

**APPLICATION OF ESTOPPEL AND WAIVER IN THE NON-
FULFILLMENT OF CONDITION PRECEDENT**

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APPLICATION OF ESTOPPEL AND WAIVER IN THE NON-
FULFILLMENT OF CONDITION PRECEDENT

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To my family and friends...

Thank you for your endless support and doa.

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ABSTRACT

Since the early 1856, the judge has already recognized the importance of the conditions precedent in contract law. In construction contract, conditions precedent is widely used in time-bar provision and usually stipulates the contractor to comply with certain specified procedures if he wants to avail himself of other contractual provisions. It is possible under English law for a condition precedent to be effective, so as to preclude a claimant from bringing an invalid claim. However, in practice, especially in construction contract for instance, the particular circumstances of each situation will need to be considered, not solely because the courts construe these provisions extremely strictly, but also because the actual circumstances of the case might reveal that the conditions precedent has not been effective. Under these circumstances, the contractor may be able to rely upon the equitable principles of waiver and/or estoppel. This principle of estoppel and waiver however can be used only on certain circumstances. Hence the objective of this research is to identify the circumstances or situations that allow the application of estoppel and waiver to be used when the contractor fails to follow conditions precedent. To achieve the objective of this research ten law cases were identified. From the analysis of these cases, there are seven circumstances have been identified: one, when there is non-denying of non-fulfillment of conditions precedent by the employer; two, when there is an acceptance of late submission of conditions precedent in the previous performance; three, when there is a promise made by the employer to the contractor; four, when the conduct or actions made by the employer that gives an impression of accepting of non-fulfillment of conditions precedent; five, when there is failure of the performance of conditions precedent on the employer's part that lead to the non-fulfillment of conditions precedent on the contractor's part; six, when there is conducts or acts made by the employer that gives agreement to prolong the period of the fulfillment of conditions precedent and lastly, when there is an acceptance of the performance even though the conditions precedent is not been fulfilled. Besides, there are also certain cases that point out that conditions precedent may remain effective.

ABSTRAK

Sejak awal tahun 1856, hakim telah mengiktiraf kepentingan syarat terdahulu di dalam undang-undang kontrak . Di dalam kontrak pembinaan, syarat terdahulu telah digunakan secara meluas dalam klause masa dan biasanya mensyaratkan kontraktor untuk mematuhi prosedur tertentu tertentu jika dia ingin membela dirinya untuk peruntukan lain. Klause syarat-syarat terdahulu adalah berkesan di bawah undang-undang Inggeris. Ia bertindak untuk menghalang pihak menuntut daripada membawa tuntutan tidak sah. Walau bagaimanapun di dalam amalan syarat-syarat terdahulu, terutamanya di dalam konteks pembinaan, setiap keadaan dan situasi perlu dipertimbangkan sebelum syarat terdahulu ini di amalkan. Ini adalah kerana ada keadaan dan situasi yang menyebabkan syarat-syarat terdahulu ini tidak berkesan. Dalam keadaan ini, kontraktor mungkin boleh bergantung kepada prinsip-prinsip '*estoppel*' atau '*waiver*'. Walau bagaimanapun, prinsip '*estoppel*' dan '*waiver*' ini hanya boleh digunakan hanya pada keadaan atau situasi tertentu. Sejajar dengan itu, objektif kajian ini adalah untuk mengenal pasti keadaan atau situasi yang membenarkan prinsip '*estoppel*' dan '*waiver*' apabila kontraktor gagal untuk mengikut syarat terdahulu. Untuk mencapai objektif ini, sepuluh kes undang-undang telah dikenal pasti dan dianalisis melalui pendekatan kaedah kualitatif. Daripada sepuluh kes, terdapat tujuh keadaan telah dikenal pasti iaitu tiada penafian oleh pihak majikan apabila syarat-syarat terdahulu tidak dipenuhi, terdapat penerimaan lewat oleh pihak majikan bila kontraktor mengemukakan syarat-syarat terdahulu dalam prestasi yang lepas , perjanjian yang dibuat oleh majikan kepada kontraktor, apabila kelakuan atau tindakan yang dibuat oleh majikan memberi isyarat bahawa pihak majikan menerima kepada tidak mengikut syarat terdahulu, kegagalan pihak majikan untuk mengikut syarat terdahulu yang membawa kepada ketidakpatuhan syarat terdahulu bagi pihak pihak kontraktor , terdapat kelakuan atau tindakan yang dibuat oleh majikan yang memberikan persetujuan untuk memanjangkan tempoh memenuhi syarat terdahulu atau akhir sekali keadaan di mana terdapat penerimaan prestasi walaupun syarat-syarat itu tidak dipenuhi . Selain itu, terdapat juga beberapa kes yang menunjukkan bahawa syarat-syarat boleh kekal berkesan.

