

TERMINATION OF CONTRACT DUE TO ANTICIPATORY BREACH

IMANINA AFRINA BINTI AMINUDDIN

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DEDICATION

*To my beloved Father and Mother,
Sisters and Brother,
And Friends.*

Thank you for your support, guidance and everything.

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ABSTRACT

Anticipatory breach of contract may occur when the promisor does an act which makes the performance impossible or he expressly renounces the contract before the due date. The term anticipatory breach of contract is rarely heard among the stakeholder in construction industry. Uncertainty of performance prone to cause the innocent party to suffer financially and start to question their employer dedication to complete the project. Therefore, the first objective for this research is to determine the issues that leads to anticipatory breach of contract in construction industry while the second objective would be to determine the remedies for the innocent party that involved with anticipatory breach within the construction industry. This research adopts qualitative study which focusing on documentary analysis of legal document. In this study, data were collected from the primary sources such as books and articles and secondary sources such as case laws from the Lexis Malaysia. From that secondary data, nine court cases of anticipatory breach of contract were selected and analysed to identify common issues that leads to anticipatorily repudiated the contract whom was acted by the defaulting party. Content analysis technique was adopted in analysing all the law cases. From the cases referred, anticipatory breach arises after one of the parties decided to abandon the work or fail to commence the work regularly and diligently which is considered as an act in which make the performance impossible to accomplish. The findings for first objective concluded that failure to proceed diligently, impossibility of performance and project abandonment can lead to anticipatory breach of contract. However, several court cases within these categories ended up as a wrongful termination due to prejudice act done by the innocent party. For the second objective, remedies for the innocent party who suffers due to anticipatory breach is available in which the innocent party can choose whether to accept or reject the repudiation of contract. Most of the cases analysed, the innocent party chooses to accept the repudiation and terminate the contract with the defaulting party. In conclusion, to avoid from getting counter-claimed by the defaulting party and preserve the confidentiality of the project, the innocent party must investigate thoroughly before deciding to terminate others and the remedies will help them from falling into further delay in which will affect more resources in the future.

ABSTRAK

Pelanggaran kontrak antisipatif terjadi apabila pemegang janji melakukan perbuatan yang membuat prestasi mustahil untuk dicapai atau dia secara tegas menolak kontrak sebelum masa yang ditetapkan. Istilah pelanggaran kontrak secara antisipatif jarang didengar di kalangan pihak berkepentingan dalam industri pembinaan. Ketidakpastian prestasi menyebabkan pihak yang tidak bersalah menderita dari segi kewangan dan mula mempersoalkan dedikasi majikan mereka untuk menyiapkan projek tersebut. Oleh itu, matlamat pertama penyelidikan ini adalah untuk menentukan isu-isu yang membawa kepada pelanggaran kontrak dalam industri pembinaan sementara objektif kedua adalah untuk menentukan remedi bagi parti yang tidak bersalah yang terlibat dengan pelanggaran antisipatif tersebut. Kajian kualitatif yang digunakan memfokuskan pada dokumentasi undang-undang. Dalam kajian ini, data dikumpulkan dari sumber utama seperti buku dan artikel dan sumber sekunder seperti kes dari Lexis Malaysia. Melalui data sekunder, sembilan kes pelanggaran kontrak yang bersifat antikipatori telah dipilih dan dianalisis untuk mengenal pasti isu-isu yang membawa kepada pelanggaran kontrak. Teknik analisis kandungan telah digunakan untuk menganalisis semua kes undang-undang. Melalui kes-kes yang dirujuk, pelanggaran antisipatif timbul setelah salah satu pihak memutuskan untuk meninggalkan kerja atau gagal untuk melakukan kerja yang membuat prestasi mustahil untuk dicapai. Kesimpulan untuk objektif pertama adalah kegagalan untuk meneruskan kerja dengan gigih, kemustahilan prestasi dan pengabaian projek boleh menyebabkan pelanggaran kontrak. Walau bagaimanapun, beberapa kes mahkamah di dalam kategori ini berakhir sebagai penamatan salah kerana perbuatan prasangka yang dilakukan oleh pihak yang tidak bersalah. Untuk tujuan kedua, remedi bagi pihak yang tidak bersalah ialah mereka boleh memilih sama ada untuk menerima atau menolak pelanggaran kontrak. Kebanyakan kes yang dianalisis, parti yang tidak bersalah memilih menerima penamatan kontrak dari pihak yang ingkar. Kesimpulannya, untuk mengelakkan daripada tuduhan balas oleh parti ingkar dan memelihara rahsia projek, pihak yang tidak bersalah mesti menyiasat dengan teliti sebelum memutuskan untuk menamatkan orang lain dan remedi itu akan membantu mereka daripada kelewatan yang akan menjejaskan lebih banyak sumber pada masa hadapan.

