

**THE DEGREE OF PERFORMANCE IN CONSTRUCTION CONTRACT**

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## ABSTRACT

Where in any contract, usually building contracts, payment by installments, commonly called progressive payments, are provided for, the law on entire contracts is inapplicable. Though the introduction of interim payment has modified the strict requirement of entire contract, the mere fact that some payments are made at some stage of the contract does not render it to be a divisible one. Where a contract called for a retention sum to be held until completion, the contract is usually entire as to the retention moneys, but not necessarily the interim payments. Therefore the issue of failure to complete entirely could still exist and capable of causing dilemma to contractor and employer alike. The issue of entire completion becomes more stringent in small projects where the method of payment is by way of indent. Without the provision of interim payment, the contractor is required to complete their work in entirety before entitles to payment. With the inception of doctrine of substantial performance, the question though arises when do the contractor is said to have substantially completed their work. From the common law perspective, the test of substantial completion is being used to determine whether the contractor have completed their work substantially. This research set out to determine the test of substantial performance employed in Malaysian construction cases. From the analysis, it was found where a contract has been substantially performed, the test was substantial performance as derived from the common law principle, i.e. by looking at the nature of the defects and the proportion between the cost of rectifying them and the contract price and not whether the defects were of such a trifling nature that they could be regarded under the *de minimis rule*.

## ABSTRAK

Bagi mana – mana kontrak, terutamanya kontrak pembinaan, pembayaran secara beransur – ansur yang dikenali sebagai bayaran interim diperuntukkan, undang - undang berkaitan kontrak keseluruhan adalah tidak terpakai. Walaupun pengenalan bayaran interim telah mengubah keperluan kontrak keseluruhan, namun fakta di mana sebahagian bayaran dibuat pada sebahagian peringkat di dalam kontrak tidak bermaksud bahawa ianya adalah kontrak separa. Kontrak yang memperuntukkan wang tahanan sehingga penyiapan kerja, undang – undang kontrak keseluruhan adalah terpakai ke atas wang tahanan tersebut tetapi tidak semestinya ke atas bayaran interim. Oleh itu, isu kegagalan kontraktor menyiapkan keseluruhan kerja masih relevan dan mampu memberikan dilema kepada kontraktor dan juga majikan. Isu berkaitan kontrak keseluruhan menjadi lebih kritikal bagi projek – projek kecil di mana kaedah pembayaran dibuat secara inden. Tanpa peruntukan bayaran secara interim, kontraktor dikehendaki menyiapkan kerja mereka secara keseluruhan sebelum layak mendapat bayaran. Namun dengan pengenalan doktrin ‘substantial performance’, timbul persoalan, bilakah kontraktor dikatakan telah menyiapkan kerja mereka secara hampir keseluruhan. Dari perspektif undang- undang ‘common’, ujian ‘substantial completion’ telah digunakan dalam menentukan samada kontraktor telah menyiapkan kerja mereka secara hampir keseluruhan. Kajian ini telah dilakukan bagi menentukan ujian ‘substantial performance’ yang digunapakai dalam kes pembinaan di Malaysia. Dari analisa yang dijalankan, didapati bahawa bagi menentukan samada satu – satu kontrak telah dilaksanakan secara hampir keseluruhan, ujian ‘substantial completion’ yang berasal dari undang – undang ‘common’ telah digunapakai iaitu dengan melihat keadaan kecacatan kerja dan juga nisbah di antara kos pembaikan dan juga kos kontrak asal dan bukannya samada kecacatan tersebut adalah terlalu remeh seperti di bawah prinsip *de minimis rule*.