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LIST OF ABBREVIATIONS

AC	Law Reports: Appeal Cases
AIR	All India Report
All ER	All England Law Reports
AMR	All Malaysia Reports
BLR	Building Law Report
CIDB	Construction Industry Development Board
CLJ	Current Law Journal (Malaysia)
CLR	Commonwealth Law Reports
Const LR	Construction Law Reports
ER	England Law Report
EWCA	England and Wales High Court
FMSLR	Federated Malay States Law Reports
HL	House of Lords
PWD	Public Works Department
LR	Law Reports
MLJ	Malayan Law Journal
PAM	Pertubuhan Arkitek Malaysia
PWD	Public Work Department (Malaysia)
QB	Queen's Bench
RIBA	Royal Institution of British Architects
RHC	Rules of High Court
SCR	Supreme Court Report
SLR	Singapore Law Report
WLR	Weekly Law Report

CHAPTER 1

INTRODUCTION TO RESEARCH

1.1 BACKGROUND OF RESEARCH

Conditions precedent as defined by Fifth Edition of Black's Law Dictionary is one that is to be performed before one agreement becomes effective. It calls for the happening of certain event or performance of some acts after the terms of contract have been acted on, before the contract shall be binding on both parties.¹ In simpler layman's terms, a conditions precedent is a contractual clause in a contract that provides a need of happening of certain conditions or performance before the contract or certain parts of the contract would be enforced.

The role of conditions precedent existed in a contract to protect the parties in the contractual transaction where the party is not in breach if he fails to perform his part of the contract. However if the condition is found to be a conditions precedent, then non-

¹ Gamer, B. A. (August 1999). *Black's Law Dictionary*. West Group.

performance of that condition will allow the employer to refuse to indemnify for any loss arising under the policy before that condition has been satisfied.²

Due to its task to protect the contractual transaction between the parties, conditions precedents have been used widely in many contracts such as in loan and purchase agreements, land and property development agreements, insurance contract as well as in the construction contract. In the construction contract, the related provision of conditions precedent is mainly used in the clause for Extension of Time (EOT)³ and clause of direct loss and/or expense.⁴

Under clause 44.1 of JKR PWD 203A (Rev 1/2010), the contractor may claim for his loss and/or expense due to delay by giving a written notice to the Superintending Officer (S.O) within 30 days of such events or circumstances or delay. The notice shall specify the estimate of the amount such loss and/or expense. Later within 90 days after completion of the works, the contractor should submit full particulars of the claims of loss and/or expense with the supporting documents, vouchers, explanations and necessary calculations. Clause 44.3 states that if the contractor fails to comply with the requirement of clause 44.1 and clause 44.2, the contractor will not be entitled for such loss and/or expense and the Government will be discharged of its liability in connection with the claim.

Clause 24.1 (a) of PAM 2006 states that for the contractor to claim for his loss and/or expense, the contractor must give a written notice with his initial estimate of his claim and supported with all necessary calculations within 28 days of Architect's Instruction or at the start of occurrence of the matters stated in clause 24.3.⁵ The giving

² Gladwell, A. (2003). Policy Conditions: Legal Classification and Consequences of Breach. *Herbert Smith's Insurance Update Newsletter*

³ Clause 43.1 of PWD, Clause 23.1a of PAM

⁴ Clause 44.1 of PWD 2010, Clause 24.1 of PAM and Clause 32.1 of CIDB

⁵ Clause 24.3 of PAM 2006

of such notice is a 'conditions precedent' to claim for the loss and/or expense and if the contractor fails to do so, he would lose his entitlement under the contract and/or common law. Clause 24.1(b) of PAM 2006 subsequently mentions that at the end of 28 days the contractor should submit his complete particulars and details of loss and/or expense together with all necessary calculations to substantiate his claim. If he fails to do so, it is considered that the contractor has waived his right to claim for loss and/or expense.