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LIST OF ABBREVIATIONS

| | | |
|--------|---|---|
| AC | - | Appeal Cases, House of Lords |
| ALL ER | - | All England Law Reports |
| AMR | - | All Malaysia Reports |
| BLR | - | Building Law Reports |
| CIDB | - | Construction Industry Development |
| CIPAA | - | Construction Industry Payment and Adjudication Act 2012 |
| CLJ | - | Current Law Journal (Malaysia) |
| CPC | - | Certificate of Practical Completion |
| FIDIC | - | International Federation of Consulting Engineers |
| IEM | - | Institute of Engineer Malaysia |
| JCT | - | Joint Contract Tribunal |
| JKR | - | Jabatan Kerja Raya |
| MLJ | - | Malayan Law Journal |
| NLC | - | National Land Code |
| PAM | - | Pertubuhan Arkitek Malaysia |
| PD | - | Project Director |
| PWD | - | Public Work Department |
| SA | - | Sale and Purchase Agreement |
| S.O. | - | Superintending Officer |
| UTM | - | Universiti Teknologi Malaysia |

CHAPTER 1

INTRODUCTION

1.1 Introduction

The act of anticipatory breach in a contract may occur even before the time of performance arrives or on another term where the promisor refuses to continue his promise before the actual time of performance. Under the Contracts Act 1950, anticipatory breach falls under section 40 which stated that

When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

From that provision, it is clearly stated that the contract needs to be discharged as it is an act of breaching the contract.

The origin of anticipatory breach arises from the 19th century within the case of *Hochster v De la Tour* (1853) 2 EI & B1 678, 118 ER 922. At first, the court allowed if a promisor wants to exit the contract following the promisor's renunciation. The court stated that it is not an actual breach of contract if it happens before the performance day occurs. The claimant in the case *Hochster v De la Tour* disagreed with that statement and submitted that the renunciation was itself the cause of an actual breach of contract. However, no direct prior authority was on the claimant's side until they refer to the case of *Planché v Colburn* (1831) 8 Bing 14, 131 ER 305; (1831) 5 Carr & P, 172 ER 876.

Within the case of *Planché v Colburn*, two problems arise as the claimant wanted to sue the defendant after he has broken his contract by refusing to deliver the manuscript. The first problem is that, the contract is not an actual breach of contract if the defendant offers to rescind the contract. And if the claimant agrees with the offer,

he would be deprived of a right to sue for contractual damages which would otherwise have been available if he had not accepted the breach and the defendant had persisted in his refusal to perform when the date for performance arrived. On the other hand, if the claimant ignored the 'offer', the defendant would not even be in breach and the claimant would have to waste his resources on a futile contract as he would be bound by the contract to remain ready to perform.

Due to the situations above, the Lord Campbell CJ formulated an 'implied promise' theory. This theory works as both parties impliedly promised to maintain 'willingness and readiness' to perform the contract, and if one of the parties back off, the claimant has the right to terminate the contract. Hence for the 'offer to rescind' theory, Lord Campbell disagree with it and stated that, immediate action for contractual damages is necessarily followed by a discharge of the contract.

Later, in the case of *Avery of Bowden (1855) 5 EI & BI 714, 119 ER 64*, new theory named breach-conversion rule had been created. This rule act as a principle of election and it was neatly summed up by Cockburn CJ in *Frost v Knight (1872) LR 7 Ex 111*:

"Where the promise may, if he thinks proper, threat the repudiation of the other party as wrongful putting an end to the contract, and may at once bring his action as on breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstanced which may have afforded him the means of mitigating his loss."

