NATURE OF DELAY IN NOMINATED SUBCONTRACTING

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for the award of the degree of
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DEDICATION

Thanksgiving to Allah s.w.t, as with the consent awarded, I am able to finish this dissertation within the given time.

To my beloved mother, Asmah Binti Majid, “you are my strength when I was weak”,
my siblings, my beloved friends…

and not forgetting to my late grandmother…Tok Yah (mak)
my late grandfather…Tok Mat (abah)
my late father..
may Allah bless you…Amin.
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Thank you.
ABSTRACT

Construction delay is a result of occurrence beyond the control of either the contractor or the employer. Delay can be categorized as excusable, non-excusable, compensable, and concurrent. There are many causes that can contribute delay in construction. However, delay in nominated subcontracting are very seldom acknowledged and the ways to improve also seldom discussed. As a result, to identify the causes of delay on account of nominated subcontractor’s work are often difficult. Thus, the objective of this study is to identify circumstances which are caused delay in nominated subcontractor’s work and their implication to the main contractor. In Malaysia, most of the standard form of contract such as PWD203A, PAM 19988 and CIDB 2000 have provided grounds which gives entitlement for an extension of time to the main contractor in the event of delay on the part of the nominated subcontractor. The methodology that has been applied in this study is a detail analysis of ten (10) cases which have been selected through Malayan Law Journal. The results proved that there are several circumstances which caused delay in nominated subcontractor’s work. Every causes have their own implication to the main contractor in terms of entitlement of extension of time as well as the liability of damages. This study concludes that, irregular payment is the prominent cause which contributed to delay in nominated subcontracting.
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<td>Joint Contract Tribunal</td>
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<td>PAM</td>
<td>Persatuan Arkitek Malaysia</td>
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<td>RIBA</td>
<td>Royal Institute of British Architects</td>
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<td>SO</td>
<td>Superintending Officer</td>
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<td>EOT</td>
<td>Extension of Time</td>
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CHAPTER 1

INTRODUCTION

1.1 Background Study

Construction industry is a series of different specialist in contributing to the work at different times, different skills, work for different organization and sometimes different geographical locations.\(^1\) However, the parties including clients, designers, contractors and suppliers share the same goals of minimizing costs and duration to deliver the projects.\(^2\)

Furthermore, every construction project has a defined goal or objective, specifics tasks, defined time including beginning and end, defined deliverables and resources being consumed. To complete any projects successfully, many tasks need to be accomplished by the project team for instance, the owner must define the requirements, the designer needs to translate the requirements into contract document and the construction

professionals need to organize and manage the physical construction in accordance with the contract document.\(^3\)

Besides, project schedules are useful and essential to the successful coordination of the project. Eggleston\(^4\) stipulates that, most construction contracts specify performance time in achieving completion of the whole of the works. On top of that, time may be fixed either by reference to specified dates or by reference to a construction period and it is essential that precise completion date can be established.

Sundra Rajoo\(^5\) is of the view, a contractor’s obligation is to carry out and complete the works accordance to the contract. Furthermore, the contractor’s legal obligation is to complete the project by the date for completion or within the date for completion.\(^6\)

Wright\(^7\) however, asserts that finishing a project on schedule is a difficult task to accomplish in the uncertain, complex, multiparty and dynamic environment of construction. Most of projects are eventually completed more or less to specification but seldom on time and within budget. Thus, many of these problematic situations are either beyond control and often lead to delay.\(^8\)

1.2 Problem Statement

Many construction projects suffer from delay. Failure to finish either within the original planned time and budget or both, ultimately results in a delay. In addition to that, construction projects involve more variables and uncertainties than in the product line also increases the probability of delay.  

Therefore, disputes involving delayed construction projects are widespread in the construction industry. Datuk Seri Mohd Effendi Norwawi has noted that delays in government projects have become crucial problems which need to be solved immediately. Furthermore, National House Buyer Associated highlight that the complaints statistics regarding late delivery and liquidated ascertained damages (LAD) in year 2002 is 13%, and 14% in year 2005. Besides, abandoned projects had increased from 19% in 2002 to 23% in 2005.

