

DEFENCE OF ABATEMENT FOR DEFECTIVE WORKS

MOHAMAD FAIRUZ BIN KIPRAWI

UNIVERSITI TEKNOLOGI MALAYSIA

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MOHAMAD FAIRUZ BIN KIPRAWI

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DEDICATION

To my beloved parents, late grandmother, fiancée and my sisters

Thank you for your love, support and everything

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Highest gratitude and to Allah S.W.T. who give me ideas and physical strength to complete this research.

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ABSTRACT

Defective works are one of the major issue in the Malaysian construction industry which have been the main concerned by the industry players, especially the employer. Although everyone in the industry is aware of this problem, the defective building works are still unpreventable and cause a lot of claims and litigation in the industry. In the context of construction law, the little known common law right of abatement can provide an employer with the entitlement, by way of defence to a contractor's claim, to reduce sums otherwise payable to contractors by asserting that the sum claimed has not been earned. A typical example arises in circumstances where an employer asserts that the value of works claimed by a contractor should be reduced on account of defects in those works. To date, abatement has not achieved the same status as the similar and inter-linked defence of set-off. This common law right to abate will provide an alternative to the employer as a defence for claim for defective works. Unlike set-off, abatement is a common law rights which can be used by all the parties in the industry without having to serve any early notice or need to be stated clearly in the conditions of contract. In view of the above, this study has been conducted and the data are collected using Lexis-Nexis database. Subsequently, related cases are gathered and analysed. There are three main principles of abatement and one principle on measure of damages in abatement has been indentified. Judges will depend on the facts in every single case to award damages based on the principle of abatement.

ABSTRAK

Kecacatan kerja merupakan salah satu isu utama di dalam industri pembinaan di Malaysia yang telah menjadi perhatian utama oleh setiap pihak di dalam industri terutamanya majikan. Walaupun semua pihak mengetahui tentang masalah ini, namun ia masih tetap tidak dapat dielakkan dan telah menyebabkan pelbagai tuntutan dan kes-kes perundangan di dalam industri ini. Di dalam konteks undang-undang pembinaan, *abatement*, yang merupakan hak yang terdapat di dalam *common law*, boleh memberikan hak kepada majikan dengan memberi perlindungan daripada tuntutan pihak kontraktor, hak untuk mengurangkan jumlah pembayaran yang sepatutnya dibayar dengan menyatakan nilai kerja yang dituntut di dalam tuntutan yang telah dibuat oleh pihak kontraktor tidak diperolehi. Sebagai contoh, pihak majikan menyatakan nilai kerja yang dituntut telah berkurangan di sebabkan oleh kecacatan pada kerja tersebut. Sehingga masa kini, *abatement* masih lagi kurang digunakan di mahkamah berbanding dengan perlindungan *set-off*. Hak *abatement* akan memberi satu alternatif kepada pihak majikan untuk melindungi hak mereka dalam kecacatan kerja. Tidak seperti *set-off*, *abatement* boleh digunakan oleh semua pihak tanpa perlu memberi sebarang notis awal ataupun perlu dinyatakan secara jelas di dalam syarat-syarat kontrak. Berdasarkan yang tersebut, kajian ini telah dilakukan dan data telah dikumpul melalui pangkalan data Lexis Nexis. Kes-kes yang berkaitan telah dikumpul dan dianalisa. Daripada analisa tersebut, terdapat tiga prinsip utama *abatement* dan satu prinsip berkaitan dengan cara menilai kerugian telah dikenal pasti. Hakim akan bergantung dengan setiap fakta di dalam setiap kes untuk menentukan ganti rugi berdasarkan prinsip *abatement*.

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C.A. Duquemin Ltd v Raymond Slater [1993] 65 BLR 124; 35 Con LR 147

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Tubeworks Ltd v Tilbury Construction Ltd [1985] 30 BLR 67

Yandle & Sons v Sutton, Young and Sutton [1922] 2 Ch 199

Yarmouth v France [1897] 19 QBD 647

LIST OF ABBREVIATIONS

AC	Appeal Cases
All ER	All England Law Reports
All ER Rep	All England Law Reports, Reprint
BLR	Building Law Reports
CLJ	Construction Law Journal
Con LR	Construction Law Reports
CLR	Commonwealth Law Reports
EG	Estate Gazette
EGD	Estate Gazette Digest
Exch	Court of Exchequer
HL	House of Lords
HGCRA	Housing Grants, Construction and Regeneration Act 1996
JCT	Joint Contracts Tribunal
KB	Kings Bench Law Report
LGR	Local Government Reports
LJQB	Lae Journal Reports, Queens Bench
LR, CP	Law Reports, Common Pleas
QB, QBD	Law Reports: Queen's Bench Division
WLR	Weekly Law Report

