

THE CAUSES OF DISPUTES OF FINAL ACCOUNTS: MALAYSIAN CASE LAW ANALYSIS

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ABSTRACT The closing of final account has frequently caused disputes and ended up with court cases in construction industry. The prolongation of closing final account due to disputes is devastating to contracting parties especially contractors. Therefore, it is crucial to identify the significant causes of disputes of final accounts. Such disputes can be due to the contractor, consultant, employer or uncertain contract clauses. The purpose of this study is to identify the most significant causes of disputes for final accounts from Malaysian law cases. These causes are categorised according to the types of causes which are contractor-related, consultant-related, employer-related and contract-related. Case law analysis is being adopted for primary data analysis for this study. The findings of this study discovered that the most significant cause of disputes of final accounts is the unreasonable late payments and non-payments by employers. The next significant cause of the disputes is the inadequate contract administration by contractors which is mainly due to error in submitting final claims. This is followed by the inadequate contract administration by the consultants where the consultants or third parties delayed in certifying the final accounts. Contract related causes are relatively less significant which are mainly related to conclusiveness of final account due to subsequent defective works and back to back clauses. Inexperienced contractor which led to poor quality of work is found to be the least significant cause of disputes for final accounts. Upon the identification of the significant causes of disputes for final account in Malaysia, awareness of avoiding disputes for final account can be created among contract parties and possible solutions can be obtained for Malaysian construction industry.

Keywords: Final Account, Final Certificate, Payment, Dispute.

1. INTRODUCTION

Zarabizan et al. [1] revealed in their studies that disputes of final accounts may occur due to various reasons (causes). Their literature review shows that one of the major reasons is delay in settling final accounts. The other reason is undervalue of the final accounts which may arise from set-off or deduction to final accounts. All these causes are under the category of payments and due to the non-performance of contract terms by the parties. Payment is always the issue in construction industry. In America, Charles and Bruce [2] revealed in their survey that payment is one of the top reasons of disputes in the construction industry of the country.

In other words, if the parties fail to execute the payment clauses stipulated in the contract or misapply the uncertain terms of contracts for final accounts, disputes will arise. The process of preparing, certifying and settling final account are stipulated in the contract and if one of the parties has failed to perform according to the terms, the other party will dispute it. For instance, a contractor shall be entitled to the outstanding amount due under a final account once the final certificate is issued upon the final stage of final account. However, if the employer delay or refuse to make the final payment despite the final certificate, dispute will be initiated by the contractor.

If there is significant number of disputes of final accounts, the economy of the industry that directly linked to national economy will be persistently impacted. Construction industry plays significant role in boosting and maintaining the economy of the country. If the industry is plagued by payment

problem especially at final account stage, the economy will be impacted. Closing of final accounts is crucial for the recovery of cash flow for contractors as it allows the contractors to claim the final amounts due. If the closing of final accounts are unsuccessful and end up with disputes, the development of the industry will be slowed down. The extensive expenses spent on dispute resolutions will impact the economy or cash flow of a construction company thus affects the productivity of that company. The reduction in productivity will impact the economy of the construction industry and ultimately impact the national economy in Malaysia as the industry contributes more than 3 per cents to the Gross Domestic Product of the country.

1.1 Statement of Problem

Disputes that have led to delay in final account settlement are the main reason to project failure as indicated by Thanuja and James [3]. James and Matthew [4] stressed that construction projects successes can be measured by project schedules, budget, quality and minimal disputes. However, Kwok [5] asserted that final account stage is paid little attention in respect of the critical factor of project failure in current construction industry. The construction industry is plagued by persisting delayed payments to contractors and significant number of them are due to disputes of final accounts. Thanuja and James [3] discovered through literature review that failure to comply with payment conditions for interim, final and variation claims have caused disputes between contractors and employers.

There are many cases of late payments and non-payments in the industry. David and Ranon [6] discovered through their survey that majority of the specialist contractors and the main contractors in America indicated that the final payments from their employers are delayed. Odeyinka and Kaka [7] reported through their survey that contractors in United Kingdom are unhappy with the delayed final payments from the employers. Kwok [5] identified that there are backlogs in closing final accounts in Hong Kong.

In Malaysian construction industry, Zarabizan et al. [1] identified that disputes of final account have worsened delayed payments in the industry. They discovered that delayed final payments due to disputes caused major problems to cash flow of the contractors and affected other companies along the supply chain such as sub-contractors and suppliers. Sundra [8] pointed out that payment issues during post-contract stages such as delayed progress payments and final payments (due to delay in closing final accounts), non-payments and conditional payments have been persisting in Malaysian construction industry.