While in clause 32.1 of CIDB standard form of contract for building work 2000 edition, in order for the contractor to claim loss and/or expense, he should submit a written notice, specifies the events of the delay and its consequences, the appropriate contract references to such events that are relevant to the loss and/or expense and also the estimated value of such loss within 30 days after the events. Clause 32.1(b) provides that the notice is a 'conditions precedent' to the contractor's entitlement to loss and expense.

These provisions in the construction contract specify that the contractor must give a notice within a specified period of time, for any matter that may give rise to a claim for additional time or money. The intention of these provisions is that a failure to comply e.g. issue the required notice will jeopardise the contractor's entitlement to extra payment for the time overrun.

Besides that, the time-bar provisions in the construction contract is intended to be a conditions precedent to the contractor's claim for an extension of time and additional money. Some commentators regard it as a provision that will exclude the employer's liability to the contractor, unless the contractor first provides the notice within time. Such provisions can be effective under English law.

However, the in the case of *Temloc v Errill Properties*⁶ the English court had taken the view that timelines in construction contracts are generally not mandatory, but rather directory, unless the contract clearly states that the party will lose its right, and sets out a specific timelines within which the notice must be served. In other words, the clause firstly, identifies precisely the events that trigger the notice period and secondly, clearly sets out the right that will be lost once the timeline expires.

The general principle is that it is possible for a condition precedent to effectively preclude a claimant from bringing an invalid claim. However, it is suggested that the failure to fulfil a condition precedent provision in a contract is not always fatal to the claim. It is suggested that there are equitable principles such as estoppel and waiver that may, in certain circumstances, defeat the requirement of the fulfilment of such condition precedent. In practice, especially in construction contract for instance, the particular circumstances of each situation will need to be considered not solely because the courts construe these provisions extremely strictly, but also because the actual circumstances of the case might reveal that the conditions precedent has not been effective. Under these circumstances, the contractor may be able to rely upon the equitable principles of waiver and/or estoppel.

Estoppel is an equitable principle that is used when one party indicates by words or conduct that he does not require the satisfaction of the condition precedent and the other party materially changes his position in reliance thereof, the first party is estopped from insisting that the condition be satisfied. If this becomes an issue and is subsequently referred to the court, the plaintiff must prove that he relies upon the defendant's words or conducts to his detriment. The plaintiff must prove; one, that the defendant's conduct amounted to a misrepresentation or a concealment of material facts; two, that the defendant knows or should have known of the true facts; three, that the plaintiff did not know of the facts concealed or the misrepresentation at the time plaintiff

⁶ [1987] 39 BLR 30, CA, C Croom Johnson LJ.

acted upon the defendant's conduct; four, that the conduct was done by the defendant with the intention that it be acted upon by the plaintiff; five, that the plaintiff reasonably and justifiably relied on defendant's conduct to plaintiff's detriment or harm.⁷

Waiver is the voluntary relinquishment of a known right. It may give rise to an estoppel. If a party 'B' waives his right under a contract and 'A' relies upon the waive and reliance changes his position to his detriment 'B' is thereby estopped or precluded from taking advantage of 'A's changed position. If 'B' disputes the matter 'A' brings this matter to the court, then 'A' as the plaintiff must provide the proof that 'B', the defendant knows that he has a right to insist on the discharge of the condition precedent but nevertheless agreed his obligation to perform would not depend on the performance of plaintiff's obligation. If plaintiff proves this, plaintiff may be excused from performing his obligation.

1.2 PROBLEM STATEMENT

As mentioned previously, the principle of estoppel and waiver may be relied upon by a contractor but upon certain circumstances. For example, in the case of *Perbadanan Nasional Berhad v Dato' Ibrahim bin Ali*,⁸ where the conditions precedent was not effective due to no objection by the plaintiff regarding the non-fulfilment of conditions precedent by the defendant.

