SUSPENSION OF WORKS AS REMEDY FOR NON-PAYMENT

LEE CHIA KUANG

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.

Nevertheless, I would like to express my gratitude towards my beloved family who has contributed to the completion of this research. I am grateful for their sincere support, love, encouragement and motivation. Their love and continued support had made this project report successfully researched and completed.
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 similarly 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.
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ABSTRAK

TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>CHAPTER</th>
<th>TITLE</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>DECLARATION</td>
<td></td>
<td>ii</td>
</tr>
<tr>
<td>DEDICATION</td>
<td></td>
<td>iii</td>
</tr>
<tr>
<td>ACKNOWLEDGEMENT</td>
<td></td>
<td>iv</td>
</tr>
<tr>
<td>ABSTRACT</td>
<td></td>
<td>v</td>
</tr>
<tr>
<td>ABSTRAK</td>
<td></td>
<td>vi</td>
</tr>
<tr>
<td>TABLE OF CONTENTS</td>
<td></td>
<td>vii</td>
</tr>
<tr>
<td>LIST OF ABBREVIATIONS</td>
<td></td>
<td>xiii</td>
</tr>
<tr>
<td>LIST OF CASES</td>
<td></td>
<td>xiv</td>
</tr>
<tr>
<td>LIST OF FIGURES</td>
<td></td>
<td>xvi</td>
</tr>
</tbody>
</table>

1 INTRODUCTION 1
1.1 Introduction 1
1.2 Problem Statements/ Research Issues 4
1.3 Research Objective 7
1.4 Scope of Research 8
1.5 Significance of the Research 8
1.6 Research Methodology 8
1.6.1 Research Stage One: Literature Review 11
1.6.2 Research Stage Two: Collection of Data 11
1.6.3 Research Stage Three: Data Analysis 12
1.6.4 Research Stage Four: Summary Formation and Report Writing 12
2 NON-PAYMENT IN THE CONSTRUCTION INDUSTRY

2.1 Introduction 13
2.2 Contractor’s Right to Payment 15
  2.2.1 Contractors Right to Payment under Express Terms of Contract 15
  2.2.2 Contractor’s Right to Payment under Common Law Principles (Quantum Meruit) 16
  2.2.3 Contractor’s Right to Payment under Implication of Statutory Provisions 18
2.3 Employer’s Consequences of Non-Payment 19
2.4 Contractor’s Actions against the Employer for Non-Payment 21
  2.4.1 Determination of Employment 22
  2.4.2 Application for Summary Judgment 22
  2.4.3 Application for Winding up Petition 23
  2.4.4 Terminate the Contract under Common Law 24
  2.4.5 Claim for Interest 26
  2.4.6 Suspension of Works 27
2.5 Proposing Suspension of Works as the Best Remedy for Non-Payment 28
2.6 Conclusion 30

3 CONTRACTOR’S RIGHT IN SUSPENSION OF WORKS

3.1 Introduction 32
3.2 Contractor’s Dilemma in Suspension of Works 33
3.3 Development of Suspension of Works Clause 35
3.4 Contractor’s Right to Suspend Works for Non-Payment under Express Provisions of Contracts 37
  3.4.1 Contractor’s Right to Suspend Works for Non-Payment under PAM 2006 37
3.4.1.1 Contractor’s Entitlements After Suspending Works for Non-Payment under PAM 2006 39
3.4.1.2 Contractor’s duties Following Suspension under PAM 2006 40

3.4.2 Contractor’s Right to Suspend Works for Non-Payment under Standard Form of CIDB 2000 40
3.4.2.1 Contractor’s Entitlements after Suspending Works for Non-Payment under CIDB 2000 42
3.4.2.2 Contractor’s Duties Following Suspension under CIDB 2000 43

3.4.3 Technical Definition of Suspension of Works under PAM Contract 2006 and CIDB 2000 43
3.4.4 Back-to-back Provisions in Sub-Contracts 45
3.4.4.1 Back-to-back Provisions in PAM Sub-Contract 2006 (Nominated) 46
3.4.4.2 Back-to-back Provisions in CIDB Standard Form of Sub-Contract for Nominated Sub-contractor [Form CIDB.B (NSC)/2002] 47
3.4.4.3 Back-to-back Provisions of PAM 2006 and CIDB 2000 in Domestic Sub-Contracts 48

