

NOTICE AS CONDITION PRECEDENT TO CLAIM LIQUIDATED  
ASCERTAINED DAMAGES (LAD)

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## ABSTRACT

Most forms of building contract include a clause entitling the employer to a specified amount of damages, referred to as liquidated and ascertained damages (LAD) if the contractor is late in constructing a project. This clause sets out the procedure and condition that need to be followed by the employer. Some provision for example in clause 40.1 PWD 203A (Rev. 2007) require the employer to issue notice of intention before claiming LAD. The purpose of the issuance of notice is to inform the contractor about the payment or deduction. However, does the issuance of notice is condition precedent to the said claim? Some provision does not specifically expressly state the requirement to issue notice. So, there is an argument that section 56(3) of Contract Act is effective as an implied term to the contract. Based on the respective situations, question arises whether the employer's entitlement to liquidated damages is waived if he fails to issue the said notice. This study is carried out to determine whether notice is condition precedent to claim liquidated damages and the legal impact of notice provision for liquidated damages claim. The study was carried out mainly through documentary analysis of law journals. It was found that when the provision expressly state that notice is condition precedent, the failure to comply with notice provision might jeopardize the employer's claim. However, the employer's claim is not totally rejected because based on prevention principle, the contractor who caused the delay, cannot benefit from its wrong act. When the provision did not expressly state that notice is a condition precedent, it can be condition precedent by implication. The argument that section 56(3) is an implied term to the contract was wrong because section 56(3) is only applicable when the contract becomes voidable.

## ABSTRAK

Kebanyakan borang kontrak pembinaan mengandungi klausa bagi membolehkan majikan menuntut ganti rugi jika kontraktor tidak menyiapkan kerja pada tarikh siap yang ditetapkan yang dikenali sebagai Ganti Rugi Tertentu dan Ganti Rugi Ditetapkan. Klausa ini mengandungi prosedur dan syarat yang perlu diikuti oleh pihak yang berkontrak. Terdapat sesetengah klausa yang menyatakan bahawa majikan perlu mengeluarkan notis niat sebelum memohon ganti rugi seperti yang dinyatakan di dalam klause 40.1 JKR 203A (Sem. 2007). Tujuan pengeluaran notis adalah untuk memaklumkan kepada kontraktor mengenai pembayaran atau pemotongan yang akan berlaku. Namun, adakah pengeluaran notis menjadi syarat yang perlu dipenuhi sebelum membuat tuntutan tersebut? Sesetengah klausa tidak menyatakan keperluan untuk mengeluarkan notis niat sebelum menuntut ganti rugi. Oleh itu, terdapat pendapat mengatakan seksyen 56(3) Akta Kontrak 1950 akan bertindak sebagai syarat tersirat kepada kontrak mereka. Berdasarkan situasi yang dinyatakan di atas, persoalan timbul sama ada hak majikan terhadap ganti rugi akan terjejas jika dia gagal mengeluarkan notis. Kajian dijalankan untuk mengetahui sama ada notis menjadi syarat sebelum menuntut ganti rugi dan kesan peruntukan notis tersebut dari sudut undang-undang. Kajian telah dijalankan dengan menjalankan analisis dokumentari jurnal undang-undang. Hasil kajian mendapati apabila klausa menyatakan notis menjadi syarat sebelum memohon ganti rugi, kegagalan untuk mematuhi syarat tersebut akan menjejaskan hak majikan terhadap ganti rugi tersebut. Namun, majikan masih layak untuk menerima pampasan kerana berdasarkan prinsip pengelakan, kontraktor tidak boleh mendapat keuntungan daripada kesalahannya sendiri. Pendapat yang menyatakan seksyen 56(3) adalah syarat tersirat kepada kontrak adalah salah kerana seksyen 56(3) hanya boleh terpakai apabila kontrak tersebut menjadi kontrak yang boleh dielakkan.