

Certification in Malaysia: Does it have to be a
choice between the Devil and Deep blue sea
PAM CPD Talk

**Certification in Malaysia: Does it have to be a choice
between the Devil and the Deep Blue Sea**

By

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26th June 2010

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- Introduction

- Common law principles on contract

- Entire Contract.

- A contract in which neither party can demand performance by the other unless he himself either has performed his obligations or is otherwise ready and willing to do so. In *Hoening v Isaac (1952)*, Lord Denning MR noted in his judgment that whether the entire performance of a contract is a condition precedent to payment depends on the true construction of the contract. E.g. a where contract for carriage of goods by sea provides that freight becomes due on the arrival of goods at the agreed destination, the ship-owner cannot recover either the stipulated freight if he abandons voyage by reason of perils of the sea and had to discharge the goods at an intermediate port: *The Fort Kip (1985)*

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- Introduction

- Common law principles on contract

- Exact performance

- **Arcos v E A Ronaasen & Son (1933), Lord Atkin**

- » If the written contract specifies conditions of weight, measurement and the like, those conditions must be complied with.

- Professor Brownsword

- » “the objection to the decision in *Arcos* is not so much that the buyers were allowed to act unreasonably or inefficiently by rejecting goods which they could use, but that they were allowed to reject such goods in order to take advantage of a falling market. In short, the objection is that the buyer’s acted in bad faith.”

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- Introduction...
 - Doctrine of Substantial Performance
 - **Building & Estates Ltd v AM Connor [1958]**
 - The rigour of the common law rule requiring exact performance by the promisor as a condition precedent to his right recovery under a lump sum contract has been modified to some extent by judicial decisionsthat in certain circumstances a promisor who has substantially performed his side of the contract may sue on the contract for lump sum but remains liable in damages for his partial failure to his fulfill his contract obligation.
 - **Babcock Energy Ltd v Lodge Sturtevant Ltd (1994)**
 - HH Humphrey Lloyd, QC held that completion of a contract normally means the discharge of all contractual obligations including the liability for payment of damages for breach of a primary obligation.

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- Introduction.....

- Practical Completion

- **Westminster City Council v Jarvis & Sons Ltd (1970)**
Viscount Dilhorne

- [but] practical completion Completion of all construction that has to be done... the defect liability method is provided in order to enable defects not apparent at the date of practical completion to be remedied. If they had been then apparent, no such certificate would have been issued.

- **P & M Kaye Ltd v Dickson Ltd (1972)**

- Court held the architect was entitled to withhold the issuance of practical completion certificate until all known defects except minor ones have been corrected.

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- Introduction.....
 - Conflicting position of the court on the definition of practical completion created :
 - Uncertainties in the administration of construction contract.
 - ‘Strengthen’ the hands of architects
 - The need of impartial certifier.

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- **Historical Background**
 - Industrial Revolution in the 18th century
 - Construction sector moved into new era
 - Construction professions became widely recognized,
 - The construction profession dealt with the shift in emphasis to the control of technology.
 - Concept of impartial certifier was first mooted in the engineering profession.

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- **Historical Background....**

- **John Smeaton (1724-1792)**

- Contributed immensely to setting the standards of behavior expected of professionals
- Asserted that the professionals must possess a degree of independence from the promoters in the matter of design.

John Rennie (Smeaton's contemporary)

“ engineers should not be dabblers in shares and should be free alike of contractors and contracts.

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- **Historical Background...**
 - John Rennie:
 - Was deeply concerned that if the engineer was also a shareholder of a contractor's company he may be beholden to the company if he was involved in a project with them.
 - Was concerned that an engineer's judgment could be impaired by external influence such as the contractor.

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- Historical background...
 - Smeaton, Rennie and Telford were unanimous in their views that construction professionals are expected to be independent, upright and impartial.
 - Isambard Kingdom Brunel advocated an uncompromising stand towards contractor who underbid the tender that the certifier must exercise the duties without fear or favour.

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- **State of Construction Professionals**
 - Sir Michael Latham in-Constructing The Team (1994) reported amongst others:
 - The fear of professional consultants that they will be held personally liable by clients for unforeseen expenditure on contracts....
 - Professional consultants become increasingly partial towards the Employers

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- What is Certification in Construction?
 - **Token Construction Co. Ltd v Charlton Estates Ltd.**
Edmund Davies LJ described certification as:
 - The expression in a definite form of the exercise of the *judgment, opinion or skill* of the engineer, architect or surveyor in relation to some matters provided by the terms of the contract.

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- What is Certification in Construction..
 - **Secretary of State for Transport b Birse-Farr Joint Venture**, Hobhouse J said:
 - At interim stage, it cannot always be wholly exact exercise. It must include an element of *assessment* and *judgment*. Its purpose is not to produce a final determination of the remuneration to which the contractor is entitled but is to provide a *fair system* of monthly progress payments to be made to the contractor.