3.4.5 Contractor’s Right to Suspend Works for Non-payment under other Contracts – FIDIC 49
3.5 Contractor’s Right Under Statutory Provisions to Suspend Works for Non-Payment 51
3.5.1 Suspension of Works for Non-payment under Housing Grants, Construction and Regeneration Act (HGCRA) 1996 (UK) 52
3.5.2 Suspension of Works for Non-Payment under Building and Construction Industry Security of Payment Act 1999 amended in 2002, New South Wales, Australia (NSW Act) 54

3.5.3 Suspension of Works for Non-Payment under Construction Contracts Act 2002 (New Zealand act) 55

3.5.4 Suspension of Works for Non-Payment under Construction Contracts Act 2004 Isle of Man (IoM act) 57

3.5.5 Suspension of Works for Non-Payment under Building and Construction Industry Security of Payment act 2004 (Singapore Act) 58

3.5.6 Case Study: Contractor Exercise Suspension of Works under Construction Contracts Act 2002- *Marsden Villas Limited* vs *Wooding Construction Limited* 60

3.6 Conclusion 62

4 ANALYSIS OF CASE LAW: IDENTIFYING POSSIBLE PROBLEMS THAT CONTRACTOR MAY FACE WHEN SUSPENDING WORKS AS REMEDY FOR NON-PAYMENT 65