Recently, the “blame game” over the long-delayed Sultanah Bahiyah Hospital in Alor Setar continues between the parties involved. This project failed to be completed on time in December 2003 and due to that the cost incurred to RM565 million for the four-year delay. Nevertheless, there is nobody who wants to take the blame over this problem. In fact, the parties still unable to identify the causes constitute to the four-year delay of the hospital.

How delay can occur in construction project? There are many ways that a construction project can be delayed. In short, all parties to the design and construction

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process can delay the project. Delay may be the result of their direct action or of their failure to act especially if they have duty to act in the circumstances.\(^{14}\)

Nevertheless, unexpected events may happen during the life of the construction project and can affect construction time necessary for completion of the work. For instance, force majeure, negligence, discrepancies and so forth, may occur on the construction project to increase the time of performance of the overall project or affect any given activity and most common causes differ under different project.\(^{15}\)

Based on Sundra Rajoo’s views\(^ {16}\), it shows that delaying circumstances can be of three types namely delay caused by Contractor, delay caused by the natural events and delay caused by Employer or his agent. Besides, delay caused by nominated subcontractor or supplier also disturb of the progress of the works.\(^ {17}\)

In addition to that, it has been highlighted in several studies on causes of delay and one of them shows that delays in subcontractor’s work has been ranked at no. 25 out of 73 causes.\(^ {18}\) According to a study on contractor’s responses of the significance of factors causing delays in building projects, it has been asserted that delay in subcontractor’s work has been ranked at no. 11 out of 20.\(^ {19}\) Further to this, study on delay factor in relation to subcontractors also proven that it falls at ranking no. 9 out of 28.\(^ {20}\) Another study proves that, by basing on the overall ranking of the 44 factors, delay in

\(^{15}\) Fong, L.C. (2004). The Malaysian PWD Form of Construction Contract, Sweet & Maxwell, Malaysia
\(^{17}\) Carnell, N.J (2005). Causation and Delay in Construction, Blackwell Publishing Ltd., UK
subcontractor’s works is among the top 4.\textsuperscript{21} With reference to that, it reveals that delay caused by subcontractors can be considered as a significance cause that contributes to delay in projects. Therefore, these studies show that delay caused by nominated subcontractor is a significance cause of delay in construction world.

Basically, under PWD 203A Clause 43(k), PAM 98 Clause 23.7(vii) and CIDB Clause 24.1(p) has asserted that the contractor is allowed extension of time on account of delays on the part of the nominated sub-contractor or nominated suppliers. Due to that, the main contractor is entitled to an extension of time when delayed by a nominated sub-subcontractor and there is no liability on the part of the employer for liquidated damages.

However, a particularly controversial area of risk allocation in respect of nominated sub-contractors and suppliers is that of delay. The reason why this is controversial is that, where such an extension of time is granted to main contractor, the employer is deprived of the right to claim liquidated damages which the main contractor would otherwise passed on to the delaying sub-contractor.\textsuperscript{22}

Besides that, in the case of\textit{Westminster City Council v. Jarvis & Sons Ltd (1970) 7 BLR 64}, cites that the main contractor claimed extension of time by rely on phrase ‘delay on the part of nominated sub-contractor’ and has taken all reasonable steps to avoid and reduce. Finally, the court held that no extension should be granted.\textsuperscript{23} Thus, it shows to identify causes of delays are often difficult and the burden on the party seeking to prove delay is a heavy one.\textsuperscript{24} Hence, what is the nature of the delay in nominated subcontractor’s work? What are the main causes that contribute to this delay? What are

\begin{itemize}
\item \textsuperscript{23} Ibid, 21
\item \textsuperscript{24} Carnell, N.J (2005). \textit{Causation and Delay in Construction}, Blackwell Publishing Ltd., UK
\end{itemize}
common circumstances causing delay in nominated subcontracting and their implication to the main contractor?

In the view of the above, it is necessary for the parties in this construction industry, mainly employer, architect, main contractor and nominated subcontractor to have better knowledge of the causes of delay in nominated subcontractor’s work before considering it’s the implication to the main contractor.

1.3 Objective of the Study

With reference to the above problem statement, the following is the objective of this study:

1. To identify circumstances which are caused to delay in nominated subcontractor’s work and their implication to the main contractor.

