

SUSPENSION OF WORKS AS REMEDY FOR NON-PAYMENT

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UNIVERSITI TEKNOLOGI MALAYSIA

SUSPENSION OF WORKS AS REMEDY FOR NON-PAYMENT

LEE CHIA KUANG

**A project report submitted in partial fulfillment of the requirements for the
award of the degree of
Master of Science in Construction Contract Management**

**Faculty of Built Environment
Universiti Teknologi Malaysia**

JULY 2009

DEDICATION

Specially dedicated to:

My beloved Father, Lee Kee Chin

My beloved Mother, Tan Chun Thoo

My cute little baby sister, Lee Jo Ying

Thanks for all the love and encouragement ~

ACKNOWLEDGEMENT

As a result of the completion of this research, I wish to thank everyone who has helped and encouraged me. Many thanks to the supervisor for this research, Encik Jamaludin Yaakob. His guidance has motivated and helped me throughout the completion of this research. I am so thankful for his commitment and his guidance in contributing towards my understandings and thoughts.

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ABSTRACT

Construction industry is vital for the nation's growth and will only continue to function with the basis of payment by the employer. However this industry has been plagued by the non-payment scenario, and directly affecting contractor's cashflow. In properly securing payment and remedying non-payment by the employer, contractor nevertheless can choose to suspend works. This right is a self-help remedy that can be an effective means of securing payment without the need to instigate other formal procedures and remedies which are time and money consuming. In Malaysia, this right has been introduced in CIDB 2000, and later in PAM 2006 for building works; while the other countries such as UK, New Zealand, Australia, Isle of Man, and Singapore has incorporated this right in their building acts since a very long time. Despite of this convenience, studies have shown many contractors in Malaysia do not favour this right in remedying non-payment, and similiarly there is almost no case law (except one case in New Zealand) that illustrate contractor exercising this right. This research therefore has been done to explore what are the possible problems that the contractor may encounter and to what extent it may arise when exercise this right in relation to PAM 2006 and CIDB 2000. The result shows that the contractor's right in suspension of work can be challenged by the employer for several grounds such as the validity of notice to suspend works, validity of interim certificates and the right to set-off as grounds for non-payment. Secondly, without proper fulfillment such as mitigation of loss, prevention of delay, and submitting notices, contractor can be held to have lost his rights in these claims. Thirdly, contractor may face problems in suspending works downstream as there is lack of back-to back provisions in sub-contracts. This research will shed a light of what are the possible problems that the contractors may encounter under PAM 2006 and CIDB and forms a guideline for the contractors to suspend work optimistically.

ABSTRAK

Industri pembinaan adalah penting kepada pembangunan negara, dan kesinambungannya hanya akan berterusan berasaskan pembayaran daripada majikan yang mapan. Akan tetapi, industri ini telah dibelenggu dengan masalah ketidakbayaran dan mengganggu status kewangan pihak kontraktor. Penangguhan kerja dapat dipilih dan dilihat sebagai satu cara yang efektif dan alternatif kepada cara-cara yang lain yang hanya memakan masa dan wang dalam menangani ketidakbayaran. Di Malaysia, penangguhan kerja telah diperkenalkan di borang setara CIDB 2000, dan seterusnya di PAM 2006 untuk kerja-kerja bangunan. Negara-negara lain seperti UK, New Zealand, Australia, Isle of Man, and Singapore telah memperuntukkan penangguhan kerja sebagai satu hak untuk kontraktor dalam akta pembinaan. Walaupun demikian, kajian telah menunjukkan banyak kontraktor di Malaysia tidak memilih alternatif ini. Malah, sehingga hari ini hampir tidak ada satu kes mahkamah (kecuali satu kes di New Zealand sahaja) yang mampu memberi ilustrasi di mana kontraktor telah menggunakan alternatif ini terhadap ketidakbayaran majikan. Dengan itu, kajian telah dilakukan di sini untuk mencari potensi masalah-masalah yang akan dihadapi kontraktor apabila menggunakan hak penangguhan kerja di bawah borang setara PAM 2006 dan CIDB 2000. Daripada kajian ini, potensi masalah yang dihadapi meliputi cabaran daripada majikan dalam notis, sijil interim dan hak “set-off” sebagai satu alasan untuk ketidakbayaran. Malah, hak kontraktor dalam menuntut kerugian dan pemanjangan masa akan dipertikaikan sekiranya kontraktor tidak memitigasikan kerugian dan mengurangkan kelewatan dan memberi notis. Akhir sekali, kontraktor akan mengalami masalah untuk melaksanakan penangguhan kerja terhadap pihak bawahan disebabkan ketiadaan klausa di borang sub-kontrak. Kajian ini akan memberi petunjuk yang berguna kepada kontraktor supaya optimis untuk menangguh kerja di bawah PAM 2006 dan CIDB 2000.