There are numerous court cases pertaining to final accounts for construction projects. Richard, et al. [9] stressed that construction industry is the most litigious industry and America alone has spent more than \$5 billion annually on litigation. In Australia, final payments issue was one of the six major categories of disputes at litigation. Sundra [10] stressed that litigation is usually the last resort when parties are unable to resolve the dispute through other alternative dispute resolutions and it is used when the parties are ready to terminate the contract. This is because litigation cost is expensive and it is a long agony process. Ang [11] discovered in their research that 44% of the disputes for payments took more than 8 years to solve through litigation.

Final account is the final stage the contractors have to get over in order to get their full payments from employers. The full payments are meant to settle outstanding payments to sub-contractors and suppliers and it is important to restore cash flow power of the contractors in order for them to stay in the business. Instead of full payments, extra expenses are incurred from delayed payments due to litigations for affected construction projects [11]. Besides, litigation cost is extra expenses for losing parties which is detrimental to construction economy too.

The problems elaborated above triggered the need to investigate the causes of the occurrences of disputes of final accounts that caused delayed payments in the industry. Upon identification of causes of disputes of final accounts, similar disputes in future should be reduced. The identification of the causes would allow the contract parties to be aware of the problems that would lead to disputes at final account stage. Such awareness among the contract parties is important for the formulation of strategic plans of avoiding the disputes and ensuring successful closing of final accounts. Upon the formulation of effective strategic plans or solutions to the disputes, similar disputes in future should be reduced.

1.2 Objective of Research

To identify the significant causes of disputes of final accounts in Malaysia.

2. COMMON CAUSES OF DISPUTES OF FINAL ACCOUNTS

The causes of disputes of final accounts are mainly related to proximate causes such as inadequate contract administration, late payments and non-payments by employers, inexperienced contractors and inappropriate contract conditions. Zarabizan et al. [12] divided the proximate causes of disputes of final accounts into inexcusable and excusable causes.

Inexcusable causes refer to the faults of either contract party such as contractors or management team according to the principles established by Zarabizan et al. [12]. If the contract parties perform their duties and responsibilities according to contracts, there is less likelihood of dispute. However, if either party breaches the contract or fails to perform according to the contract, the other party will tend to dispute the matters. Such disputes are due to the inadequate conduct or insufficient information given by either party under the contract. Examples of inexcusable causes include inadequate contract administrations, unreasonable late payments or non-payments by employers and inexperienced contractors as listed by Manvendra and Wayal [13] and Peter et al. [14].

Excusable causes refer to circumstances beyond the control of the contract parties such as inadequate or uncertain express provisions of contracts. These causes are not due to default of either party but due to uncertain or inappropriate contract provisions. If a contract provision is uncertain, it will cause the contract parties to apply or rely on it according to own interpretations. When the other party disagrees with the interpretation and application of the provision, dispute will arise. Examples of these issues are conclusiveness of final account due to subsequent defects, reasonable time to finalize variation and uncertain back to back clauses in sub-contracts.

Zarabizan et al. [1] categorized these causes into contractor-related which involves contractor team; management-related which involves management team such as architects, quantity surveyors, engineers and employers; and contractual-related which involves uncertain contract terms. The examples of contractor-related causes are errors in submitting final accounts and failure to agree to valuation of claims (inadequate contract administration by contractors) as well as inexperienced contractors. The examples of management-related causes are delay in certifications and unreasonable rationalization of rates (inadequate contract administration by consultants) as well as unreasonable late payments and non-payments by employers. Whereas the examples of contractual-related causes are questions of provisions of contracts such as the criteria of conclusive final account, reasonable time for the finalization of variation amounts and uncertain back to back clauses.

3. RESEARCH METHODOLOGY

Legal cases (case law) based on previous court cases which are related to the final account are collected from Malayan Law Journals via UTM library electronic database, namely Lexis-Nexis Legal Database for case study. The court cases are identified from the Lexis-Nexis Legal Database by using the key words such as 'final account' and 'final certificate'. After identifying all the common causes of disputes of final account through literature review, case study will be carried out. Case study is suitable for this study as it helps to identify the causes of disputes of final account through analytical approach.

Naoum [15] referred the primary data collection method as fieldwork research. One of the fieldwork approaches is case study. Case study approach is used to carry out in-depth analysis of cases. Hence, before in-depth analysis can be carried out, cases from reliable sources (Malayan Law Journals) must be attained.

Subsequently, analytical case study is adopted in this study to determine the causes of disputes of final account. Naoum [15] divided the case study methods into descriptive case study, analytical case study and explanatory case study. Bouma and Atkinson [16] stressed that analytical case study is adopted if the elements that cause or affect the other elements are identified (hypothesis through literature review). For current study, analytical case study (case law review) is adopted for primary data analysis to justify the causes of disputes of final accounts established in the literature review. Case law review will provide instances or examples of the causes of disputes of final accounts suggested in the literature review.

