

A REPUDIATORY BREACH IN THE CONSTRUCTION INDUSTRY –  
NON-PAYMENT

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## ABSTRACT

Many complaints have been voiced about non-payments and it is causing severe cash flow problems to contractors. The reaction of many contractors when faced with non-payment is to consider stopping work on site. Whilst this is understandable in many instances, it may amount to a repudiatory breach by the contractor. The contractors are only entitled to terminate the contract when non-payment is a repudiation of contract. But is the act of non-payment goes to the root of the contract? Whether failure to pay amounts to repudiation will depend on the circumstances of the case. Therefore, this study is to identify circumstances where non-payment by an employer constitutes a repudiatory breach of contract. Findings of this study will assist the contractor to understand his position before he takes action when the employer fails to make payment. The approach adopted in this research is case law based; only cases specifically centered on issue of non-payment will be discussed in this study. The selection of sample court cases involved a depth study rather than a random sample. A total number of 11 cases were studied, where 7 of them were involving construction contracts and 4 were contracts of sales of goods. It is found that there are 2 circumstances in which non-payment constitutes to repudiatory breach and 9 circumstances in which non-payment does not amount to repudiation of the contract. As a conclusion, the result of the analysis seems to suggest that, in most of the circumstances, non-payment is not a repudiatory breach of contract by the employer. The contractors are not advised to stop work at the site when the employer refused to make payments, or he himself would be guilty of a breach of contract in failing to maintain regular and diligent progress. But, an employer may be held to be in repudiatory breach of contract in failing to make payment if his action shows an intention no longer to be bound by the contract and his default goes to the root of the contract.

## ABSTRAK

Terdapat banyak kontraktor yang tidak dibayar dan mereka menghadapi masalah kewangan yang serius. Apabila kontraktor tidak dibayar, mereka akan memikir untuk meninggalkan kerja di tapak pembinaan. Walaupun ini dapat difahami, ia mungkin merupakan pecah kontrak oleh kontraktor. Kontraktor hanya boleh menamatkan kontrak apabila tindakan tidak bayar merupakan pecah kontrak oleh majikan. Adakah tindakan tidak bayar merupakan repudiasi? Sama ada tindakan tidak bayar merupakan repudiasi adalah bergantung kepada keadaan. Maka, kajian ini adalah untuk mengenalpasti keadaan di mana tindakan tidak bayar merupakan repudiasi pihak majikan. Hasil kajian akan membantu kontraktor memahami haknya sebelum ia mengambil tindakan apabila majikan tidak membayar. Pendekatan yang diguna dalam kajian ini adalah berdasarkan kes mahkamah, hanya kes yang berpusat pada isu tidak bayar akan dibincang dalam kajian ini. Pemilihan kes adalah secara mendalam, bukannya secara rawak. Sebanyak 11 kes dikaji, di mana 7 melibatkan kontrak pembinaan dan 4 melibatkan kontrak jual beli. Didapati, hanya 2 daripada 11 kes menunjukkan keadaan di mana tidak bayar merupakan repudiasi majikan, dan 9 menunjukkan keadaan di mana tidak bayar tidak merupakan repudiasi majikan. Sebagai kesimpulan, hasil kajian mencadangkan tidak bayar tidak merupakan repudiasi oleh majikan dalam kebanyakan keadaan. Kontraktor adalah tidak dicadangkan untuk meninggalkan kerja di tapak pembinaan apabila majikan tidak bayar, supaya dia tidak didakwa pecah kontrak atas alasan gagal untuk melaksanakan kerja dengan tekun. Tetapi, seseorang majikan akan didakwa repudiasi kerana gagal membayar jika tindakannya menunjukkan dia tidak ingin diikat oleh kontrak, dan tindakannya memecah asas kontrak.