension of time fairly and reasonably. The detail of the five case studies as follows:

Case Study 1  Cadangan Pembangunan Perumahan yang Mengandungi 160 Unit Rumah Kos Rendah Satu Tingkat, 45 Unit Rumah Kos Sederhana Rendah satu Tingkat Dan Satu Unit Pencawang Elektrik Di Felda Mempaga 2, Mukim Sabai, Daerah Bentong, Pahang Darul Makmur.

Case Study 2  Membina Dan Menyiapkan Rumah Kos Rendah Dan Kos Sederhana Rendah Satu Tingkat, Kedai Satu Tingkat Dan Kerja-Kerja Infrastruktur Yang Berkaitan Di Felda Bukit Goh, Kuantan, Pahang Darul Makmur.
Case Study 3
Cadangan Membina Dan Menyiapkan 192 Unit Rumah Kos Rendah, 58 Unit Rumah Kos Sederhana Rendah, 5 Unit Kedai, Bazaar, Pencawang Elektrik Dan Kerja-Kerja Infrastruktur Yang Berkaitan Di Felda Lepar Hilir Saujana, Kuantan, Pahang Darul Makmur

Case Study 4
Membina Dan Menyiapkan Rumah Kos Rendah Setingkat, Rumah Kos sederhana Rendah Setingkat, Kedai Setingkat, Pencawang Elektrik Dan Kerja-Kerja Infrastruktur Yang Berkaitan Di Felda Keratong 3, Mukim Keratong, Daerah Rompin, Pahang Darul Makmur

Case Study 5
Cadangan Membina Dan Menyiapkan 125 Unit Rumah Kos Sederhana Di Atas Lot 2263-2268, 2173 di Bandar Muadzam Shah, Mukim Bebar, Daerah Rompin, Pahang Darul Makmur

1.5 Research Methodology

In order to achieve the objectives of this study, a systematic process of conducting this study had been organized. Basically, this study process comprised five major stages, which involved identifying the study issue, literature review, data collection, data analysis, conclusion and suggestions.
1.5.1 Stage 1 : Identifying The Research Issue

The study issue arises from intensive reading of books, journals and articles which can be attained from the UTM library, Building Construction Information Centre (BCIC) and Resource Centre of Alam Bina (RC). Based on the study issue, the objective of the study has been identified. In addition to that, this research is executed to review the relevant court decisions with the intention of identifying how Superintending Officers or Contract Administrators approach their duty to assess Extension of Time fairly and reasonably.

1.5.2 Stage 2 : Literature Review

Collection of various documentation and literature regarding the study field is of most important in achieving the research objectives. Besides, secondary data is collected from reading materials in printed form like books, journals, research paper, magazines, reports, proceedings, seminar paper as well as information from the internet. It is important to identify trends and developments over time in construction industry, as well as the general state of knowledge concerning the subject area of delay such as background, definition, type, procedures, relevant events and etc.

1.5.3 Stage 3: Data Collection

In this stage, after identifying all the background and relevant issues through literature review, legal cases based on written opinions of courts, which are related to the study issue, will be collected from different sources such as All England Law
Reports, Malayan Law Journals, Singapore Law Report and etc. via UTM library electronic database, namely Lexis-Nexis Legal Database. Data from the five case studies had also been collected from Felda Engineering Services Sdn Bhd.

1.5.4 Stage 4: Research Analysis

Once the previous related court cases under Malayan Law Journal were collected, reviewing and clarifying of all the facts of the cases will be conducted. The data from the five cases also were also collected in housing projects procured by Felda Engineering Services Sdn Bhd. The focus will be to identify how Superintending Officers or Contract administrators approach their duty to assess Extension of Time fairly and reasonably. After presenting the issues of each case based on case studies, a thorough discussion and comparison will be done in order to achieve the objectives of this study.

1.5.5 Stage 5: Conclusion And Recommendation

In this stage, reviews on the whole process of the study will be made to identify whether the study objective has been achieved. After presenting the study findings, recommendations and limitations of the study and a topic for further research emerge. Figure 1.1 shows a flowchart of the research methodology to achieve the objectives of the study.
RESEARCH ISSUE
The issue is that a dispute arises when there is an issue of determining whether the Contract Administrator or Superintending Officer acts correctly regarding the ‘fair reasonable’ assessment of extension of time.

RESEARCH OBJECTIVE
To identify how Superintending Officers or Contract Administrators approach their duty to assess Extension of Time fairly and reasonably.

LITERATURE REVIEW
- Construction delay, types of delay, causes of delay, extension of time, purpose of granting EOT, The ground for EOT, relevant events, procedure for claiming EOT, Timing of the notification, detailed particulars of EOT, assessment of EOT, duties of engineer in granting EOT, fair and reasonable EOT, the law cases relating fair and reasonable and the Protocol Of The Society Of Construction Law

RESEARCH METHOD
- Data collection:
  - Legal cases in relation to the fair and reasonable in assessing extension of time
  - Access to UTM library electronic database(Lexis-Nexis Legal Database)
  - Data from case studies.

DISCUSSIONS

CONCLUSION & RECOMMENDATIONS

Figure 1.1: Research Methodology
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Lim Chong Fong (2004), The Malaysian PWD Form Of Construction Contract,


Nicholas J. Carnell, Causation and Delay In Construction Disputes, Second Edition

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