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All ER	All England Law Reports
BCL	Building and Construction Law
BLR	Building Law Report
CLD	Construction Law Digest
CLJ Supp	Current Law Journal Supplement
Con LR	Construction Law Report
FSR	Fleet Street Reports
K.B	King's Bench
MLJ	Malayan Law Journal
NTSC	NT Supreme Court
NZLR	New Zealand Law Reports
SLR	Singapore Law Reports
TCC	Technology and Construction Court

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- Ayer Itam Tin Dredging Malaysia Berhad vs YC Chin Enterprise Sdn Bhd [1994] 2 MLJ 754
- Ban Hong Joo Mines Ltd vs Chen & Yap Ltd [1969] 2 MLJ 83
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- Channel Tunnel Group Ltd vs Belfour Beatty Construction Ltd & others [1992] 2 ALL ER 609
- Chandler Bros Ltd vs Boswell [1936] 3 ALL ER 179
- C.M Pillings & Co Ltd vs Kent Investments Ltd [1986] 4 Con LR 1
- Dawnays Ltd vs F.G. Minter Ltd [1971] 1 BLR 16
- DR Bradley (Cable Jointing) Ltd vs Jefco Mechanical Services [1989] 6 CLD , 7-19
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Parkinson vs Commissioners of Works [1949] K.B.632

Pembinaan Leow Tuck Chui & Sons Sdn Bhd vs Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57

Reinwood Ltd v Brown & Sons Ltd [2006] TCC 9 November 2006

Token Construction Co Ltd v Charlton Estates Ltd [1973] 1 Build LR 48

The Jardine Engineering Corporation Limited v Shimizu Limited [1992] 63 BLR 96

Turner Corporation vs Austotel Pty Limited (1994) [1994] 13 BCL 378

Woo Kam Seng vs Vong Tak Kong [1968] 2 MLJ 244

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CHAPTER 1

INTRODUCTION

1.1 Introduction

Construction industry is vital for the nation's growth, and works as an important cog in the wheel propelling the Malaysian economy. Nevertheless, it will only continue to function with the basis that the people and the professionals such as the architects, engineers, surveyors, and labourers are paid for work and services that have been properly executed¹.

However, over the years, cash flows problems due to non-payment culture of the employer have worried key players in the industry². As the saying goes, “cash flow is the life blood of the construction industry”³, payment has been one of the criteria and essence for a successful construction project⁴. Payment was identified as one of the ten priority areas in the Malaysian construction industry during a

¹ Lim Chong Fong.(2005).The Malaysian Construction Industry – The Present Dilemmas of the Unpaid Contractors. *Masters Builders Journal (4th Quarter)*, pg 80-82

² CIDB. (2007). *Construction Industry Master Plan Malaysia 2006-2015*. Malaysia: CIDB, pg 135