CHAPTER I

INTRODUCTION

1.1 Background Of Study

Most of the time, a set off in construction arise due to dissatisfaction of one party to another party on the quality of the works carried out. In the historical case of Hanak v. Green,¹ the builder asserted he could set off his counterclaims against the claims made by Mrs Hanak due to her dissatisfaction of his work. The analysis made by the Court of Appeal, which agreed with the builder's assertion, resolved the dispute between Mrs Hanak and her builder. However, the problems of set-off continues to exist in the construction industry where there are claims and counterclaims because the question continues to arise whether one can be set off against the other.²

Originally, there are no common law right at all to set off a counter claim.³ The common law did, however, allow the remedy of abatement. In Oxford Dictionary Of Law, abatement is defined as “ any reduction or cancellation of money payable”. Here, the employer does not seek to set up a cross claim against the contractor's

¹ [1958] 2 WLR 755.

² Neil F. Jones (1991). “*Set-off In The Construction Industry.*” Blackwell Science, United Kingdom, pg 1.

³ Ibid.

claim, but rather alleges that, because of the defects, the contractor's claim itself is not justified.⁴

The law in respect of the defence of abatement was recently considered in detail by the English courts in *Multiplex Construction (UK) Ltd v Cleveland Bridge UK Ltd*.⁵ After an analysis of the case law on the defence of abatement, Justice Jackson held that the following principles apply:

- (1) In a contract for the provision of labour and materials where performance has been defective, the employer is entitled at common law to maintain the defence of abatement against claims for payment.
- (2) The measure of abatement is the amount by which the product has diminished in value due to the actions of the contractor.
- (3) The method of assessing diminution of value depends on facts of the case.
- (4) In some cases, diminution may be assessed by comparing the current market value of the construction with the market value that it ought to have had. Otherwise, and as was the case here, the best method was the cost of the remedial works, as the value of the steelworks did not have a market value in the conventional sense, only to the contractor who was obliged to produce the completed stadium;
- (5) The measure of abatement can never exceed the sum that would have been otherwise due to the contractor.
- (6) Abatement is not available as a defence to a claim in respect of professional services.

⁴ Murdoch, J. and Hughes, W. (1992). "Construction Contracts Law and Management." E & FN Spon, London, pg 336.

⁵ [2006] Adj.L.R. 12/20

- (7) Claims for delay / disruption / damage caused to anything other than what the contractor constructed cannot feature in the defence of abatement.

The difference between abatement, set-off and counterclaim is all too often misunderstood.⁶ Abatement is the process of reducing a price or a value on the grounds, for example, that the works have not been properly carried out, incomplete, or not carried out at all.⁷ By contrast a set-off is a defence to a claim used to reduce or extinguish a claim and is resultant from a party's breach of contract. However a counterclaim, whilst also results from a party's breach of contract, may also give rise to an award for damages.⁸

These distinctions can often be quite important, particularly in the context of the Construction Act in the UK, where it has been held that a set-off may not be made in the absence of a withholding notice.⁹ A withholding notice will not, however, normally be required for a defence of abatement to be argued. That is to say, if the work is defective, the amount due to the contractor may be reduced correspondingly and thus, in reality, there is no withholding against the proper amount due.¹⁰

⁶ Silver, R. (2008). "Abatement, Set-Off and Counterclaim – What's the Difference?" from <http://www.silver-shemmings.co.uk/construction-law/abatement-set-off-counterclaim.asp>

⁷ Ibid

⁸ Silver, R. (2008). "Abatement, Set-Off and Counterclaim – What's the Difference?" from <http://www.silver-shemmings.co.uk/construction-law/abatement-set-off-counterclaim.asp>

⁹ Brewer, G. (2006). "Legal Case Study: The defence of abatement". *Contract Journal*. <http://www.contractjournal.com/Articles/2006/11/01/52679/legal-case-study-the-defence-of-abatement.html>

¹⁰ Ibid.

1.2 Problem Statement

In the context of construction law, the little known common law right of abatement can provide an employer with the entitlement, by way of defence to a contractor's claim, to reduce sums otherwise payable to contractors by asserting that the sum claimed has not been earned. A typical example arises in circumstances where an employer asserts that the value of works claimed by a contractor should be reduced on account of defects in those works. To date, abatement has not achieved the same use in courts as the similar and inter-linked defence of set-off.¹¹

In Malaysian construction industry Standard Contract Form, there is no express provision for abatement as a defence to contractor's claim. Out of three most common used Standard Contract Form (which is Public Work Department 203, PAM Contract 2006 and CIDB Standard Form of Contract for Building Works) only PAM Contract 2006, clearly expressed that entitlement for Employer to set off claim made by Contractor¹² under the following conditions:

- i) The Architect or Quantity Surveyor (on behalf of the Employer) has submitted the Contractor complete details of their assessment of such set-off;
- ii) A written notice have been given to the Contractor by the Employer specifying his intention to set-off the amount and the grounds on which set-off is made.