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- **Independence and Impartiality of Certifier**
 - Independence, fairness and impartiality were cited by Smeaton, Rennie and Telford as essential qualities of an engineer.
 - Qualities which are particularly crucial when carrying out certifying duty.
 - Can there be independence and/or impartiality when the certifier is paid by only one party?

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- **Independence and Impartiality of Certifier**
 - Gillian Eastwood of International Arbitration Group.
 - Broadly speaking dependence raises questions relating to existence of a relationship(whether financial, social or otherwise) between the arbitrator and the parties: it is thus more tangible and is effectively an objective standards. The concept of partiality in contrast is concerned with bias or prejudice in relation to the subject matter of the disputes or one of the parties.

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- Independence and Impartiality of Certifier
 - **Sutcliff v Thackarah**, Lord Reid
 - The building owner and the contractor make their contract on the understanding that in all matters the architect will act as a *fair and unbiased* manner and it must therefore be implicit in the owner's contract with the architect that he shall not only *exercise due care and skill* but also reach such decision fairly, holding the balance between his client and the contractor”

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- Independence and Impartiality of Certifier..
- Lord Reid laid down in his judgment that not only must a certifier make decision with skill and care, such decision should be arrived at impartially.
 - **Porter v Magill**, the House of Lords laid down the test of impartiality:
 - “whether the relevant circumstances would lead a fair minded and informed observer to conclude that a real possibility that the tribunal is biased.

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- **Certifier's Standard of Care**
 - Under English law, the Employer has a duty to ensure that the engineer/architect certifies where the contract requires a certificate or make decisions where the contract gives an engineer/ architect a choice whether to act or not
 - **Balfour Beatty Civil Engineering v Docklands Light Railway Ltd**
 - The Employer is not held responsible for the contents of the decision i.e no obligation to ensure that the engineer act correctly.

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- **Certifier's Standard of Care.**
 - Many of the engineer/architect's decision are discretionary and as such there is often no objectively correct or incorrect decision.
 - Impartiality is more concerned with the means by which the certifier arrives at the decision.

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- **Certifier's Standard of Care..**
 - **Bolam v Friern Hospital Management Committee, McNair J held:**
 - Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is..... ..the standard of the ordinarily skilled man exercising and professing to have that skill.

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- **Duty of a Self Certifier**
 - Many subcontracts or bespoke contracts have employer's representative rather than impartial 3rd party certifier.
 - Certifiers under this category of contract face a further challenge as they are likely to succumb to pressure from Employer or main contractor.
 - These certifiers are acting as the judges in their own court.

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- **Duty of Self Certifier..**
 - Self certifier contradicts the maxim of natural justice, *nemo debet esse iudex proporia sua causa*; which means “ no man can be a judge in his own cause.
 - **Rosebaugh Standhope v Redpath Dorman Long**, imposed a set of stringent requirements for self certifier, in excess of what would be expected of a third party neutral certifier.

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- The English Court of Appeal held in **Rosebaugh** that a party acting as self certifier was not entitled to:
 - Deny payment of substantial sum by way of claimed but unproven setoff when by so doing the other party might become insolvent
 - Assume to himself a greater power than a court has when dealing with an application for summary judgment, where an arguable defence is raised
 - Rely on its own position in a disputed liability situation.

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- Duty of Self Certifier
 - **Balfour Beatty Civil Engineering Ltd v Dockland Light Railway Ltd**. The Court held:
 - As long as the certifier acted fairly, honestly and reasonably, the contractor had no cause of action against the employer, even if the certifier made an **honest mistake**. (Emphasis Added)

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- **English Jurisprudence on Certification.**

- Dual capacity of an architect as certifier

- **Page v Llandaff and Dinas Powis RDC.**

The contract provided that the decision of the surveyor with respect of the value, amount, state and condition of any part of the works executed, or of any part thereof altered, omitted or added, and also in respect to any and every question that may arise concerning the construction of this contract, shall be *final and without appeal*. (Emphasis Added)

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- English Jurisprudence on Certification...
 - **Page v Llandaff and Dinas Powis RDC Channel J** held:
 - The council had interfered with the surveyor in the exercise of his function as a quasi-arbitrator between the parties and the certificate was not conclusive and binding.

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- English Jurisprudence on Certification...
 - **Sutcliff v Thackarah**, the Law Lords gave a comprehensive exposition of the two roles of an architect as an agent and as a certifier in a construction contract. Lord Reid said:
 - The building owner and the contractor make their contract on the understanding that in all such matters the architect will act in a fair and unbiased manner and it must therefore be implicit in the owner's contract with the architect that he shall not only exercise due skill and care but also reach such decision fairly, holding the balance between his client and the contractor.