4. DATA ANALYSIS

4.1 Inadequate Contract Administration: Contractor Related (Table 1)

Contractors errors in submitting documents and fail to provide sufficient information for final claims

Case law analysis showed that two contractors erred by failing to show the proof of overall work done and part of work done. Two cases showed that the contractors failed to show verification of final account by the consultants and the S.O.. Another contractor failed to show Certificate of Making Good Defects and Final Certificate for final claim.

Contractor do not agree with valid valuation

One case showed that the contractor failed to agree with the five omissions agreed earlier in a meeting with the employer. Another contractor failed to agree with the valid deduction of LAD.

4.2 Inadequate Contract Administration: Consultant or Third Party Related (Table 2)

Consultants or third party delay in certifying

There was one case whereby the project was handed over to the client and the defects liability period was initiated but the Certificate of Practical Completion was yet to be issued by the consultant. In another case, the employer's officer delayed the certification of final certificate thus the judge allowed the appellant to rely on the results of joint inspections and the five interim certificates for the claim. Besides, there was an S.O. delayed in certifying work done and final certificate. Another employer's

team failed to issue the final certificate upon the completion of works. Another S.O. under the JKR contract delayed in certifying the Certificate of Making Good Defects and Final Certificate. Yet another S.O. delayed the issuance of Certificate of Making Good Defects and final account.

4.3 Unreasonable Late Payments and Non-payments by Employers (Table 3)

Most of the employers failed to pay despite valid final account statement such as in Ng Eng Wan case, Iasb Construction case, Espl case, Rira Bina case and Crown Alliance Marketing case. One employer failed to pay and argued that the final account was inconclusive but the judge found that the parties agreed to payments upon joint inspections. Some judges found that the final certificates were conclusive evidence thus proved that the employers failed to pay accordingly such as in TSR Bina case, CCG Concrete Constructions case and Bachy Soletanche case. There was another employer failed to pay despite payment certificate number 16 was considered a final certificate.

4.4 Inexperienced Contractor Lead to Poor Quality of Work (Table 4)

There was one case where the work carried out by the contractor was poor in quality and led to the dispute.

4.5 Contract Related: Conclusiveness of final accounts (Table 5)

There were judges held on to the uncertain principle that the final account would be inconclusive if subsequent defective works were discovered such as in High Century case, Geopancar case and SA Shee case.

4.6 Contract Related: Back to back clauses (Table 6)

There was one case whereby the subcontractor confused with the imposition of LAD under an uncertain back to back clause. On the other hand, some subcontractors challenged the application of 'pay when paid' back to back clause due to its uncertainty thus caused the disputes such as in Pernas Otis Elevators case, BBR Construction Systems case and Procorp Realty case.

Table 1. Inexcusable Cause of Final Account Dispute: Inadequate Contract Administration by Contractors

Case Number	Case Title	Year	Cause of Disputes	Final Judgment	Disputed Quantum (RM)	Amount Granted (RM)
8 MLJ 157	<i>Liang Court Wanisara (Sarawak) Sdn Bhd v Mohamed Shookry Abdul Ghani & Ors</i>	2014	Contractor erred by submitting insufficient document (lack of proof of work done).	The judge dismissed the application due to lack of attachment of certification of work done. The appellant did not attach Certificate of Practical Completion to the claim to show the work was completed. The judge found that the contractor's claim was premature as the CPC and the final certificate were yet to be issued. The judge found that this evidence was crucial for the finalization of final account thus dismissed the application for the entitlement of the outstanding sum.	RM1,956,800	RM0.00
MLJU 573	<i>Hasrat Sedaya Sdn Bhd v Bumihway (M) Sdn Bhd</i>	2012	Contractor erred in submitting document for final account by failing to show supporting document for the remaining claimed sum.	The judge held that only RM1,052,907.57 was allowed and the remaining claim of RM257,108.87 (RM1,310,016.44 minus RM1,052,907.57) was dismissed due to lack of proof. The appellant failed to prove the work done for the remaining work with any valid evidence thus the judge did not grant the full amount claimed.	RM1,310,016.44	RM1,052,907.57
MLJU 802	<i>Tkn Property Sdn Bhd v Syarikat KMZ Sdn Bhd and Anor</i>	2011	Contractor erred by failing to have the final account verified by consultants.	The judge dismissed the application as the final account statement adduced was found lack of verification. The final amount claimed was not verified by the quantity surveyor and architect of the project thus rendered the account inconclusive.	RM2,136,231.47	RM0.00
MLJU 2158	<i>Project 33 Construction Sdn Bhd v MBF Norinco Sdn Bhd</i>	2010	Contractor erred by failing to show supporting documents of Certificate of Making Good Defects (CMGD) and Final Certificate.	The judge allowed the application to withhold the remaining retention sum due to lack of Certificate of Making Good Defects (CMGD) and Final Certificate. Without the certificate of making good defects, the employer has the right to call the contractor to rectify any work discovered subsequently. Furthermore, without the CMGD, the final certificate cannot be issued. The final certificate was the proof of final outstanding sum due, which was lacking, thus the sum claimed was dismissed	RM76,000.00	RM0.00
MLJU 518	<i>Procorp Realty Sdn. Bhd. v Sumpiles (Malaysia) Sdn. Bhd</i>	2001	Contractor erred by failing to provide Final Certificate for the claim of the outstanding sum.	The judge dismissed the application by the appellant for the summary judgment. The judge held that the final account statement lacked of verification and certification of the S.O. thus the final account statement was yet to be final and conclusive. Therefore, the application for the summary judgment to grant the outstanding sum stated in the final account was dismissed.	RM254,249.32	RM0.00