Both of the theories 'implied promise' and 'breach conversion rules' are said to be problematic and needed to be reviewed. The breach conversion rule is said can be used to sabotage the other parties and as for the implied promise theory, it can be practically used however there is still gaps and misunderstanding occur as the authorities may not enlightened if different situation happened.

Now, as the familiarity on anticipatory breach of a contract had widened, it has been included under termination provision in most construction contract. In review of

Clause 25.0 – Determination of Contractor’s Employment by Employer

The Employer may determine the employment of the Contractor if the Contractor defaults in any of the following:

- 25.1 (a)
- 25.1 (b)
- 25.1 (c) *if he fails to proceed regularly and/or diligently with the Works;*

iii. CIDB 2000

Clause 44.1 – Determination Due to Default by Contractor

(a) Without prejudice to any other right or remedies which the Employer may possess, if the Contractor defaults in any or more of the following respects:

- (i)*
- (ii)*
- (iii)*

(a) (iv) he fails to proceed with the design (to the extent required by the Contract) and/or the execution and completion of the Works with due diligence and expedition.

(b) Then the Superintending Officer may give a notice specifying the default or defaults (hereinafter referred to as the “Specified Contractor’s Default”).

iv. IEM 1989

Clause 51 – Termination of Contractor’s Employment

(a) Without prejudice to any other right or remedies which the Employer may possess, if the Contractor defaults in any or more of the following respects, that is to say:

- (i) ...*

- (ii) *If he fails to proceed regularly and diligently with the Works, or*
- (iii) *If he fails to execute the Works in accordance with this Contract or persistently neglects to carry out his obligations under this Contract*

Then the Engineer may give to him a notice by registered post or by recorded delivery specifying the default, and if the Contractor shall either continue such default for fourteen (14) days after receipt of such notice or shall at any time thereafter repeat such default (whether previously repeated or not), then the Employer may thereupon by a notice sent by registered post or by recorded delivery terminate the employment of the Contractor under this Contract.

Based on the review of the above-mentioned clause, the employer is entitled to terminate the contractor's employment without the necessity to give any reason in advance by issuing a prior notice to the contractor if he happens to conduct an anticipatory breach of contract. In these clauses, it is noticeable that the term anticipatory breach is hidden within the termination clauses. If the contract includes the clause stated about "fails to proceed with regularly and diligently...", then it is safe to say that the contractor can be terminated under the term anticipatory breach by the employer

1.2 Problem Statement

In the business world, it is very familiar with a rapidly fluctuating market arena where changes happen which often result in cataclysmic upheavals. According to Squillante (1973), changes in terms of inconsistent interest rates, sustainability, changes of key personnel and a myriad of other things happen to affect drastically a contract for the sale of goods. Any of the above events, and many others not mentioned including an emotional feeling by one of the parties that he has made a bad bargain, can cause one of the parties to the contract to feel that he cannot or should not perform as has been agreed. That party may then inform the other of his decision not to perform the contract which then result of such a notice is an anticipatory breach or also known as anticipatory repudiation.

Articles written on anticipatory breach usually be in relation to trade and real estate's activities. According to Garth (2016), anticipatory repudiation can lead to disincentivizes communication between trade partners, and it creates an artificial incentive framework in which a party must make decisions. A party facing difficulty in the performance of its obligations can receive no benefit from a communication while anticipatory repudiation remains applicable. Apart from it affecting the trade activities, it is also known to been affecting the construction industry sector.

Standard form of contract in Malaysia such as PAM (with quantities), PWD 203A, CIDM, and IEM in Malaysia emphasized on termination of contract when contractor/subcontractors fails to work diligently and regularly according to the project planning (Tay, 2006). However, there are a few cases where the parties that did not notice that they had fail to work accordingly after sudden changes in design. According to Tay (2006), one of the reasons for the termination of the contractors' employment is unsatisfactory work progress. As the end result, the unsatisfied employer will charge the contractor on anticipatory breach once they realised that their resources had been wasted.