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- Lord Morris of Borth-y-Gest added his view in the **Sutcliff** case. He stated:
 - Being employed by and paid by the owner he unquestionably has in diverse ways look after the interest of the owner. In so doing he must be fair and he must be honest. He is not employed by the owner to be unfair to the contractor. If work to a certain specification is to be done under the contract there is neither unfairness nor partisanship in ensuring the work is properly carried out. It would be unfair to the owner to permit work that is inferior to the contract terms; it would be unfair to a contractor to require work that is superior to the contract terms.

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- Certifier as a Quasi-Arbitrator
 - **Chambers v Goldthorpe (1905)**, the Court of Appeal held that:
 - That the negligence of the architect was in the exercise of his function under clauses which he was to act impartially towards the building owner and the contractor, and he occupied the position of an arbitrator was not liable to action by building owner for negligence exercise of those functions.

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- English Jurisprudence on Certification
- **Chambers v Goldthorpe**, Romer LJ, dissenting views.
 - I think it would be lamentable that in cases of this kind an employer who pays an architect for supervising work and who has duties for which he is paid, should have no remedy against him.

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- English Jurisprudence on Certification
 - The supposed general immunity of an architect as certifier in **Chambers v Goldthorpe** arose from a standard form of building contract.
 - Clause 20 stated: A certificate of the architect,showing the final balance due or payable to the contractor is to be *conclusive evidence* of the works having been duly completed....

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- Certification Under PAM Contracts
- PAM 2006 Conditions of Contract
 - **Clause 30.16**
 - The final certificate shall be conclusive on the final value of Works with the exception of any outstanding claims between the Employer and Contractor under Clause 30.11. The final Certificate shall not be conclusive evidence that any work, materials and goods to which it relates and design (if any) executed by the Contractor and/or Nominated Sub-contractors are in accordance with the Contract.

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- English Jurisprudence on Certification
 - PAM 1998 Clause 30.8
 - *No certificates* of Architect shall of itself be *conclusive evidence* that any work, Materials or goods to which it relates are in accordance with the Contract.

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- **Clause 30.11-Items in Final Account**
 - 30.11(a) the adjustment made to the contract sum;
 - 30.11 (b) The amounts to which the Architect considers that the contractor is entitled under the express provisions of the Contract;
 - 30.11(c) the omission of PC sum.....
 - 30.11 (d) the adjustment of provisional sum
 - 30.11(e) any liquidated Damages imposed by the Employer;
 - 30.11(f) setoff by the Employer expressly provided in the contract;
 - 30.11(g) interest payable by either of the parties to the other party under Clause 30.17

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- Transition of Certifier's immunity to liability
 - ***Chambers v Goldthorpe***, Romer LJ in his dissenting judgment said:
 - Architect has no obligation to the contractor as long as recourse is available to the contractor to seek redress by way of arbitration
 - Architect however remains liable to his employer even when acting as certifier.

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- English Jurisprudence on Certification
 - ***Sutcliff v Thackarah***
 - Architect erroneously certified a certain works which were later found to be defective in the interim certificate.
 - Employer paid the contractor based on interim certificate.
 - Contractor's employment was terminated. And Contractor went into liquidation
 - Employer unable to recover the overpayment.
 - Employer sue architect for wrongful certification.
 - At 1st Instance- No immunity
 - Court of Appeal- Immunity
 - House of Lords- Unanimous decision: no immunity.

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- English Jurisprudence on Certification
 - Liability of the certifier to Contractors
 - **Michael Salliss & Co Ltd v Calil, William F Newman Associates**
 - Only reported English decision of a successful claim in tort by a contractor against the certifier for negligent certification

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- English Jurisprudence on Certification
 - Liability of the certifier to contractors
 - Partially reinstated by the case of **Pacific Associates v Baxter**.
 - Modified standard FIDIC form
 - Conditions of contract includes a clause which absolve all professionals including the certifier from any liability.
 - Conditions also includes an arbitration clause.
 - Purchas LJ said:
 - The position [in this case] may well have been different otherwise if GC 67 or some other provision had not been included in the contract.

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- English Jurisprudence on Certification
 - Ian Duncan Wallace, QC
 - The presence of arbitration clause precluded contractor's action
 - Nicholas Lane
 - the presence of the disclaimer clause absolving all professionals working on the project stalled the action.