10 MLJ 496	<i>Cobrain Holdings Sdn Bhd v Perwira Bintang Holdings Sdn Bhd</i>	2014	Contractor failed to agree with valid valuation. The contractor could have failed to keep proper record of meetings which led to disagreement with the valuation.	The judge dismissed the application and allowed omissions in valuation which were agreed by the parties and the counterclaim of RM575,335.28 was granted. The judge found that the disagreement to a valid valuation based on the agreement in a meeting (to include the omission items in the valuation) was not reasonable thus gave judgment for the respondent.	RM3,857,230.42	RM3,281,895.14
MLJU 41	<i>Majutera Sdn Bhd v Kerajaan Malaysia, Jabatan Kerja Raya</i>	2012	Contractor failed to agree with valid LAD deduction in final certificate.	The judge dismissed the application and allowed deduction of LAD in the valuation of final certificate as the delay was on the part of the appellant. The judge found that the appellant failed to prove that the work was completed on time thus the LAD was considered reasonable. On the other hand, the respondent managed to prove the delay on the part of the appellant with various evidence such as warning letters issued by the respondent for work delay.	RM713,678.00	RM0.00

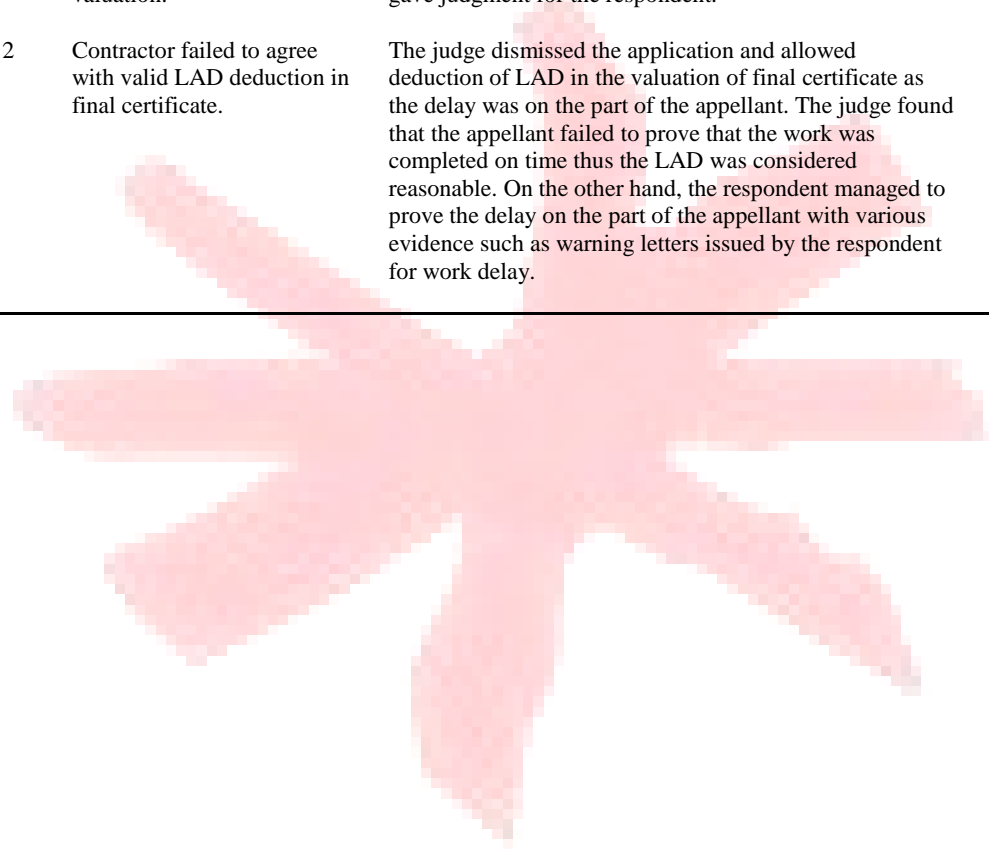


Table 2. Inexcusable Cause of Final Account Dispute: Inadequate Contract Administration by Consultants or Third Parties