In this case, there was one conditions precedent need to be complied by the plaintiff which was to appoint the defendant as the Executive Director of the company

⁷ *Palatine I v. Planning Board of Montville*, 133 N.J. 546 (1993)

⁸ [2012] MLJU 925

before the defendant have to open a sinking fund account. However the plaintiff did not fulfil the conditions precedent.

Sometime later, the plaintiff claimed for specific performance in that the defendant to pay RM10,564,800.00 for the share he bought (the sinking fund account) and also alternative damages for the defendant's breach of the agreement. Briefly, the defence made by the defendant was since the conditions precedent was not fulfilled, the defendant was thus released from his obligation under the agreement.

The plaintiff contended that the defendant was aware of the terms of the agreement and non-fulfilment of the conditions precedent by the plaintiff. Furthermore, the defendant's conduct of not raising any protestation or objection over the non-fulfilment of the conditions precedent had estopped the release of his obligation to pay the amount of the sinking fund account to the plaintiff.

Lee Swee Jeng J in High Court held that it is rather late in the day for the defendant to raise it now after 8 years. If indeed he had not been appointed as the Executive Director of the Company, when he knew he should have been, he had gone along with the Company and indeed had acquiesced in the Company's action. He could have raised this issue with the Board of the Company at the material time but did not. The judge held that this is a fit and proper case for the application of the principle of estoppel as expressed in section 115 of the Evidence Act 1950.

The learned judge Lee Swee Jeng also quoted Federal Court's decision in the case of *Boustead Trading (1985) Sdn. Bhd v Arab-Malaysian Merchant Bank Berhad*⁹ at page 298 where stated that:

⁹ [1995] 4 CLJ 283

"In the present case, there are contemporaneous documents to suggest that the appellant, Chemitrade and the respondent proceeded upon the assumption - an erroneous assumption of law - that the Factoring Agreement was indeed a good and valid assignment. The respondent's letter to the appellant of 14 February 1990, which we have earlier reproduced, is a document in point. The letter says that there has been an assignment under the Factoring Agreement. It was open at that stage for the appellant to dispute the construction which the respondent placed upon that Agreement. But it did not do so. Instead it chose to go along with the respondent's interpretation of the document. Can it now say otherwise? We do not think it can. It would be unjust and unconscionable to permit the appellant to now challenge the meaning which the parties gave to the document."

The act of the defendant to remain still and not object to the non-fulfilment of conditions precedent by the plaintiff creates a circumstance that may allow the plaintiff to have excuse or reason for their non-performances of conditions precedent. At some points, this case also shows that the law has recognized the equitable principle of estoppel and waiver in the non-fulfilment of conditions precedent, but only if under such circumstances aroused. There must be other circumstances that may allow principle of estoppel to be used when there is non-fulfilment of conditions precedent. Hence this research is aimed to venture into such circumstances that can be used by the contractor if they fail to fulfil conditions precedent.

1.3 RESEARCH OBJECTIVE

The objective of this research is to identify the circumstances or situations that allow the application of estoppel and waiver to be used when the contractor fails to follow conditions precedents.

1.4 SCOPE OF RESEARCH

Research will be conducted based on topic of conditions precedent and also the principle of estoppel and waiver. It focuses on the reference of court cases that related to the issues, the standard forms of contracts (particularly in conditions precedent of loss and/or expense clauses) and statutory provisions.

1.5 SIGNIFICANCE OF RESEARCH

This research was conducted to give insight of how principle of estoppel and waiver can be used in claiming for direct loss and expense, in order to help the contractor to know what are the circumstances exist to help them when they fail to follow conditions precedent. In accordance with that, all criteria and circumstances were analyzed based on the interpretation and judgments by the court. The results from this research will determine the circumstances which may allow the contractor to use if

he fails to fulfil the conditions precedent that has been set out in the construction contract.

1.6 RESEARCH METHODOLOGY

In order to conduct a research, an approach/ approaches need to be adopted. The criteria to be considered in selecting the appropriate and the best approach depend on the nature of the problem and the type of data/ information that are required and available for the research.¹⁰

In this research, the proposed methodology used is only by secondary data. Secondary data is collected by using the 'desk research approach'. The secondary data is collected from books, journals, articles, dissertations, research papers and internet.