³ Lord Denning in *Dawnays Ltd vs F.G. Minter Ltd* [1971] 1 BLR 16

⁴ Sr Noushad Ali Naseem Ameer Ali. (2006). *A “ Construction Industry Payment and Adjudication Act” : Reducing Payment Default and Increasing Dispute Resolution Efficiency in Construction*. From [http://www.mbam.org.my/mbam/images/MBJ3Q06\(pdf\)/CsNaseem\(ACTpt1\).pdf](http://www.mbam.org.my/mbam/images/MBJ3Q06(pdf)/CsNaseem(ACTpt1).pdf)

construction industry roundtable in June 2003. A recent survey carried out by CIDB in collaboration with University Malaya, even showed that delayed and non-payment in the Malaysian construction industry chronically affecting the entire delivery chain⁵. It is really an irony to see the construction industry facilitated by professionalism creates such an intricate situation for the contractors.

It has been customary for employer to make periodic payments to contractor, due to the fact that large capital expenditure and the extended period of construction, it would be difficult for even the most fiscally strong contractor to finance the entire project until completion⁶. Eventually, when the project moves towards completion, the contractor loses leverage, while the employer gains leverage. Some employers misuse this leverage, by delaying the payment, and eventually lead to non-payment⁷. Basically, the contractor would be left with the option of progressing with the work concurrent with suing for payment with interest, or if the non-payment by the employer is so serious to constitute a repudiatory breach, the contractor can choose to terminate the contract⁸. Indeed, termination as the way to remedy non-payment is expressly stated out in some standard form of contracts, however as a matter of practice, many unpaid contractors are reluctant to go on the route of termination⁹.

As proposed by some of the professionals, suspension of works might do the trick as one of the avenues in solving the unpaid problems. Suspension of works represents a contingency that can be made available to the contractor to the contract in certain defined situation whereby the progress of the work can be temporarily halted, waiting the employer to remedy the non-payment default¹⁰. Encouraged to be one of the avenues in solving problems of non payments by the employer,

⁵ Ibid

⁶ Jervis, B.M, and Levin, Paul. (1988). *Construction law Principles and Practice*. U.S: McGraw-Hill Book Company, pg 153.

⁷ Howrey,LLP. (2005). *Managing Payment Delays on International Construction Projects*, from http://www.constructionweblinks.com/Resources/Industry_Reports__Newsletters/Nov_21_2005/man a.html

⁸ Ban Hong Joo Mines Ltd vs Chen & Yap Ltd [1969] 2 MLJ 83.

⁹ Lim Chong Fong.(2005).The Malaysian Construction Industry – The Present Dilemmas of the Unpaid Contractors. *Masters Builders Journal (4th Quarter)*, pg 80-82

¹⁰ Harbans Singh. (2004). *Suspension of Work: An Overview*. From [http://www.bem.org.my/publication/septnov04/E&L\(Suspension\)\(24-35\).pdf](http://www.bem.org.my/publication/septnov04/E&L(Suspension)(24-35).pdf)

mechanism of suspension of works has been strongly recommended to be included in the proposed Construction Industry Payment and Adjudication Act by the Construction Industry Working Group on Payment (WG 10) during the construction industry round table in June 2004 chaired by the Honorable Minister of Works, and is envisaged in the second strategic thrust in the Construction Industry Master Plan 2006-2015¹¹.

Countries such as Australia, New Zealand, UK, Isle of Man, and Singapore have envisaged suspension of works as a statutory right. It is believed such right would enable the contractor who is aggrieved for non-payment to suspend construction works until he is fully paid. Recently there is one case law in New Zealand (*Marsden Villas Limited vs Wooding Construction Limited*) has demonstrated the successfulness of the Construction Contracts Act (New Zealand Act) working properly in empowering the right of suspension for non-payment to the contractor.