Case Number	Case Title	Year	Cause of Disputes	Final Judgment	Disputed Quantum (RM)	Amount Granted (RM)
8 MLJ 157	<i>Liang Court Wanisara (Sarawak) Sdn Bhd v Mohamed Shookry Abdul Ghani & Ors</i>	2014	Consultant delayed the issuance of Certificate of Practical Completion thus delayed the process of final account which caused the dispute. Works already handed over to the client and the defects liability period effected but the CPC was not issued which is obviously a delay on the part of the consultant.	The judge dismissed the application due to lack of certification of work done. The appellant failed to show the Certificate of Practical Completion in the claim. The judge found that this evidence was one of the important documents for the finalization of final account thus dismissed the application by the appellant.	RM1,956,800	RM0.00
MLJU 788	<i>Projek Penyelenggaraan Lebuhraya Berhad v Base Specialist Sdn Bhd</i>	2012	Consultant delayed the issuance of final certificate thus rendered the final account pending and led to the dispute.	The judge allowed the application although final account was inconclusive as the parties agreed to payments upon joint inspections. The judge held that the application of the claim should not be dismissed merely due to late issuance of the final certificate by the consultant. This is because the payment was agreed upon joint inspection of work done instead of depending strictly on final certificate alone.	RM530,203.54	RM530,203.54
MLJU 991	<i>Te-Cond Engineering Sdn Bhd v LM Bina Sdn Bhd (dahulunya dikenali sebagai Reng Energy Sdn Bhd) & Anor</i>	2012	Superintending officer delayed the issuance of certificates thus led to the dispute.	The judge allowed the application for final payment by the appellant. The judge was in the opinion that it would be unfair to the appellant if the final payment was held due to the failure of the superintending officer to perform his duty. Mere lack of final certificate from the responsible superintending officer should not dismiss the claim as the work was proved to be completed and the final sum claimed was correct.	RM232,752.63	RM232,752.63
4 MLJ 121	<i>Guthrie Landscaping Sdn Bhd v Hasrat Usaha Sdn Bhd</i>	2011	The respondent's team failed to issue the final certificates thus dispute arose.	The judge allowed the application for final payment as the works were proved completed and the final sums were proved correct. The judge found that the fault was on the part of the respondent by failing to issue the final certificates for the works successfully performed by the appellant thus it would be unfair to hold the money merely due to the lack of the final certificates.	RM410,061.78	RM410,061.78
3 MLJ 609	<i>Jetara Sdn Bhd v Maju Holdings Sdn Bhd</i>	2007	Consultant delayed the issuance of CMGD and final certificate thus rendered the final account pending and led to the dispute.	The judge allowed the application as the parties agreed to the final account through several meetings. The application for the outstanding sum was allowed although there was no final certificate to certify the final sum because the judge found that the fault was on the part of the employer by failing to certify the final outstanding sum due to the appellant.	RM3,017,587.15	RM3,017,587.15
MLJU 426	<i>CM Indah (dahulunya dikenali sebagai Chai Mio Constructions Sdn Bhd) v UB Ushabina Sdn Bhd</i>	2006	Employer's team delayed the issuance of CMGD and statement of final account and led to the dispute.	The judge allowed the application for summary judgment as the works were proved to be completed and the defects liability period has lapsed. The judge found that the officer of the employer was in the fault of not issuing the CMGD and final certificate within a reasonable time as the work was successfully completed and the final sum claimed was correct.	RM496,429.78	RM496,429.78

Table 3. Inexcusable Cause of Final Account Dispute: Unreasonable Late Payments and Non-payments by Employers