4.1 Introduction 65

4.2 Possible Problem 1: Challenges to Contractor’s Right in Suspension of Works by the Employer 66

4.2.1 Notice to Suspend Works Has Been Given Unreasonably or Vexatiously 67

4.2.2 Employers Challenges the Validity of Interim Certificates as a Basis for Non-Payment 71

4.2.2.1 Interim Certificate is Not Validly Issued by Registered Professional 71

4.2.2.2 Architect/ S.O Has Been Acting Impartially, Fraudulent in issuing
Interim Certificate

4.2.2.3 Interim Certificate was Fundamentally Inaccurate in Content and Computation

4.2.3 Reasons for Non-Payment is Due to Set-Off

4.2.3.1 Common Law Right in Set-Off

4.2.3.2 No Presumption on a General Rule that Exclude the right to Set-Off in interim Certificates

4.2.3.3 Situations That Allow Employer to Set-Off

4.2.3.4 Set-Off in PAM 2006

4.2.3.5 Set-Off in CIDB 2000

4.3 Possible Problem 2: Challenges to Contractor’s Entitlements in Suspension of Works

4.3.1 Contractor Does Not Mitigate Losses

4.3.2 Contractor Does Not Prevent Delay

4.3.2.1 Contractor Do Not Use His Best Endeavour to Prevent or Reduce Delay under PAM 2006

4.3.2.2 Contractor Does Not Take Reasonable Steps to Avoid or Reduce Delay Under CIDB 2000

4.3.3 Contractor’s Right in Extension of Time and Loss and Expense is Deprived For Not Submitting notices of claims

4.4 Possible Problem 3: Problems of Back-to-Back Provisions in Sub-Contracts


5 CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction 103

5.2 Summary of Research Findings 104

5.3 Recommendation: Guidelines for Contractor Exercising Suspension of Works 107

5.4 Conclusion 109

5.5 Limitation of Research 109

5.6 Suggestion for Further Research 110

REFERENCES
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>All ER</td>
<td>All England Law Reports</td>
</tr>
<tr>
<td>BCL</td>
<td>Building and Construction Law</td>
</tr>
<tr>
<td>BLR</td>
<td>Building Law Report</td>
</tr>
<tr>
<td>CLD</td>
<td>Construction Law Digest</td>
</tr>
<tr>
<td>CLJ Supp</td>
<td>Current Law Journal Supplement</td>
</tr>
<tr>
<td>Con LR</td>
<td>Construction Law Report</td>
</tr>
<tr>
<td>FSR</td>
<td>Fleet Street Reports</td>
</tr>
<tr>
<td>K.B</td>
<td>King’s Bench</td>
</tr>
<tr>
<td>MLJ</td>
<td>Malayan Law Journal</td>
</tr>
<tr>
<td>NTSC</td>
<td>NT Supreme Court</td>
</tr>
<tr>
<td>NZLR</td>
<td>New Zealand Law Reports</td>
</tr>
<tr>
<td>SLR</td>
<td>Singapore Law Reports</td>
</tr>
<tr>
<td>TCC</td>
<td>Technology and Construction Court</td>
</tr>
</tbody>
</table>
LIST OF CASES

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
BMC Construction Sdn Bhd v Dataran Rentas Sdn Bhd [2001] 1 MLJ 356
Brani Readymixed Pte Ltd vs Yee Hong Pte Ltd [1995] 1 SLR 205, CA
Canterbury Pipe Lines Ltd vs The Christchurch Drainage Board [1979] 16 BLR 76
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
Gaymark Investments Pty vs Walter Construction [1999] NTSC 143
Gilbert-Ash (Northern) Ltd vs Modern Engineering (Bristol) Ltd [1973] 1 BLR 73
Gunung Bayu Sdn Bhd vs Syarikat Pembinaan Perlis Sdn Bhd [1987] 2 MLJ 332
Hoenig vs Isaacs [1952] 2 All ER 176
IBM UK Ltd vs Rockware Glass Ltd [1980] FSR 335
Jia Min Building Construction Pte Ltd vs Ann Lee Pte Ltd [2004] 3 SLR 288
J.M Hill and Sons Ltd vs London Borough of Camden [1980] 18 BLR 31
John Jarvis vs Rockdale Housing Association Ltd [1987] 36 BLR 48


Kemayan Construction Sdn Bhd vs Prestara Sdn Bhd [1997] 5 MLJ 608

Lazarus Estates Ltd vs Beasley [1956] 1 All ER 341

Ling Heng Toh Co vs Borneo Development Corporation Sdn Bhd [1973] 1 MLJ 23

Mahkota Technologies Sdn Bhd (Formerly known as the General Electric Co (M) Sdn Bhd vs BS Civil Engineering Sdn Bhd [2000] 6 MLJ 505

Malaysian Rubber Development Corp Bhd vs Glove Seal Sdn Bhd [1994] 3 M.L.J 569

Marsden Villas Limited vs Wooding Construction Limited [2007] 1 NZLR 807

Mondel v Steel [1835-1842] All ER Rep 511

Parkinson vs Commissioners of Works [1949] K.B.632

Pembenaan 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


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

Yong Mok Hin vs United Malay States Sugar Industries Ltd [1966] 2 MLJ 286
# LIST OF FIGURES

<table>
<thead>
<tr>
<th>FIGURE NO</th>
<th>TITLE</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.1</td>
<td>Stages of Research</td>
<td>10</td>
</tr>
</tbody>
</table>
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 executed\(^1\).

However, over the years, cash flows problems due to non-payment culture of the employer have worried key players in the industry\(^2\). 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 project\(^4\). Payment was identified as one of the ten priority areas in the Malaysian construction industry during a

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\(^3\) Lord Denning in Dawnays Ltd vs F.G. Minter Ltd [1971] 1 BLR 16

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 chain. 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 completion. 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-payment. 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 contract. 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 termination.

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 default. Encouraged to be one of the avenues in solving problems of non payments by the employer,

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5 Ibid
8 Ban Hong Joo Mines Ltd vs Chen & Yap Ltd [1969] 2 MLJ 83.
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 2006-2015\textsuperscript{11}.

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 (\textit{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.

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 business. 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 economy. 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-payment. However, non-payment related dispute remedied through litigation if affordable but it takes too long; while arbitration is faster but expensive.

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 litigation. 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.

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14 Ibid
in the UK\textsuperscript{17}. 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 parliament\textsuperscript{18}. 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 now\textsuperscript{19}. 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 avenues\textsuperscript{20}. 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.

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*\textsuperscript{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.

\textsuperscript{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”\textsuperscript{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.

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.