However, there is no common law right for contractor to suspend works for non-payment, as suspension for non-payment is only available to contractor if there is express clause in contract, and by implication of statutory provisions. In Malaysia, it appears that without specific statutory provisions, the contractors have no opportunity to exercise this option. Prior to year 2000, no Malaysian Standard form of contract for building works provides this express right. However, when CIDB 2000 standard form of contract was first introduced, suspension of work was an express right for the contractors, and six years after that, this right was entrenched in PAM 2006 as well. Enshrined both in CIDB 2000 and PAM 2006 for building works, eventually it gives a new dimension for the contractors rather than terminating the contract and other avenues which put their interest at stake and consumes times and money.

¹¹ Sr Noushad Ali Naseem Ameer Ali. (2006). A “ *Construction Industry Payment and Adjudication Act*”: *Reducing Payment Default and Increasing Dispute Resolution Efficiency in Construction*. From [http://www.mbam.org.my/mbam/images/MBJ3Q06\(pdf\)/CsNaseem\(ACTpt1\).pdf](http://www.mbam.org.my/mbam/images/MBJ3Q06(pdf)/CsNaseem(ACTpt1).pdf)

1.2 Problem Statement/ Research Issues

Failure of the employer to pay for work properly executed is one of the contractor's worst fears, as the amount of money owed may be substantial and this can drive the contractor and his or her sub contractor out of business¹². Lately there are signs that deteriorating economic conditions begun to hurt the construction industry despite the government's injection of an additional allocation of RM 7 billion into the economy¹³. This scenario greatly affects the key players especially the contractors in their cash flow. This circumstance has indeed worsened the adversarial nature of the construction industry, due to the fact that construction industry is complex and easily bound to raise financing issues and disputes relating to non-payment¹⁴. However, non-payment related dispute remedied through litigation if affordable but it takes too long; while arbitration is faster but expensive¹⁵.

Suspension of works nevertheless can be regarded as a self-help remedy to the contractor who has not received payment, and if used properly it can be as effective means of securing overdue payment without the need to instigate other more formal procedures such as adjudication, arbitration or litigation¹⁶. However, there is no common law for contractor to suspend works for non-payment, and contractor can only suspend works based on express provisions in contracts and statutes.

Under statutes, suspension of work has already been created under a statutory right in section 112 of the HGCRA 1996 to remedy the non-payment of the employer

¹² Kwakye, A.A. (1997). *Construction Project Administration in Practice*. England: Addison Wesley Longman, pg 241.

¹³ The Star. (2008). Proposed act To protect contractors. *The star*. From <http://star-space.com/news/story.asp?file=/2008/12/9/pnews/2735045&sec=pnews>

¹⁴ Ibid

¹⁵ Lim Chong Fong. (2005). The Malaysian Construction Industry – The Present Dilemmas of the Unpaid Contractors. *Masters Builders Journal (4th Quarter)*, pg 80-82

¹⁶ Pettigrew, R. (2005). *Payment Under Construction Contracts Legislation*. London : Thomas Telford, pg 120

in the UK¹⁷. Besides that, countries like Singapore, and New Zealand, Australia and Isle of Man had similar acts which had incorporated the right of suspension of work since a very long time ago.

However in Malaysia, the Construction Industry Payment and Adjudication Act is still awaiting submission to the cabinet for approval and directive so that a formal Bill can be presented to parliament¹⁸. The construction industry had been pushing for the act that provides for inter alia the suspension of work since 2004 and yet, there has been little progress until now¹⁹. Hence, the only way for the contractor to suspend works is to rely upon the express provisions if any set out in construction contracts. So far, suspension of works for non-payment was incorporated in FIDIC since a long time ago and in Malaysia this right was introduced in CIDB 2000, and later in PAM 2006 for building works.

Despite of the importance of suspension of work as a remedy for non-payment in Malaysia being promoted by the key players, yet a recent survey study carried out by University Malaya has shown that contractors are less willing to exercise out the right to suspend works and their responds towards this right is unfavorable compared to the other avenues²⁰. Hence, first impression comes to mind is that the right to suspend works enshrined in what we have now in standard form of contracts such as PAM 2006 and CIDB might posses certain difficulties which impede contractor's interest in exercising this right against non-payment by the employer. Is there really a problem by exercising this provision? Unfortunately there are no study made and no writings can provide this information.