Case Number	Case Title	Year	Cause of Disputes	Final Judgment	Disputed Quantum (RM)	Amount Granted (RM)
MLJU 139	<i>Ng Eng Wan trading as Pembinaan Wan Jaya v Maju Holdings Sdn Bhd</i>	2013	Employer delayed and refused to pay final sum despite valid final account statement.	The summary judgment was granted by the judge in favour of the appellant due to valid final account statement and weak defense to prove that there was no contractual relationship between the parties. The judge found that it was inappropriate for the respondent to withhold the payment with all the necessary certifications of work done and final account.	RM5,850,322.97	RM5,850,322.97
MLJU 31	<i>Iasb Construction Sdn Bhd v Pembinaan Purcon Sdn Bhd</i>	2012	Employer delayed and refused to settle the final payment despite the S.O. issued valid final account statement thus caused the dispute.	The judge dismissed the application of the appellant and confirmed previous court decision to allow the claim of remaining sum by respondent. The judge rejected the reasons of non-payment given by the appellant such as delay in completion and defective works as there was valid final account statement issued by the S.O. of the project.	RM 1,816,390.76	RM 1,816,390.76
MLJU 788	<i>Projek Penyelenggaraan Lebuhraya Berhad v Base Specialist Sdn Bhd</i>	2012	Respondent (main contractor) delayed and refused to pay the appellant (subcontractor) despite agreed to pay upon joint inspection thus dispute arose.	The judge allowed the application although final account was inconclusive as the parties agreed to payments upon joint inspections. The judge found that the agreement to pay the final sum upon joint inspection was breached by the respondent thus the appellant was entitled to the outstanding sum.	RM530,203.54	RM530,203.54
MLJU 1439	<i>Espl (M) Sdn Bhd v Radio & General Engineering Sdn Bhd & Ors and another suit</i>	2011	Employer delayed and refused to pay thus caused the dispute.	The judge allowed the application due to the existence of valid final account statement. Although the respondent tried to deny the outstanding sum for the work done by the appellant, but the valid final account issued by the contract administrator of the project showed the amount correct thus the judge reached the decision.	RM19,312,836.48	RM19,312,836.48
2 MLJ 378	<i>Rira Bina Sdn Bhd v GBC Construction Sdn Bhd</i>	2011	Employer delayed and failed to make payment despite the existence of final account statement caused the dispute.	The application to restrain winding up petition was dismissed by the judge as the 'pay when paid' clause did not exist and the final account statement issued was valid and enforceable.	RM2,439,228.22	RM2,439,228.22
MLJU 1364	<i>TSR Bina Sdn Bhd v Kontena Nasional Bhd</i>	2011	Employer delayed and refused to make payment despite conclusive final certificate was issued was the	The application of summary judgment was allowed by the judge and the amount of RM847,001.55 was awarded to the appellant. The judge found the evidence of final certificate adduced by the appellant was	RM847,001.55	RM847,001.55

			cause of dispute.	correct and convincing thus the judgment was made.		
MLJU 1853	<i>Sri Pelagat Sdn Bhd v Malaysian Wetlands Foundation</i>	2009	Employer delayed and refused to make payment without a valid reason was the cause of dispute as the employer failed to provide convincing defence.	The judge held that the appellant was entitled to the full payment under the final certificate. The payment certificate entitled the payment certificate number 16 adduced by the appellant was considered a final certificate as it specified that all works were considered to be completed and conclusive with the issuance of the certificate.	RM1,652,828.65	RM1,652,828.65
2 MLJ 16	<i>Crown Alliance Marketing (Pte) Ltd v Abv Builders Sdn Bhd</i>	2001	Employer delayed to make payment without a valid reason was the cause of dispute in this case.	The judge granted the summary judgment for the appellant for the entitlement of the full outstanding sum. The judge held that the 'pay when paid' principle relied by the respondent was non-existence and there was a final account statement issued by the respondent's own officer thus the judgment was given for the appellant.	RM689,251.90	RM689,251.90
7 MLJ 46	<i>CCG Concrete Constructions (M) Sdn Bhd v Rich Avenue Sdn Bhd</i>	2000	Employer refused to make payment although he had received the final certificate from the Architect thus caused this dispute.	The judge held that the appellant was entitled to the outstanding payment under the final certificate. The final certificate was issued by the Architect who was the contract administrator of the project thus the final account was final and conclusive. The employer was under the responsibility to pay according to the certificate.	RM1.42 million	RM1.42 million
MLJU 700	<i>Bachy Soletanche (Malaysia) Sdn. Bhd. v Kin Hup Seng Construction Sdn. Bhd</i>	2000	Employer caused the dispute by failing to make payment without a valid reason as the final certificate was proved correct and final with all appropriate adjustment due to LAD.	The judge allowed the application for the outstanding sum to be payable under the final certificate. The final certificate was issued by the competent consultant of the project and proved correct after deduction for LAD thus the respondent was responsible to make the payment due.	RM1,230,290.91	RM1,230,290.91

Table 4. Inexcusable Cause of Final Account Dispute: Inexperienced Contractor

Case Number	Case Title	Year	Cause of Disputes	Final Judgment	Disputed Quantum (RM)	Amount Granted (RM)
8 MLJ 161	<i>United Exploration (M) Sdn Bhd v IJM Corp Bhd</i>	2011	Inexperience contractor which led to poor quality of work and failure to complete the work thus caused the dispute.	The judge agreed that the counterclaim of RM266,113.64 should be awarded to the respondent for rectification of poor work quality and expenses to complete the work by the respondent. The judge found that the evidence proved that the work carried out by the appellant was poor in quality thus counterclaim for rectification of the work was granted. The failure of the appellant to refute the complaint of the poor quality of work proved the complaint was true and correct.	RM3,461,670.18	RM3,195,556.54

