

**WAIVER OF EMPLOYER'S TERMINATION RIGHT BY DOCTRINE OF  
ELECTION**

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## **DEDICATION**

This thesis is dedicated to my father, who taught me that the best kind of knowledge to have is that which is learned for its own sake. It is also dedicated to my mother, who taught me that even the largest task can be accomplished if it is done one step at a time. This thesis is also dedicated to my husband and daughter, who constantly giving me undivided supports and encouragement to overcome any challenges in life with their unconditional love and trust.

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## **ABSTRACT**

A contract creates a legal obligation upon the contracting parties. Generally, a contract may be terminated before completion at common law or by the exercise of express rights set out in the contract itself. Contracts can be brought to an end in a variety of ways, either by performance, agreement, frustration or by breach. Under common law, the innocent party can terminate the contract by the operation of law when a party intimates by words or conducts that he does not intend to honour his obligations or when the guilty party commits breach so serious that evinces its intention not to perform. However, a repudiation of contract does not automatically terminate the innocent party's obligations under the contract. The innocent party has choices between the right to continue the contract or to accept the repudiation of the guilty party as terminating the contract. In legal terminology the choice is known as "election". In order for the doctrine of election to operate effectively, there are certain essential elements and conditions to be fulfilled. If an election is not done correctly due to certain circumstances, it can be considered as an ineffective election. The employer's decision to affirm the contract or treat the contract as an end would be challenged. In situation where the employer elects to terminate the contract, it would become a waiver to the employer's termination right. Therefore, this study focused on the circumstances that are considered as waiver of the employer's termination right by election. From the result of this research, it can be concluded that the circumstances that may lead the employer to have waive their termination right by election are delay in termination, unequivocal conduct to affirm and affirmation of contract.

## ABSTRAK

Kontrak membentuk satu hubungan yang sah di antara pihak-pihak yang berkontrak di sisi undang-undang. Secara umumnya, kontrak boleh ditamatkan sebelum kontrak dilaksanakan di bawah undang-undang lazim Inggeris atau melalui hak-hak nyata yang dinyatakan dalam kontrak itu sendiri. Kontrak boleh diakhiri dalam pelbagai cara, sama ada melalui pelaksanaan, persetujuan, kekecewaan dan kemungkiran. Di bawah undang-undang lazim Inggeris, pihak yang tidak bersalah boleh menamatkan kontrak dengan penguatkuasaan undang-undang apabila sesetengah pihak menunjukkan sama ada dengan kata-kata atau dengan kelakuan yang dia tidak berniat untuk menghormati kewajipannya atau apabila pihak bersalah melakukan kemungkiran serius yang menunjukkan dia tidak berhasrat untuk melaksanakan kewajipannya. Walau bagaimanapun, penolakan kontrak tidak menamatkan kewajipan pihak yang tidak bersalah secara automatik di bawah kontrak. Pihak yang tidak bersalah mempunyai pilihan antara hak untuk meneruskan kontrak atau menerima penolakan pihak yang bersalah sebagai menamatkan kontrak. Dalam istilah undang-undang, pilihan itu dikenali sebagai "pemilihan". Untuk membolehkan doktrin pemilihan berfungsi dengan berkesan, terdapat unsur-unsur dan syarat-syarat tertentu yang perlu dipenuhi. Jika 'pemilihan' tidak dilakukan dengan betul kerana keadaan tertentu, ia boleh dianggap sebagai 'pemilihan' yang tidak berkesan. Keputusan majikan untuk mengesahkan kontrak atau menamatkan kontrak akan dicabar. Dalam keadaan di mana majikan memilih untuk menamatkan kontrak, ia akan menjadi pengecualian hak majikan untuk menamatkan kontrak. Oleh itu, kajian ini memberi tumpuan kepada keadaan yang dianggap sebagai pengecualian hak penamatan majikan melalui 'pemilihan'. Hasil penyelidikan ini menyimpulkan bahawa keadaan yang boleh menyebabkan hak majikan untuk menamatkan kontrak melalui pemilihan dikecualikan adalah keterlambatan dalam penamatan kontrak, kelakuan yang jelas untuk pengesahan dan penegasan kontrak.