Although the defence of abatement has been recognized for at least 150 years,¹³ its use in the construction field raises one difficulty. This is where the disputed claim rests, not upon a simple assertion by the contractor that money is due,

¹¹ Dolan, S. (2007). "The Common Law Defence of Abatement : A Change of Direction" .from <http://www.mhc.ie/news+-events/legal-articles/220/>

¹² See Clause 30.4 of PAM 2006.

¹³ *Mondel v Steel* [1841] 8 M & W 858.

but rather on architect's certificate or its equivalent.¹⁴ In such circumstances an employer seeking to defend the claim will face an uphill task, since it requires the court to be convinced of a substantial possibility that the work has been over certified. It is established that clear evidence will be needed and that vague allegations of defective work will not suffice.¹⁵

A claim for set-off may potentially have a wider reach than abatement. Damages claimed as a set-off may concern, for example, the cost of putting right defects in the work, but may also include damages suffered as a consequence of the manner in which the work has been carried out, for example, damages for delay.¹⁶ The measure of abatement, on the other hand, must be limited to the difference in value of the work itself as a consequence of the defective work. Additionally, a set-off must be raised by way of a separate cross-claim. An abatement may, however, simply be regarded as a defence to a claim for payment in respect of defective work.¹⁷

In the case of *C.A. Duquemin Ltd v. Raymond Slater*,¹⁸ it was explained that abatement entitles the purchaser to deduct the difference between the value of the work and materials at the date supplied and their value if they had not been defective. It does not, however, permit anything other than a deduction against the price. This case however, left open question, particularly in the context of building contracts, as to which work and materials are subject to abatement.¹⁹

While abatement has been the subject of debate in the modern construction industry for some time now, it is an important clause to be aware of as it still remains

¹⁴ Murdoch, J. and Hughes, W. (1992). "Construction Contracts Law and Management." E & FN Spon, London, pg 336.

¹⁵ Murdoch, J. and Hughes, W., loc.cit.

¹⁶ Brewer, G., loc.cit.

¹⁷ Ibid.

¹⁸ [1993] 65 BLR 124

¹⁹ Neil F. Jones , loc. cit.

a valuable tool in the armoury of a party who has suffered loss as a result of defective works.²⁰

In view of these issues, this study will try to find what are the principles of abatement and the main criteria on the measure of damages to a defective works in which abatement claim is made as a defence to a claim.

1.3 Objective of the Study

The objective of this research is to identify the principles of abatement claim and what are the criteria on the measure of damages on which an abatement claim can be made due to defective works.

1.4 Scope of Study

Based on the objective, the approach adopted in this study is based on case law which covers the following areas:

- a) Only abatement claim cases due to defective works will be discussed in the study
- b) Court cases referred in this study are mainly from English cases which is reported in Lexis Nexis..

²⁰ Brewer, G., loc.cit.

1.5 Significance of the Study

This study is expected to assist the Malaysian construction industry player to understand and give them a brief picture on what abatement is. This will also help them, especially the aggrieved party, the right and option other than set off, to defence themselves from defective works done by the other party. It is also to help the aggrieved party when seeking for damages from the wrongdoer, where he can compare the facts of his case and the fact of cases list down in this study to proceed with his abatement claim.

1.6 Methodology of Study

Methodology is important and is a vital guideline on how this study is being carried out systematically to achieve its objective. The stages involved are explained as below.

The first stage of this study is establishing the problem statement. This is the preliminary process in determining the issues and problems which is going to be studied. Literature review on documents as book, journals and internet were used to determine the issue. This is to assist the writer to acquire ideas, knowledge and information relating to the topic studied. It is also to help the writer identified issues or problems related to the topic.

The next stage is data collection and research design stage. This is the stage where all relevant data and information were collected, mainly through documentary analysis. All collected data and information were recorded systematically. The source of these data were mainly from the English Law Report, Construction Law Report and other law journals. It is collected through the Lexis-Nexis online

database. All the cases relating to the research topic will be sorted out from the database. Important cases will be collected and used for the analysis at the later stage.

After collecting data, the further stage involved in this study is data analysis and interpretation. In this stage of research, data were analyzed, interpreted and arranged. This process is to convert the data collected to necessary information which will be used for the research.

The final stage of this research process is writing up and conclusions. It involves mainly the writing up and checking of the writing. Conclusion and recommendations will be made based on the findings during the stage of analysis.