Data are collected based on a comprehensive literature review from published and unpublished materials such as prominent loss and/or expense related academic journals, websites of related associations, law cases and any other related materials.

¹⁰ Naoum, SG. *Dissertation research and writing for construction students*. 2nd edition, Elsevier Ltd, United Kingdom, 2007.

1.7 OUTLINES THEMES AND CHAPTERS

The chapters of dissertation are as follows:

Chapter 1: Introduction

Chapter one provides a general introduction of the research which discuss on the significance of the research, aim and objectives of the research, scope of the research and proposed research methodology.

Chapter 2: Conditions Precedent

Chapter two provides on the literature review of the research which covers the definition of the conditions precedent, its rules and how to review conditions precedents and also the history or development of conditions precedent in recovery loss and expense in various standard form of contract.

Chapter 3: Principle of Estoppel and Waiver

Chapter three provides on the literature review of the research which covers the definition of the principle of estoppels and waiver and its history, its type and where the doctrine can be used.

Chapter 4: Application of Estoppel and Waiver in the Non-Fulfilment of Conditions precedent

Chapter four presents the analysis of the cases regarding the equitable remedies that can be sought by the contractor if he fails to claim for loss and/or expense. The cases may be varied to the English case to Malaysian case (if any).

Chapter 5: Conclusion and recommendation

Chapter five covers the overall conclusions for the objective of the research and recommendation for future studies related to the field of this research.

1.8 CONCLUSION

This chapter is intended to provide an introduction chapter on why, what and how this research to be conducted later on. The next chapter considers in greater detail of the loss and expenses and the research on what the remedies that be sought by the contractor through various cases and statutory provisions.

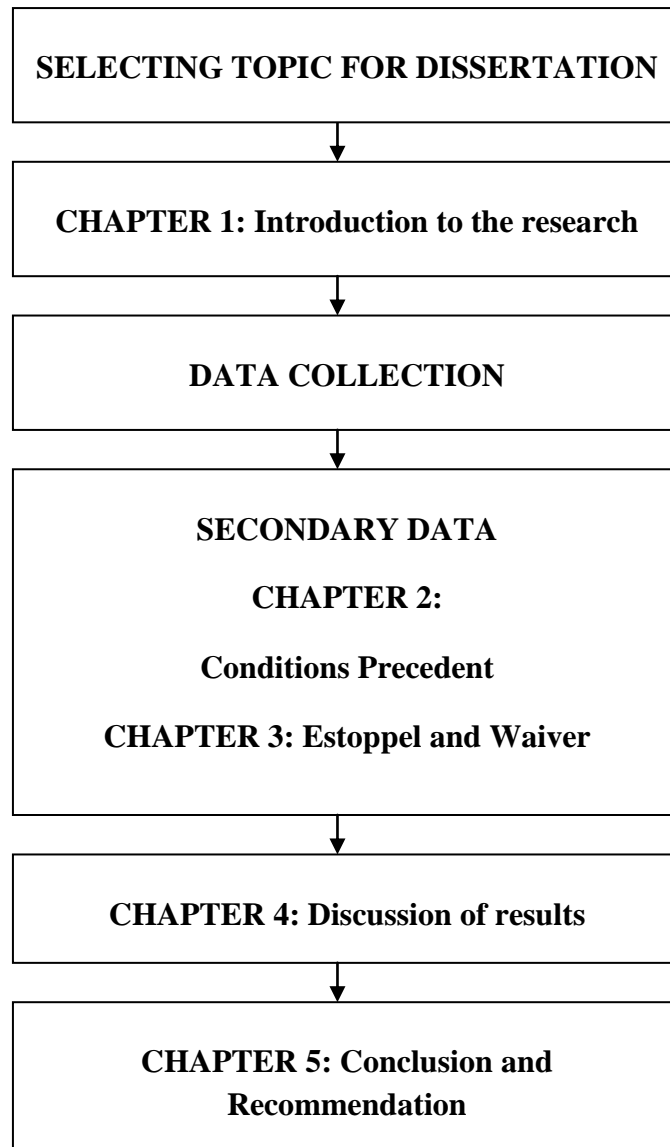


Figure 1.1 Flowchart to illustrate the flow of the research

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