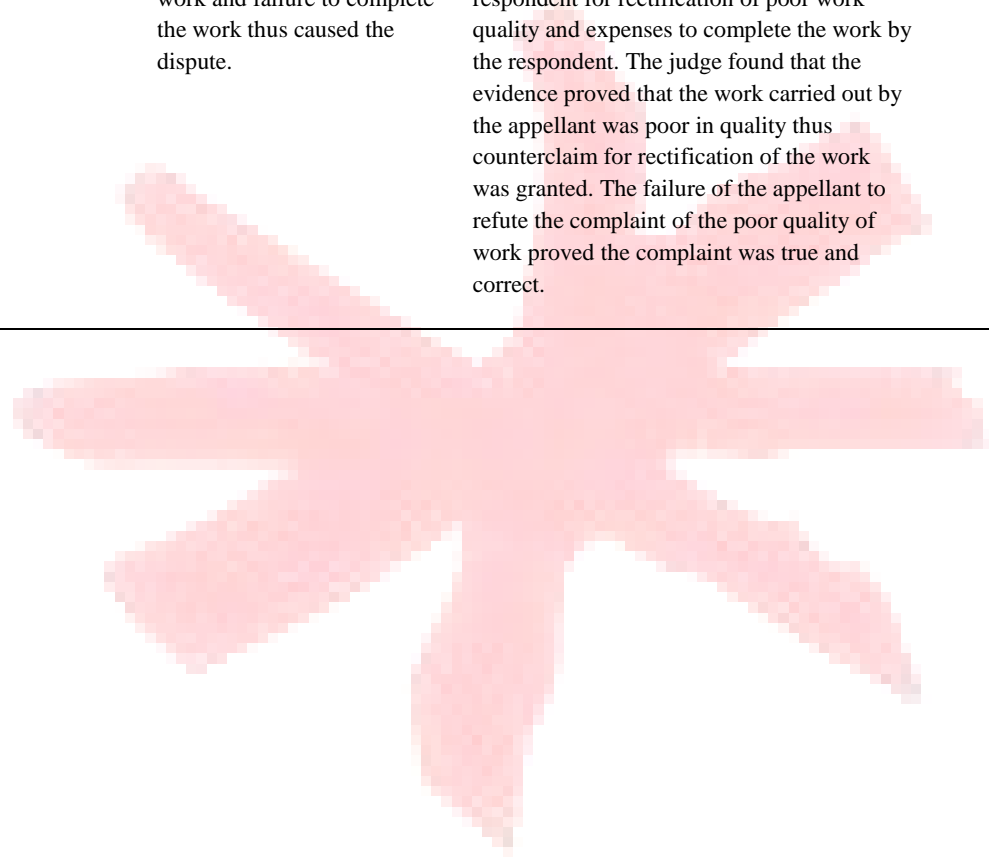


Table 5. Excusable Cause of Final Account Dispute: Conclusiveness of Final Account

Case Number	Case Title	Year	Cause of Disputes	Final Judgment	Disputed Quantum (RM)	Amount Granted (RM)
11 MLJ 344	<i>High Century Sdn Bhd v Liew Foot and Sons Construction Sdn Bhd</i>	2014	Uncertain provision to determine conclusiveness of final account by virtue of subsequent defective works. Although it seems to be the employer was at fault as the judge gave judgment for the contractor, but the dispute was due to the unfair and uncertain provision regarding the conclusiveness of final account. If such unfair provision is non-existence, similar dispute may not have arisen.	The judge dismissed the application to ignore the payment as the final account was conclusive. The judge found that the defective work was discovered before the issuance of the final certificate thus the final account was conclusive. But the judge implied that if subsequent defective work was discovered, the conclusiveness of the final account would be defeated.	RM105,600.70	RM105,600.70
4 MLJ 37	<i>Geopancar Sdn Bhd v Visage Engineering Sdn Bhd</i>	2013	Uncertain provision to determine conclusiveness of final account by virtue of defective works thus the dispute arose.	The judge allowed the application for the outstanding sum. The final account remained conclusive as there was no evidence of defective work for the counterclaim. The judge found that there was no invoice or other supporting documents to prove the deduction for defective work was correct. Similar to previous case, the judge implied that the following defective works would reverse the conclusiveness of the final account.	RM4,253,111.73	RM4,253,111.73
5 MLJ 414	<i>SA Shee (Sarawak) Sdn Bhd v Sejadu Sdn Bhd</i>	2000	Uncertain provision for the conclusiveness of final account due to subsequent defective works of sink-holes on reclaimed land thus the dispute arose.	The judge dismissed the application to restrain the case to be brought to arbitration. The judge held that the final account was proved inconclusive due to the subsequent defective work which was allowed under clause 44 of the Turnkey contract. Such issue proved that there was dispute to be brought to arbitration.	Unspecified as the rectification of the subsequent defective work was pending and yet to be quantified.	Unspecified