¹⁷ Murdoch, John. and Hughes, Will. (2008). *Construction Contracts Law and Management Fourth Edition*. London: Taylor and Francis Group, pg 331

¹⁸ The Star. (2008). Proposed act To protect contractors. *The star*. From <http://star-space.com/news/story.asp?file=/2008/12/9/pnews/2735045&sec=pnews>

¹⁹ Bernama. (2009). *Government Urged to help local construction industry*. From http://www.bernama.com/bernama/v3/news_lite.php?id=390130

²⁰ M.S. Mohd Danuri, M.E. Che Munaaim, H. Abdul Rahman, M.Hanid. (2006). *Late and Non-Payment Issues In The Malaysian Construction Industry - Contractors' Perspective*. Joint International Conference on Construction Culture, Innovation, and Management (CCIM), Dubai. (*Non-ISI/Non-SCOPUS Cited Publication*). From <http://www.irbdirekt.de/daten/iconda/CIB4392.pdf>

Similarly in Malaysia, CIDB 2000 and PAM 2006 have been launched 9 and 3 years ago respectively, and yet there is no single case law that illustrate contractors exercising out suspension of work. Despite of the convenience of this right under statutes in UK, Australia, New Zealand, and Isle of Man there is almost no case law which illustrate contractors exercising the right to suspend works except one case law in New Zealand - *Marsden Villas Limited vs Wooding Construction Limited*²¹. In this case, the employer had challenged the contractor's right in suspension of work. The employer had argued that the contractor was not entitled for suspension when he had served the contractor payment schedule, however the court held that the only way to lift the suspension was to pay the full amount to the contractor.

Following the New Zealand case, however in practice there are still various possibilities under which a contractor's action in suspension of work which may be challenged by the employer. This can pose a big problem to the contractor when they suspend works. Eventually, there are various possible grounds that the employer may be able do that. A quick search through the law cases indicates that there are several issues that employer can choose as possible grounds to challenge suspension of works by the contractor. The employer may argued the validity of the interim certificate, the validity of notices of suspension and the right to set-off as possible grounds for non-payment, thus challenging contractor's right in suspension.

Followed by that, contractor may encounter a hard time enjoying his entitlements when suspending works. Stipulated in PAM 2006 and CIDB 2000, the contractor is entitled for claiming loss and expense and extension of time when suspending works. These claims require the contractor to follow certain procedures and conditions which may prove some difficulties in his fulfillment. Besides that, contractor's entitlements in claiming these can be challenged based on other grounds as well. Nevertheless, as suspension of work relates to other parties especially sub-contractor, contractor may have problems exercising this right which is directly affecting the sub-contractors as well.

²¹ [2007] 1 NZLR 807

However to what extent these problems stated notionally will arise when contractor exercises out his right of suspension based on PAM 2006 and CIDB 2000 remains unanswered unless research and study has been done. There is less information and almost no law cases that can show the contractor has attempted his right in suspension of work for non-payment. Lackluster of this information may cause the contractors to less acknowledged about what are do's and don'ts in exercising out their right in suspending works for non-payment. As the saying goes: "if you don't keep the score, you are only practicing it"²², eventually there is a need to have a research that can shed a light to the contractors in having a clear awareness of the possible problems when exercising out suspension of work under and strengthen their understanding in the mechanism of suspension of work as a remedy for non-payment.

1.3 Research Objective

Suspension of work has been greatly emphasized as one of the remedies to allow unpaid contractors to remedy payment problems. Due to lack of information and nearly no law cases can enlighten the contractors about the possible problems that have arise when exercising out the right to suspend work in Malaysia, hence, the objective of this research is to identify:

- a) The possible problems that the contractor may encounter when he exercises his right in suspending works as remedy for non-payment based on PAM 2006 and CIDB 2000 standard form of contract for building works.