Moreover, a weak financial management system is among the causes of contractors/subcontractor's failure to carry out project within the stipulated time which result in repudiating the contract. Project failure will not only cause contractor to lose

profit but also will cause project abandonment. Does the intention or commencing an anticipatory breach can also leads to termination of contract?

There are some issues faced by the aggrieved party when they want to terminate the contract of the breaching party. The first issues are that, when the breaching party commit an anticipatory breach close to the due time of the performance. Here, the aggrieved party will be in dilemma whether to perform his contractual obligations in the face of the uncertainty created by the anticipatory breach or just cancel the contract terminating their obligations to perform. The second issue is that, according to Samuel (1974), the aggrieved party suspected that the other party prone to commit an anticipatory breach. These have been labelled as ‘uncertainty of performance’ case. By providing an alternative to cancellation this remedy also serves to promote the correct performance of contractual obligations over cancellation of the contract (Martin, 2015). However, if the aggrieved party did not act quickly against anticipatory breach, they are in risk of facing the loss from the non-performance. One question arise here is that what is the remedies that the aggrieved party need to consider to avoid unnecessary risk when dealing with anticipatory breach?

1.3 Research Questions

1. What are the issues in anticipatory breach that could lead to termination of contract of a project?
2. What are the remedies that the innocent party can consider when dealing with anticipatory breach of contract?

1.4 Research Objective

The objectives of the research are:

1. To determine issues related to anticipatory breach that leads to termination of contract in construction industry.
2. To determine the remedies for the innocent party that involved with anticipatory breach within the construction industry.

1.5 Scope of Study

This study focuses on the disputes caused by the anticipatory breach acted by contracting party in construction industry. This study is limited to case-law articles reported in the Malaysia Law Journal.

1.6 Significant of Study

The study may help to determine the remedies for the innocent party so that they able to recover from further losses. In addition, the findings of the study could be used as a way to educate the contracting parties of their prerogative if they decided to withdraw from the contract before project commencement and the remedies available for the innocent party if they happened to be the victim of anticipatory breach of contract.

1.7 Research Methodology

In order to achieve the research objectives, a systematic process of conducting this study had been organised. Basically, this research process consists of five major stages, which involve identifying the research issue, literature review, data collection, data analysis, conclusion and suggestions.

1.7.1 Stage 1: Identifying the Research Issue

The research issue arises from the intensive reading of books, journals, articles and newspaper cutting which can easily be attained from the UTM and UPSI library. From the research issue, the objectives of the study have been identified. This research is carried out based on the following issues:

1. Issue related to termination of contract due to anticipatory breach;
2. Issue related to minor understanding about anticipatory breach that frequently happen in construction industry.

1.7.2 Stage 2: Literature Review

After the research issue and objectives have been identified, various documentation and literature review regarding to the research field will be collected to achieved the research objectives. Generally, explanatory data is collected from the

latest reading materials in printing form such as books, journals, research papers, reports, newspaper as well as from the internet. It is important to identify trends and developments over time in construction industry, as well as the general state of knowledge concerning the subject area of anticipatory breach in a contract such as background, definition, procedures, relevant events and etc.

1.7.3 Stage 3: Data Collection

After identifying all the background and relevant issues through literature review, legal cases based on previous court cases which are related to the research issue will be collected from Malayan Law Journals via UTM library electronic database, namely Lexis Malaysia Database. The previous court cases which are related to the termination of contract due to anticipatory breach in construction will be sorted out from the Malayan Law Journals cases.

1.7.4 Stage 4: Research Analysis

Upon identifying the relevant case collected from the Malayan Law Journal, critical studies are then conducted to examine the decision made by the courts in respective case. In this stage, the raw data collected in the cases shall be translated into meaningful information for the purpose of illustrating point and conclusions that tally with the objectives needed to achieve for this study. The cases being referred primarily focuses within the construction industry in Commonwealth countries because of the similarities principle of English Law practises.

1.7.5 Stage 5: Conclusion and Recommendations

In the last stage, the author will review the whole process of the study with the intention to identify whether the research objectives have been achieved. After presenting the research findings, further research will be suggested. Lastly, final checking on every section of this study will be done before the submission date in avoidance of any plagiarism.

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