

Case law analysis: Power to omit work and termination for convenience

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Employers may wish to omit work from a contract or terminate the contract for any reason at its convenience. Both bespoke and standard forms of building contracts contain express provisions enabling an employer to omit work that it does not require to be done.

Until recently, few, if any, of the standard forms of building contracts contained termination for convenience provisions (the NEC 3 contract now contains at clause 92.4 a provision allowing an employer to terminate a contract for any reason). Termination for convenience provisions enables an employer to terminate a contract at any time without recourse to any determination provisions for default and to do so without being in breach of contract. These provisions are different and can cause confusion or be wrongfully applied, generating unjust results. The most common misuse relates to the use of such provisions to remove work from a party's contract so that it can be undertaken by somebody else at a cheaper price. Such matters were dealt with in the 2003 case of *Abbey Developments Limited v PP Brickwork Limited*.

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PP Brickwork had been engaged by Abbey as a labour-only subcontractor to undertake the brickwork and blockwork to 69 houses. PP Brickwork had undertaken some of the work. Abbey then decided to take away the remainder of work and have it completed by somebody else. Abbey's reason for so doing was put down to PP Brickwork's poor performance. Abbey initially relied on the determination provisions of the contract as the basis for omitting the work.

On 13 December 2001, Abbey issued a letter to PP Brickwork, which stated: "Your contract will be determined in accordance with our standard terms and conditions." That letter was issued only one day after Abbey's previous letter complaining about PP Brickwork's performance, putting it on a seven-day notice to make good the deficiencies in its performance.

The contract contained a typical variation provision allowing for the addition and omission of work. Additionally, the contract contained what was considered to be a termination for convenience provision. That provision stated: "Abbey Developments Limited reserves the right to renegotiate rates or suspend the contract and re-tender the works without vitiating the contract or giving rise to any claim from the subcontractor."

Abbey considered that this provision allowed it to remove work from PP Brickwork and to have it undertaken by somebody else. Abbey therefore relied on it to justify its actions in removing work from PP Brickwork and having it completed by somebody else. Abbey's position was rejected by PP Brickwork as it considered that the remaining work had been wrongfully removed from its contract.

Powers of omission

In reviewing matters, the judge noted that a contract for the execution of work confers on the contractor not only the duty to carry out the work, but the corresponding right to complete the work which it contracted to carry out. To take away or vary the work is an intrusion into and an infringement of that right, entitling the contractor to damages, unless the contract provides for work to be varied or omitted. Additionally, the judge noted that variation provisions had to be construed carefully so as not to deprive the contractor of its right to the opportunity to complete the works and realise such profit as may be then made, and that reasonably clear words are needed in order to remove work from the contractor to have it done by somebody else. It is implicit in most contracts that an employer who exercises a power to omit work must genuinely require the work not to be done at all, and it cannot exercise such power with a view to obtaining having the work undertaken by another at a cheaper price.

Termination for convenience

The judge then addressed the question of interpretation of the termination for convenience provision and whether it allowed Abbey to remove from PP Brickwork to have it done by somebody else. The judge noted the provision was in reality quite comparable to a clause empowering termination for convenience and stated that there is no principle in law that says in no circumstances may work be omitted and given to others without incurring liability to the original contractor's loss of profit and overheads contribution.

But the judge also stated that a contractor's right to do the work is so obvious and fundamental that it would be unaffected by the absence of

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wording to the contrary there had to be a positive negation or dilution of that right were the circumstances such that it would be inferred.

The judge concluded that the purpose of the provision in issue was to suspend the work and obtain different prices and that the Abbey was free to take the work away from PP Brickwork and have it carried out by somebody else.

However, owing to Abbey's reliance, in its 13 December 2001 letter, on the determination provisions in removing work from PP Brickwork, rather than relying on termination for convenience provision, the judge decided that Abbey did not exercise its contractual right to remove work from PP Brickwork and to give such work to another contractor. What Abbey did was to attempt to determine the contract under a different clause (which it could not do as the seven-day period in that clause had not expired).

The judge noted that while it was the intended effect of Abbey to remove the work from PP Brickwork, it was not justified by the improper operation of the contract's determination provisions. Accordingly, Abbey's actions could not be justified as the appropriate provision (termination for convenience provision) for achieving the intended result had not been properly operated.

Summing up

The case:

Abbey Developments Limited -v- PP Brickwork Limited.

The issue:

Power to omit work and termination for convenience.

The implication:

A contract for the execution of work confers on a contractor the right to complete all of the work which it contracted to carry out. However, there is no principle in law that says in no circumstances may work be omitted and given to others but reasonably clear words are needed if this is to occur.

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