

RECOVERABILITY OF AN OVERPAYMENT IN CONSTRUCTION PROJECTS

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“I hereby declare that I have read this thesis and in my  
opinion this thesis is sufficient in terms of scope and quality for the  
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requirements for the award of the degree of  
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*“WHEN PEOPLE UNDERMINE YOUR DREAMS, PREDICT YOUR DOOM,  
CRITICIZE YOU, THEY ARE TELLING YOU THEIR STORY, NOT YOURS. THERE  
WILL BE NAYSAYERS, DOUBTERS, NON-BELIEVERS AND THEN THERE WILL  
BE YOU PROVING THEM WRONG”*

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## ABSTRAK

Pembayaran dalam pembinaan adalah salah satu perkara penting dalam menjalankan projek. Oleh tu, ianya penting bagi kedua belah pihak untuk menghormati perjanjian yang dibuat. Jika tidak, ia pastinya akan menimbulkan masalah yang berkaitan dengan pembayaran dan isu-isu seperti pembayaran lewat atau tiada pembayaran merupakan antara masalah yang selalu dihadapi oleh kontraktor. Pembayaran harus dibuat untuk mengelakkan projek terbengkalai atau menyebabkan kerugian kepada pihak kontraktor. Terlebih bayaran juga merupakan salah satu masalah yang berlaku dalam industri. Pembayaran lebih adalah pembayaran yang melebihi daripada jumlah yang sepatutnya. Persoalannya adalah pembayaran lebih itu boleh diserahkan semula kepada pembayar atau tidak. Terdapat kes-kes yang berkaitan di mana penyerahan semula duit itu tidak berjaya dan ada yang berjaya. Jadi kajian ini dijalankan bagi mengetahui apakah faktor yang menyebabkan pembayaran lebih ini berlaku dan sebab yang boleh diterima untuk pembayaran semula. Kes-kes lokal telah dipilih dan dianalisa dengan menggunakan kaedah dokumen analisis. Terdapat sebelas kes yang berkaitan dan semua kes telah dianalisa dengan mengkategorikan data-data mengikut elemen-elemen yang dipilih seperti jenis kerja yang dibuat, jenis kontrak yang digunapakai, jenis hubungan dalam kontrak, masa pembayaran balik diminta dan sebab-sebab pembayaran lebih beraku serta sebab penyerahan semula boleh dibuat. Kiraan yang salah, penipuan dan memberi pernyataan yang salah merupakan antara sebab berlakunya pembayaran lebih. Ianya tidak boleh diserahkan semula jika tidak dibuktikan dengan alasan yang munasabah. Selain itu, jenis kontrak juga boleh mempengaruhi pembayaran lebih untuk berlaku kerana kebanyakan kes menggunakan kaedah subkontrak. Subkontrak tersebut tidak ditulis dengan baik setanding dengan kontrak yang umum diketahui dan majikan mudah terlupa untuk memasukkan klausa yang penting dan berkaitan dengan projek. Oleh itu, penting juga untuk sesebuah kontrak itu ditulis dengan nyata untuk mengelakkan perkara seperti ini berlaku.

## ABSTRACT

Construction payment is one of the essential things in a construction project. The formation of a contract between an employer and a contractor will usually include the terms regarding payment. It is important for both parties to respect the contract especially when it involves payment. The opposite of it will cause such disputes regarding payment to arise. Issues such as non-payment or late payment are one of the major disputes that often occur. The payment should be executed by the respective party to avoid such failure in a project or causing any financial losses especially to the contractor. Overpayment is regarded as one of the issues that have happened within the construction industry. Overpayment is when an individual has overpaid a sum of money more than as it supposed to be. The question is on the recoverability of the overpayment whether such overpayment can be recovered or not. There are cases that allow the recovery of the overpaid sum and some cases do not allow such an event. Therefore this research was conducted to identify the circumstances that allow the recoverability of an overpayment. Local legal cases have been selected prior to this research and have been analysed by using the method of documental analysis. There are eleven cases that have been analysed and for the analysis, several key elements such as the causes of an overpayment, the type of work, the type of contract, the type of relationship, the time of claim and the reasons for its recoverability have been extracted out from the cases. It is found that miscalculation, fraud and misrepresentation are one of the causes of an overpayment although the recovery of it was not always possible as it must be proved before allowing such claims. The type of contract might also influence such a decision because most cases analysed are from a subcontract basis and there are no any proven standard forms used besides using a simple contract formation. Main contractor or the employer could tend to forget such terms that are important to the project when engaging others to work with them. So, it is important that the contract formed is solid to avoid such matters to happen.