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## LIST OF ABBREVIATIONS

AC	-	Law Reports Appeal Cases
ALL ER	-	All England Law Reports
CA	-	Court of Appeal
CB	-	Common Bench Reports
CIDB	-	Construction Industry Development Board
CLR	-	Commonwealth Law Reports
FC	-	Federal Court
HL	-	House of Lords
IEM	-	Institution of Engineers, Malaysia
KB	-	King Bench
LR	-	Law Reports
LT	-	Law Times Reports
MLJ	-	Malayan Law Journal
NSWLR	-	New South Wales Law Reports
NZLR	-	New Zealand Law Reports
PAM	-	Pertubuhan Arkitek Malaysia
PWD	-	Public Work Department
QB	-	Queen Bench
SCR	-	Supreme Court of Canada
SLR	-	Singapore Law Reports

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# CHAPTER 1

## INTRODUCTION

### 1.1 Background of the Study

A contract is an agreement enforceable by law (*Contracts Act 1950* (Act 136), s. 2(h)). It creates a legal obligation upon the contracting parties with specific terms in which there is a promise to do something in return for a consideration. In construction industry, contract is required to facilitate the production of construction of products. It also serves the purpose to outline the rights and duties of all the parties involved in the contract and to allocate the risk between those parties (Harbans, 2005; Adriaanse, 2007 and Samuels, 1996). Harbans (2005) states:

A construction contract ... is a contract under which one party (commonly called the Contractor) agrees for valuable consideration to undertake to carry out works for another party (commonly called the Employer) involving design (where applicable), fabrication, erection, alteration, repair or demolition of structures and/or installation on a site made available by the latter.

(Harbans, 2005:7)

The contracting parties are obliged to 'either perform, or offer to perform, their respective promises, unless the performance is dispensed with or excused under the law' (Vohrah and Wu, 2000, p. 151).

Generally the contracting parties' main objective of entering into a contract is to see it through to completion of the project. They always place high expectations especially at the beginning of every new construction project that everything will go smoothly until the project is completed and handed over for use. The employer expects that the contractors would be able to complete the project on time, within the

budget and with desired quality while on the other hand, the contractors envisage of timely payments with a healthy profit at the end of the project. However, construction projects can be difficult and not every contract will achieve its objectives. Cooke J in *Canterbury Pipe Lines Ltd v Christchurch Drainage Board* [1979] 2 NZLR 347, p.353, states ‘Building contracts have been traditionally a fertile source of disputes’. The statement aptly summarises the nature of construction industry which is prone to complex disputes. The parties’ anticipations are often destroyed at some point in the project when one party is confronted with the unpleasant dilemma of terminating the contract.

Termination of contract occurs when a valid and enforceable contract is brought to an end either by becoming impossible to perform due to unforeseeable circumstances at the time the contract was formed or by the actions of one or both parties (The Entrusty Group, 2008). When a contract is terminated, the contracting parties are discharged from their respective further obligations arising from the contract as their duty to complete these obligations ceases to exist (Hellmuth and Johnson, 2011). Termination of contract may be exercised upon another party by operation of expressed contractual provision or by operation of law. Under common law, when there is a repudiatory breach of contract the innocent party has the right to choose between two inconsistent rights (Carter, 1997). These inconsistent rights are the right to continue with the contract and the right to terminate the contract. Contract law refers to this principle as ‘election’ (Jackson, 2016). A choice made in favour of one right or course of action against the other results in irrevocable consequences which may have not been intended.

It is not uncommon for parties to incorrectly assume that they have a right to terminate in a particular situation and to purport to terminate the contract without any legal right to do so. This can result in the termination being ineffective and the terminating party being exposed to a damages claim. In other words, rather than being the innocent party, the party who ineffectively terminates the contract unwittingly becomes the party in breach. In some cases, the right arises well before legal advice is obtained by the party. This delay give rise to the question of whether the party who seeks to terminate the contract has either affirmed the contract and

thereby waived its right to terminate or whether the right has been extinguished by the expiry of time. The affirmation may comprise a series of acts put together.

Bringing an end to one contract is usually not an easy and simple matter because the effect to terminated party is severe. The decision as to whether to terminate may be burdened with difficulty, with considerable consequences if termination went wrong. Employers, contractors and sub-contractors are becoming more frequently faced with choosing between whether to affirm a contract following what is thought to be a repudiatory breach by the other party or whether to terminate the contract. Notwithstanding the merit of grounds on which termination process was invoked, an improper or inconsistent conduct by the employer in exercising his right of election may nullify the effect of termination and could result in terminating party to be held repudiating the contract and the innocent party may claim damages including loss of profits on uncompleted works. Thus, the circumstances that may cause the employer to have waived their right for termination by election is what this thesis is seeking to explore.

## **1.2 Problem Statement**

The central issue of termination in construction contracts is the process of termination. If a right to terminate arises, the innocent party needs to decide whether to elect to (1) affirm the contract and claim damages for the particular breach or (2) terminate the contract and claim full loss of bargain damages. When the innocent party elect to accept the breach as repudiation of the contract, this must, as a general rule, be communicated to the other party in a clear and unequivocal way: *Berger v Boyles* [1971] VR 321 at 326. The question may then arise as to what should constitute adequate communication in such circumstance to ensure that the termination is effective? In *Vitol S.A. v Norelf Ltd* [1996] A.C. 800 (The Santa Clara), the House of Lord has to decide whether mere inactivity could constitute acceptance of the repudiation. It was held that non-performance of an obligation was, as a matter of law, capable of constituting an act of acceptance of repudiation.