Table 6. Excusable Cause of Final Account Dispute: Back to Back Clauses

Case Number	Case Title	Year	Cause of Disputes	Final Judgment	Disputed Quantum (RM)	Amount Granted (RM)
MLJU 1454	<i>Pati Sdn Bhd v Hasrat Usaha Sdn Bhd</i>	2011	Uncertain back to back clause relating to LAD imposition thus the dispute arose.	The application was dismissed by the judge due to LAD charge as the extension of time clause was not back to back with the main contract. The judge found that the interpretation by the respondent on the back to back clause was incorrect thus enlightened the parties with a reasonable interpretation based on the wording of the contract. The judge interpreted that the extension of time clause was excluded from the back to back principle in the subcontract.	RM729,780.36	RM0.00
MLJU 394	<i>Pernas Otis Elevators Co Sdn Bhd v Syarikat Pembinaan Yeoh Tiong Lay Sdn Bhd</i>	2003	The existence of unfair and uncertain 'pay when paid' clause defeated the other term of contract which provided that payment shall be due upon CPC and CMGD thus caused the dispute.	The application was dismissed by the judge due to the existence of 'pay when paid' clause (clause 2.3). There was no evidence of payment received by the respondent from the employer thus the claim by the appellant failed according to clause 2.3. The judge held that the 'pay when paid' clause shall prevail despite there were CPC and CMGD.	RM300,000.00	RM0.00
MLJU 104	<i>BBR Construction Systems (M) Sdn Bhd v Maxdouble Construction (M) Sdn Bhd</i>	2002	The uncertain 'pay when paid' clause for final payment as the contract did not specify clearly the clause was applicable for final payment.	The application for entitlement of outstanding sum was dismissed by the judge due to the existence of 'pay when paid' clause (clause 9). Clause 9 was applicable for final payment although the term 'final payment' was not specified. Furthermore, there was no evidence of payment received by the respondent thus the claim by the appellant failed according to clause 9.	RM1,544,381.50	RM0.00
MLJU 518	<i>Procorp Realty Sdn. Bhd. v Sumpiles (Malaysia) Sdn. Bhd</i>	2001	Court interpretation required for unfair and uncertain 'pay when paid' principle thus caused the dispute.	The application of summary judgment was dismissed by the judge as there was 'pay when paid' clause in the contract. The judge found that the 'pay when paid' clause was agreed by the parties thus shall be honored. The appellant's claim was premature as the respondent was not paid yet. The judge explained that the principle behind the 'pay when paid' principle was that the appellant's claim shall not succeed unless he proved that the employer delayed payment without a good reason or facing financial problem. However, different judges may have different interpretation on this principle (refer to <i>Rira Bina</i> case).	RM254,249.32	RM0.00

5. CONCLUSION

The research findings is summarized in Table 7 below. The research findings shows that most of the causes of disputes for final accounts are people related or inexcusable causes of disputes. The employers are the main contributors to disputes of final accounts. Out of the thirty one (31) circumstances, ten (10) disputes are due to the late payment and non- payment by the employers. The circumstances of law cases show that these employers refused to pay the final sum despite the final accounts being verified and finalized by the contract administrators of the projects. The second most significant cause is the contractor-related inadequate contract administration where seven (7) circumstances are found under this category. This is followed by the inadequate contract administration by consultants or third parties which have six (6) relevant circumstances. Consultants or third parties related causes are mainly due to delay in issuing certificates. Besides, there is one (1) circumstance of dispute related to inexperienced contractor which is due to poor quality of work.

Contract related causes of disputes which are excusable causes are less significant as compared to people related causes. However, it is important to discover the uncertain and unfair contract clauses related to final account in order to reduce the disputes due to these clauses. The back to back clause such as ‘pay when paid’ clause is the main contributor to contract-related disputes of final accounts. There are four (4) circumstances of disputes related to back to back clauses. The judges honoured the existence of the back to back clauses but such clauses are uncertain as they required court interpretations thus, led to disputes. The next significant contract related cause of disputes is conclusiveness of final accounts. There are three (3) circumstances of disputes over the conclusiveness of final accounts in relation to subsequent defective works. Such defective works would cause unending inconclusive final accounts within the six years limitation period under The Limitation Act 1953. There is no circumstance found on the reasonable time for finalization of variation amounts at final account stage.

Table 7. Number of Cases of Disputes of Final Accounts (Year 1999 – 2014)

Causes of Disputes of Final Accounts		Number of Relevant Court Cases
Inexcusable: Task and People Related	Inadequate Contract Administration Contractor-related	7
	Consultant-related	6
	Unreasonable Late Payments and Non-payments by Employers	10
	Inexperienced Contractor	1
Excusable: Contract Related	Conclusiveness of final account	3
	Reasonable time to finalize variation amounts	0
	Back to back clauses	4

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