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**LIST OF ABBREVIATIONS**

<b>AC</b>	-	Law Reports: Appeal Case
<b>All ER</b>	-	All England Law Reports
<b>CA</b>	-	Contracts Act
<b>Ch D</b>	-	The Law Reports, Chancery Division
<b>Con LR</b>	-	Construction Law Reports
<b>EWCA</b>	-	England And Wales Court Of Appeal
<b>EWHC</b>	-	England And Wales High Court
<b>HL</b>	-	House Of Lords
<b>JKR</b>	-	<i>Jabatan Kerja Raya</i>
<b>MLJ</b>	-	Malayan Law Journal
<b>MLJU</b>	-	Malayan Law Journal Unreported
<b>PAM</b>	-	<i>Pertubuhan Arkitek Malaysia</i>
<b>PWD</b>	-	Public Works Department
<b>QB</b>	-	Queen Bench
<b>UK</b>	-	United Kingdom
<b>UKHL</b>	-	United Kingdom House Of Lords

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## **CHAPTER 1**

### **INTRODUCTION**

#### **1.1 Research Background**

The formation of contract happened when two parties involved in an agreement from the basis of offer and acceptance. The agreement terms were usually set out on a document. Accordingly with the contract formed in a construction project, it is a consideration that the party agreed with the contract terms will perform to complete the project and get paid by the other party. The formation of contract was usually made between an employer and the contractor or between the main contractor and the subcontractor. It is the responsibility of the main contractor and the subcontractor to complete the project and it is the duty of the employer or the main contractor to pay for the works executed by them as outlined in the contract (Saad, 2008).

Disputes that involve payment were very usual among the construction industry players. People often not getting paid and the most issues are on the issue of non payment by the employer, payment made was late or the total amount for the

payment is short (Abdul Rashid, 2007). This kind of situation could affect the performance of the contractor financially and physically (Samy Vellu, 2006).

It will always be the responsibility of the payment holder to deliver such payment and not set it off without further reason. The payment should have been delivered to the receiver once it has been certified (Lewison, 2015). It is stated that a payment should not have been withheld by the issuing party even though the amount certified for the payment is wrong.<sup>1</sup>

The court may have a different way of analysing such contract but an interim payment issued shall be final between the involved parties of a contract. Besides that, even if the amount could be issued by mistake or negligent it was no duty by the issuing party to correct any certified certificate once approved (Mohd Yusof, 2001).

But in Malaysia construction standard forms, it is always possible to recover any disputed amount of the interim certificate on certain circumstances. Clause 30.3 of PAM 2006 Standard Form Of Contract stated that if there are any errors in the Interim Payment '*the Architect shall not be entitled to revise or correct any payment certificate issued by him*' for the current month but '*the Architect may, by a later certificate, make correction or modification in respect of any valuation errors in any earlier certificate*'. While in Clause 30.15 of PAM 2006 Standard Form Of Contract and clause 31.4 of JKR PWD Form 203a 2010 stated that the amount of debt payable by the contractor to the employer or the debt payable by the employer to the contractor must be stated in the final certificate within the Period of Honouring Certificates. In JKR PWD Form 203N 2010, there are no such provisions that allow a correction to be made to the certificate. But there was a clause of Clause 38 regarding payment set off where provided that it is the Contractor's right to set-off of any payment due to the Nominated Sub Contractor because of any proven faulty act

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<sup>1</sup> Kollerich @ Cie S.A. v. State Trading Corporation of India [1979] 2 Lloyd's Rep. 442

done by the nominated sub-contractor. It is the same in PAM 2006 of clause 30.4 on the behalf of the employer's right to set-off any payment due to the contractor.

It is the duty of an employer to serve payment to the main contractor or payment by a main contractor to a subcontractor. Payments will often been resisted or delayed with no solid reasons. This delay will often lead to other back to back claims between both parties and new issues will also arises such as from an over valuation or set offs application. These situations bring no benefits especially to the contractor where financially it could have been affected with further consequences to follow (Saad, 2008).

## 1.2 Problem Statement

Construction and engineering contracts usually contemplate interim payments being made "on account", meaning that any overpayments or underpayments can be redressed in later payment claims, or in the final account. However, claiming back an overpayment is not always possible, especially if the overpayment was made knowingly or with indifference after the project has been completed (Bailey, 2014).

It is often assumed that overpayments to a contractor or subcontractor can be recovered, but the recent case shows that this is not always so. In the case of *Furmans v Elecref*<sup>2</sup>, Furman believed it had overpaid Elecref for the work performed, and sought to reclaim the overpayment. The judge stated that, an overpaid payment is not always possible to be recovered but only on certain circumstances.