²² Kunju Ahmad, R. and Gibb, A. (2004). *Towards Effective Safety Performance Measurement-Evaluation of Existing Techniques and Proposals for the Future*. In Rowlinson, S. (Ed.). *Construction Safety Management Systems*. (425-442). London: Spon Press.

1.4 Scope of Research

The study will be focused on the contractor in Malaysia, and conducted on relevant clauses in Standard Forms of Contract for Building Works used in Malaysia such as PAM 2006, CIDB 2000 and law cases which explain the possible problems that the contractor may face when suspends works as remedy for non-payment.

1.5 Significance of the Research

Studies have even shown many contractors do not really take suspension of work as an alternative to remedy non-payment problems in Malaysia. In addition to that almost no law cases available and no study being made regarding to the issues that have arise due to suspension of work by the contractor. Hence, this research would clarify the possible problems that the contractors may face when suspend works and provide useful guidelines for the contractors about the do's and don'ts when suspending works as remedy for non-payment.

1.6 Research Methodology

This research has been carried out based on a legal research, and unlike empirical research, this study was not done based on statistical study. The primary data for this research are clauses in the construction contracts such as PAM 2006 and CIDB 2000 which explain and stipulate the right of suspension by the contractor for non-payment. Nevertheless, law cases forms an important source of the primary data which can be searched by using Lexis Nexis Engine. Although there are no direct

law cases regarding to contractor exercising the right of suspension of work, however other law cases which relate to issues of payment, certificates, etc will be sought and analyzed as these cases answers and dictate what are the possible problems that may arise when the contractor suspends works.

On the other hand, secondary data will be obtained from analysis, and researches done by people such as books, journals, articles, conferences, newspaper articles, and internet articles regarding to payment, remedies for non-payment. These secondary data materials will be sought and referred as well to aid in the literature review write up.

Eventually, all primary data and secondary data will be analyzed carefully. Documentary analysis will be made on these data as to provide an answer for the objective of this research, and all relevant information and findings will be written and made ready for summarized and published. In a nut shell, the stages for doing this research have been shown in figure 1.1 below:

1.6.1 Research Stage One: Literature Review

Through conversations with supervisor, an early perspective towards the research can be obtained. Relevant issues regarding with the research can be seen clearly, and the topic and scope of research are ascertained after getting some advice and consultations from the supervisor. Besides that, research issues are obtained as well after simultaneous reading from the sources and constant discussions with supervisor. Sources of the literature review will consist of articles in journals, magazines, published conference articles, books, websites, and handouts of published modules, and legal cases obtained from Lexis Nexis search engine.

1.6.2 Research Stage Two: Collection of Data

Collection of data can be divided into two categories, namely collection of primary data and collection of secondary data. To collect primary data, court decisions and standard form of contract analysis are vital in the collection of primary data. Standard form of contracts in Malaysia such as PAM 2006 and CIDB 2000, and legal cases obtained through Lexis Nexis Search Engine which provides important facts and data about suspension of work and contractor's rights and duties in suspension of work shall be analyzed carefully and critically. Analysis of these documents and cases shall be able to answer the objective of this research.

On the other hand, secondary data will be obtained from analysis, and researches done by people such as books, journals, articles, conferences, newspaper articles, and internet articles. Information about legal cases regarding to suspension of work, and even standard form of contracts available locally and internationally shall be referred to aid in the literature review write-up.

1.6.3 Research Stage Three: Data Analysis

All the data such as clauses from the standard form of contracts and court decision shall be analyzed qualitatively. By taking a deep look and review on the available forms of contract as well as court decisions, writing up will be made to answer the objective of the research.

1.6.4 Research Stage Four: Summary Formation and Report Writing

The summary of the study will be formed according to the analysis made before. The objective of research will be achieved based on the analysis. All relevant details will be prepared systematically in accordance with the format required. The produced report writing will then be sent for documentation and binding.