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- Certification in Malaysia
 - The Malaysian Court approved the House of Lords decision in **Sutcliff v Thackrah**
 - **Pembinaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd**, Edgar Joseph Jr stated
 - cast in his role of a professional middlemen, the architect should prima facie, be in the ideal position to ensure that both the employer and the contractor punctually carried out their respective obligations under the contract. This is not to say that if the employer is dissatisfied with the performance of the architect, he is without remedy. In such situation, the employer may terminate the services of his architect and appoint a substitute architect or even sue his architect

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- Certification in Malaysia
 - The then Supreme Court of Malaysia's decision in **Leow Tuck Chui**
 - Employer can sue architect if he is negligent in discharging his duty.
 - Certificates issued under the previous architect cannot be overruled or disregarded by architect appointed subsequently
 - Implicit in every construction contract that the certifier must act impartially.

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- **Certification in Malaysia**

- **Pure Economic Loss**

- **Kerajaan Malaysia v Cheah Foong Chiew (1993)**

- Pure economic loss is irrecoverable in tort based on Murphy's case.
- Decision in torts in England is accepted and applicable in Malaysia and cannot be challenged or denied
- On policy issue, the practice in the construction industry is based on the practice adopted in England
- The Defendant engineer was answerable to his employer and not the plaintiff. Even if he did not carry out his duties properly, no tortious claim can be made against him unless he has caused injury to someone or damaged another property.
- It was not reasonable for an employee, to be held liable to the owner of a building for his negligence which resulted in the non-completion of the building but which did not cause injury to a person or to the property owner.

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- Certification in Malaysia
 - **Dr Abdul Hamid Abdul Rashid v Jurusan Malaysia Consultants and Ors.** James Foong J in allowing pure economic loss considered the following:
 - The fundamental rationale against allowing a pure economic loss is to prevent the creation or extension of liability for an indeterminate amount for an indeterminate time to an indeterminate class. The judge held that this rationale is a misconception and an unallied fear as in all pure economic loss cases, the amount of damages claimed is not an indeterminate amount. There are costs involved in repairing, making good or replacing defective work to ensure that the defective work is made good to a condition that it should have been in the first place.

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- **Certification in Malaysia**
 - In respect of indeterminate time, the judge considered that it may be true that liability to a subsequent owner might be greater than to the first owner but this issue of indeterminacy may be limited by the element of reasonableness both in the requirement that damages be foreseeable and in the context that a duty of care is owed. Therefore the foresight test may be used to limit the endless number of claims for an indefinite period.

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- **Certification in Malaysia**
 - In respect of indeterminate class, the judge referred to the Australian decision in *Bryan v Maloney*. He held that the relationship between the builder and the first owner and the builder and subsequent owner is based on the 'assumption of responsibility' by the builder and likely reliance by the owner. In both situations, it is clearly foreseeable that any defect in the building will lead to pure economic loss being suffered by the owner(the first or subsequent)

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- **Certification in Malaysia**

- Allowing claims for pure economic loss is in line with the 'community's expectation and demand' that third parties should exercise due care and compliance with the relevant by-laws. The deprivation of relief would not justify the loss suffered on defective product, or the moral duty of the third party who exercise care. To impose a restriction on pure economic loss would be highly inequitable, particularly in cases where breach of duty of care can be substantiated. A consequence of allowing recovery of economic loss will lead to an improved level of care and improvement in the standard of manufacturing and construction which in turn supports the values on which society should strive to achieve.

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- Certification in Malaysia
 - **Steven Phoa Cheng Loon & 72 Ors v Highland Properties & 9 Ors.** James Foong J reaffirmed his earlier judgment in **Jurusan Malaysia.**
 - The Court of Appeal affirmed the trial judge's decision. However, the CA laid down the principle that pure economic loss is recoverable subject to the foreseeability test. This in turn is determined by two factors:
 - Whether there is sufficient proximity
 - Whether pure economic loss as a type of loss is foreseeable.

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- Certification in Malaysia
 - **Chin Soon Motor Sdn Bhd v Arosa Development Sdn Bhd**, the court held:
 - the architect whose certification was relied upon by the plaintiffs was liable. The architect knew or ought to have known that the plaintiffs would rely on his certification. The plaintiff was allowed to recover loss based on application of the Hedley Byrne principle that a duty arises whenever a party reasonably relies upon another to provide information or advice and the person providing the information knows or ought to know that the inquirer is relying on the advice or information provided.

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- **Conclusion: Certification in Malaysia: Does it have to be a Choice between the Devil and the Deep Blue Sea?**
 - **No:** If the architects in Malaysia act impartially as certifier. By so doing architects:
 - can avoid being sued by the employer for negligent certification.
 - can avoid be sued by contractor under tort for negligent certification: **Chin Soon Motor Sdn Bhd v Arosa Development**
 - Can avoid being liable for pure economic loss: **Steven Phoa Cheng Loon & 72 Ors v Highland Properties & 6 Ors.**

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