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<sup>2</sup> [2009] EWCA Civ 170

Furthermore, in the case of *Graham Leslie v Farrar Construction Ltd*<sup>3</sup>, The Court of Appeal's decision in *Graham Leslie v Farrar Construction Ltd* concerned on whether an employer could recover a £300,000 overpayment for build costs made to a contractor. The final decision have been decided that the employer could not recover overpayments it had paid to the contractor without further investigation. While the principles the court applied are well established and generally uncontroversial, the outcome that the employer could not recover the overpayment may be surprising to many operating companies in the construction industry.

Failure to assess or value properly the amount of payment due to a contractor that resulting in an overpayment to occur is a dangerous situation that would not allow the excess payment to be recovered back (Shiels, Quigg, & Clarke, 2016). In the case of *Dajejarhi Sdn Bhd v MKRS Group (M) Sdn Bhd & Anor*<sup>4</sup>, Dajejarhi appointed MKRS as one of its subcontractors to supply offshore scaffolding services for the installation of tubes and cables at a utility platform. Dajejarhi claim for the recovery of an overpayment made to MKRS was granted by court based on the actual valuation done by the plaintiff on the total erected scaffolding on site.

### 1.3 Research Objective

The following objective for this research has been identified pursuant to the problem statement and the objective formed is:

1. To identify the circumstances that allows an overpayment to be recoverable or not.

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<sup>3</sup> [2016] EWCA Civ 1041

<sup>4</sup> [2015] 8 MLJ 434

#### **1.4 Research Scope**

The data collected for this research would be from legal cases and these cases will be selected based on its relevancy prior to the issues mainly about an overpayment in construction industry. The study is based on cases where the contract is formed between employer with the main contractor or the main contractor with the sub contractor. Moreover, the cases will be identified through terms searched in the website of Lexis Nexis Malaysia and priority will be on the Malaysia cases to be selected.

#### **1.5 Importance Of Research**

This research is to be completed in order to identify the causes that lead to an overpayment. From there, reasons will be identified for the decision made on the recoverability of the overpayment. This research could provide information and preparation to avoid such disputes regarding overpayment. Moreover, the legal positions for the respective party if overpayment happened can be identified and prepared upon.

#### **1.6 Research Process**

This research was basically a documental analysis of legal research and being carried out through the following process as sets out in the sub topics.

### **1.6.1 Initial Study**

At this stage, readings will be done in order to outline a literature review. From the readings and the formation of the literature review, the problem statement will be identified and consequently the objective for this research will be selected. The formation of literature review, problem statement and objective was made through readings of books, journals, web articles and legal cases. For this research the problem statement is regarding an overpayment among construction projects and the objective is to identify the reasons in allowing an overpayment to be recovered or not.

### **1.6.2 Data And Information Collection**

For the collection of data and information, the data will be collected through readings from journals, seminar papers, books, research papers and law cases. Books, journals and seminar papers are mostly from law books and law journals. The seminar papers and research papers are also chosen if it does mention terms related with this research. Moreover, law cases will also be used for this research and cases are obtained from the Lexis Nexis Malaysia website. The law cases are limited to Malaysia cases prior to this research but for information collection and for outlining the literature review, international cases will also be chosen.

#### **1.6.2.1 Primary Data**

The main data used for data analysis are chosen from legal cases. Legal cases prior to this research will be using only Malaysia cases. The cases will be identified through the Lexis Nexis Malaysia website. The identification of related cases will be

made through searching of the terms related such as ‘overpayment’ or ‘overpayment in construction’. The data will then be analysed through documental analysis method of thorough reading and extracting related points.

### **1.6.2.2 Secondary Data**

In completion of the literature review and information collection, this secondary data will be used. The secondary chosen are as follows:

a) Books

Books chosen for this research and for outlining the literature review will be based on law books or any other related books. These books will be used in completion of the literature review.

b) Seminar Papers, Research Papers And Journals

Seminar papers, research papers and journals will also be used to collect information and for further understanding in this research. These sources will also be used for writing the literature review.

c) Act

Any relevant acts and related provisions will be identified to support the analysis and will be stated in the literature review.

### **1.6.3 Data Analysis**

Data collection from the primary data will be used for analysing and the analysis will be executed using the method of documental analysis of a qualitative research. Related local law cases will be read upon and the facts will be explained and summarised in Chapter 4 for case analysis. From the case facts, several key points regarding the causes of an overpayment and the reasons for its recoverability will be extracted out and outlined in Chapter 4. Possible tables and figures will be set out to show any relationship that matters prior to the objective of this research. All of those analyses will then be discussed before coming into a conclusion.

### **1.6.4 Completion**

In completion of this research, conclusions will be made in Chapter 5 regarding to the data analysed. Summary of the research findings will be outlined and in answering this research's objective, the circumstances on the recoverability of an overpayment will be summarised and discussed in the conclusion. Other than that, any other related issue found during the course of this research will be expressed through a list of possible research topics.



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