1.4 Scope of the Study
The following the scope of study:

1. The approach adopted in this study is case law based. The case will be referred is only having connection to this study which is delay in nominated subcontractor’s work. Although, the issue of delay is closely related to extension of time and liquidated damages, these areas are not elaborated in detail.

2. The standard forms of contract used in Malaysia, PAM 98, PWD203A and CIDB 2000 will be compared and discussed. The court cases referred in this study include Malaysia, Singapore, Australia, and English cases. There is no limit to the cases chosen in terms of time frame, as long as it has not been overruled by higher court and establishes a good law.

1.5 Significance of the Study

Basically, this study is expected to answer some of the uncertain issues that arise in construction contracts such as issues that related delay in construction project. In accordance to that, issues will be analyzed based on the interpretation and judgment by the courts. Normally, the reason why these issues arise in the event of delay is due the parties who are unclear and unaware of the causes of delay. Thus, by identifying the ground or causes of delay in construction project, this study will be able to create awareness to the parties consist of employer, consultant, contractor, sub-contractor and supplier about their obligation in carrying out the works within the time, budget and quality as in the contract.
In addition to that, it can be as a basic guidance for those who are involved in construction industry for instance, developers, architects, engineers, quantity surveyors, and etc. in relation to the issue of delay. Finally, hopefully it assists in avoiding unnecessary disputes while assuring project success and better relationship among the contractual parties.

1.6 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 of five major stages, which involved identifying the study issue, literature review, data collection, data analysis, conclusion and suggestions.

1.6.1 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 and determining the common causes constitutes delay claim in construction project.
1.6.2 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 printing form like books, journals, research paper, magazines, reports, proceedings, seminar paper as well as information from 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.

1.6.3 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.

1.6.4 Stage 4: Research Analysis
Once the previous related court cases under Malayan Law Journal are collected, it will be conducted by reviewing and clarifying all the facts of the cases. The focus will be on two parts, issues in delay caused by nominated subcontractors and the other is the implications of the delay towards the parties involved in the contract especially the main contractor. The circumstances which constitute delay in nominated subcontractor’s work will be determined from the relevant cases. After issues presented by each cases, thorough discussion and comparison will be done in order to achieve objectives of this study.

1.6.4 Stage 5: Conclusion And Recommendation

In this stage, reviews on the whole process of the study will be made with the intention to identify whether the study objective has been achieved. After presenting the study findings, recommendations and limitations of the study, topics for further research emerge.
RESEARCH ISSUE
- The issue is what the circumstances are caused to delay in nominated subcontractor’s work and implication to the main contractor.

RESEARCH OBJECTIVE
- To identify circumstances which are caused to delay in nominated subcontractor’s work and implication to the main contractor.

LITERATURE REVIEW
- Time for performance and delay, occurrence of construction delay, types of delay, and delay in phases of construction, consequences of delay, provision of standard forms of contract, delay in other country, extension of time, liquidated ascertained damages, sub-contracting.

RESEARCH METHOD
- Data collection:
  - Legal cases in relation to the causes of delay in construction
  - Access to UTM library electronic database(Lexis-Nexis Legal Database)
- Data analysis: Detail study on legal cases

DISCUSSIONS

CONCLUSION & RECOMMENDATIONS

Figure 1.1: Research Methodology
5.5 Conclusion

As a conclusion, there are many causes of delay in construction. Causes of delay can be further detailed into delay caused by owner/employer, delay caused by designer, delay caused by contractor, delay caused by subcontractor and delay not caused by party to the design and construction process. Delay can be categorized as excusable, non-excusable, compensable, non-compensable and concurrent delay. An excusable delay gives entitlement the main contractor to be granted extension of time and not liable for damages. Delay on the part of the nominated subcontractor is considered under this type of delay. Further to this, there are circumstances that may cause the completion period of nominated subcontract work become delay. This study has also determined six (6) circumstances, which may contribute to delay in nominated subcontractor’s work. In addition to that, based on these causes of delay, this study has identified the implications to the main contractor whether they should be entitled an extension of time or to be liable of damages. This study could be considered as guidance to the parties in construction industry in reducing and preventing of delay in construction.
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