In *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151, the Federal Court recognised the right of the respondent to adopt either course of action when a housing developer failed to deliver the house as the stated time in the contract. It is decided that the respondent allowed the delivery dates to pass and had choose to treat the contract as subsisting despite the breach, by acquiescing in the work being carried on and ordering the housing developer to finish the undone part soon. By the conduct of the respondent, he had waived his right to terminate the appellant for default.

While the terminating party is required to justify termination on the basis that they have a legal right to terminate, they are subsequently entitled to rely on any valid ground existing at the time of election whether or not they were aware of it at the time. There will be occasions when a party treats some action by party as repudiatory when subsequently it turns out not to be so, by the decision of a court. In *Platinum Nanochem Sdn Bhd v Mecpro Heavy Engineering Ltd* [2016] 11 MLJ 141, the plaintiff alleged that the defendant had failed to complete the works on time and thereby entitle to terminate the contract. The court held that the plaintiff was the actual contract-breaker and had wrongfully terminated the contract. The court agreed with the defendant that there was an express and/or implied term that the defendant's obligation to complete the works was subject to the plaintiff fulfilling its obligations first, which the plaintiff clearly fails to do so.

A party may not be obliged to accept repudiation and terminate the contract even if it might be said that to do otherwise would be unreasonable. The innocent party may treat the contract as still continuing and affirm their obligation under it. Such an arrangement is very unfair to the guilty party to some extent. The unfairness results from the fact that despite the guilty party has no intention to perform his obligation, the innocent party in affirming the contract, is entitled to continue to perform their obligation under the contract, thereby increasing their losses. When the date of performance is due, the innocent party would these losses to claim for damages. For example, in *White and Carter (Councils) Ltd v McGregor* [1961] A.C. 413, the advertising contractors agreed with a representative of a garage proprietor to display advertisements for the garage for three years. On the same day, the garage

proprietor wrote to the contractors saying that there had been a misunderstanding and purported to cancel the contract. The advertising contractors refused. The House of Lords held that they were entitled to refuse, carry out the contract and claim the full contract price.

If a contract is affirmed, it cannot subsequently be terminated in respect of the same breach leading to the affirmation, although some breaches may be, by their nature, continuing breaches giving rise to a subsequent right to terminate. An election to affirm will be inferred from conduct which is consistent only with the continued existence of the contract, such as continued performance.

Having regards to the risk in purporting to terminate when there is no right to terminate and the possibility that if there is a right to terminate, it is lost by affirmation, in many cases parties will attempt to hedge their bets and reserve their rights. A party will not necessarily affirm a contract if they give the party in breach an opportunity to perform in suitably qualified and conditional terms or otherwise continue performance subject to an express right to terminate. However, an election cannot be delayed unreasonably.

The problem statement for this research is what are the circumstances that may cause the employer to have waived their right for termination by doctrine of election? Up to the writing of this research, best to the researcher knowledge, there are no clear indication or similar researches in Malaysia that explore in details on the circumstances that will waive the employer's rights for termination due to improper conduct/process in the election. In the absence clear indication of those nature and circumstances, the employer may not know that its right to terminate can be foregone in a variety of circumstances, whether intentionally or unwittingly. That being said, there is a necessity to highlight the circumstances that may cause the employer to have waived their right for termination by doctrine of election.

### **1.3 Research Question**

The research question for this study is what are the circumstances that may cause the employer to have waived their right for termination by doctrine of election?

### **1.4 Objective of Research**

The objective of this research is to identify the circumstances that may cause the employer to have waived their right for termination by doctrine of election.

### **1.5 Previous Researches**

Several researches have been conducted in the past with reference to the issues of termination in construction contracts. In 2006, a study by Tan Lee Yong on the most commonly expressed defaulting events of termination in Malaysia's construction found that the most prevailing defaults were fail to proceed regularly and diligently followed by wrongful suspension of works by the contractor. In 2009, Roslinda binti Rosly studied the profile of construction contract termination cases. The finding shows that more than 50% termination cases were held as wrongful and the main reason is the termination process was not following the appropriate procedure provided in the contract.

The study by Chong Oi Siang in 2011 focused on the reason of wrongful or unlawful termination of construction contract and concluded that the common reasons for wrongful termination are due to unreasonable ground of termination, issuance of notice and breach by the terminating party before termination of contract. In the same year, Wan Mohd Izzuddin Bin Wan Ibrahim examined the appropriateness between literal and commonsense interpretation method for service of notice for determination in construction contract and his finding shows that



business commonsense is the appropriate method of interpretation for service of notice for determination compared to strict literal interpretation.

Table 1. 1 Previous researches

Author	Title	Year	Discussion
Tan Lee Yong	Determination of Contract by Employer in Construction Industry	2006	The study determined the most commonly expressed defaulting events of termination in Malaysia's construction and found that the most prevailing defaults were fail to proceed regularly and diligently followed by wrongful suspension of works by the contractor.
Roslinda binti Rosly	The Profile of Construction Contract Termination Cases	2009	The study developed the profile of construction contract termination cases in terms of their status and the reasons for wrongful termination. The finding shows that more than 50% termination cases were held as wrongful and the main reason is the termination process was not following the appropriate procedure provided in the contract.
Chong Oi Siang	Wrongful Termination of Contract in Construction Industry	2011	The study focused on the reason of wrongful or unlawful termination of construction contract and concluded that the common reasons are due to unreasonable ground of termination, issuance of notice and breach by the terminating party before termination of contract.
Wan Mohd Izzuddin bin Wan Ibrahim	Service of Notice for Determination in Construction Contracts	2011	The study examined the appropriateness between literal and commonsense interpretation method for service of notice for determination in construction contract. The finding shows that business commonsense is the appropriate method of interpretation for service of notice for determination compared to strict literal interpretation.

## **1.6 Scope of Research**

The research will be conducted based on the topic of termination and also the doctrine of election. The approach adopted in this research is case law based. The relevant court cases are collected through the web of Lexis Nexis and other sources from the web. The study also will be supported with the Malaysian and the international cases which wherever background knowledge is necessary.

## **1.7 Significant of Research**

Lack of knowledge in construction law by construction players has been the leading cause of dispute. Employers, consultants and contractors though with years of experiences in the industry are usually lacking of the legal knowledge and understanding on the operation and effects of various clauses in construction contracts in general and termination of contracts in specific. The lacking in understanding the legal and contractual aspects of contract may be caused by not having the experience to undergo the process itself or just plain ignorance of the topic overridden by greed, self-righteous and professional pride. Lack of knowledge in construction law will lead to wrong interpretation of contracts in which the party tends to take trivial matters like requirements for an election to terminate lightly without realising that termination is not automatic upon a repudiation. This trivial matter may turn out to be matter of great importance in the eye of Courts of law.

The purpose of this research is to provide a better understanding to the contractors and the employer of their termination rights of construction contract. By understanding their rights to terminate, any party to contract who wish to terminate the other party will exercise their termination rights effectively and prudently. The owner considering termination should consider whether it has waived its right to

termination by its affirmative conduct. On the other hand, the contractor can explore whether there is any basis for arguing forfeiture as a challenge to a termination.

## **1.8 Organisation of Research**

This research has been prepared in five main chapters, namely the introduction, literature review, research methodology, analysis and discussions, as well as conclusion and recommendations. Contents of each chapter will be elaborated in order to facilitate the readings and understanding of this research.

The brief descriptions of each chapter are as follows:

### **1.8.1 Chapter 1: Introduction**

This chapter presents the overall content on the study. It introduces the background of the study, problem statement, research question, objective of research and scope of study. It also includes the significant of the research methodology in order to achieve the objective of the study.

### **1.8.2 Chapter 2: Literature Review**

This chapter will examine and synthesise the relevant literature to the study. This chapter discussed generally about contract in construction industry and the doctrine of election in construction contract termination. It includes the discharge of contract, termination in construction contracts, principle of the doctrine of election, preconditions of election and its application in construction contract termination.

### **1.8.3 Chapter 3: Research Methodology**

This chapter presents the research methodology used in this study which consists of five stages, namely initial study, literature review, data collecting, data analysis and conclusion and recommendation.

### **1.8.4 Chapter 4: Analysis and Discussion**

This chapter analysed the results from the judicial decisions as reported in law reports which are related to the research issue on circumstances that may cause the employer to have waived their right for termination by doctrine of election which are referred to the court.

### **1.8.5 Chapter 5: Conclusion and Recommendations**

This chapter summarise the research outcomes followed by a conclusion of the study. Suggestions and recommendations for future research also provided in this chapter.

## **1.9 Conclusion**

The first chapter is the introduction for the whole study whereby it consists of the background of the study, problem statement, objective of research and the scope of research. In addition, this chapter also includes the importance of the study. In the next chapter the researcher will discussed on the termination of contract and the doctrine of election.

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