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Omission

Construction Law Terms: A to Z

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O is for Omission

What is an omission?

Construction contracts typically include clauses permitting the employer to instruct variations to the works. An employer may use the variations clause to vary the scope of the contract and exclude the specified works. Omitting works in accordance with the contract can lead to a potential cost saving as the effect of omitting work will often reduce the contract price. However, an employer's right to omit work in this way is far from unfettered.

Where does the right to omit works come from?

The right to omit works from a contractor's scope is grounded in the contractual right to vary the works. But not all variations clauses will allow an employer to omit works and even those that do might restrict that right. In *SWI Ltd v P&I Data Services*,[1] the Court of Appeal referred to the contractor having both an obligation and an entitlement to carry out the contractual scope of works: "*Normally, without some term allowing for variations under a fixed price contract to perform works, the paying party is not entitled vary the contract by reducing the work to be done; the builder would have a right to say that he had quoted a fixed price to do certain work and he was prepared to carry out all that work in order to receive his payment*".[2] Consequently, the court found that there was no implied term to reduce the contract price to reflect omitted work.[3]

The court went on to say that "*if, of course, the paying party simply waives his right to have the complete works performed the builder will be entitled to his full price for what he has done, and ... would not be in breach of contract for not performing*". It is therefore clear that an employer can only omit works by a variation and reduce the price accordingly if it is expressly permitted under the terms of the contract.

Can an employer omit works from one contractor and give them to another?

The general rule is that if the contractual prerequisites discussed above are in place, an employer may omit work with the intention that this work is not to be carried out by the contractor. An employer may not, however, award those works to another party, unless it is expressly permitted to do so.

The guiding precedent on this issue is the decision of the Technology and Construction Court in *Abbey Developments Ltd v PP Brickwork Ltd*[4] in which the court referred to the contractor's entitlement to carry out the contractual scope of works: "*The basic bargain struck between the employer and the contractor has to be honoured, and an employer who finds that it has*

[1] [2007] EWCA Civ 663
[2] [2007] EWCA Civ 663, para 18
[3] [2007] EWCA Civ 663, para 21
[4] [2003] EWHC 1987 (TCC)

entered into what he might regard as a bad bargain is not allowed to escape from it by the use of the omissions clause so as to enable it then to try and get a better bargain by having the work done by somebody else at a lower cost once the contractor is out of the way". The question is whether the contractual provisions are broad enough to give the employer the right to omit works and redistribute it to an alternative contractor: "*[R]easonably clear words are needed in order to remove work from the contractor simply to have it done by somebody else*".[5] If the original contract does not include such "*reasonably clear words*" then the employer will need to reach an ad hoc agreement before it can omit work and redistribute it to others.

How much work can an employer omit?

While the court has reluctantly permitted the omission of works if that right forms part of the parties' bargain, it has taken care to set out limits to this power. See, for example, *Stratfield Saye Estate Trustees v AHL Construction Ltd*[6] in which a contractor was employed to carry out waterproofing on a cost-plus basis. When the employer realised that the cost of the works would exceed what it was willing to spend, it sought to omit nearly the entire scope of the contractor's works.

Citing the principle in *Abbey Developments*, that an employer may not use an omission to escape from a bad bargain, the court held that the employer was not entitled to issue omissions that would "*detract from or change the fundamental characteristic of the works*".[7] In cases such as *Stratfield Saye*, where the omission effectively amounted to a termination, such an attempt to effectively escape the contract cannot be covered by a variation absent express wording permitting an omission of such broad scope. Even where the omitted portion of the scope is barely significant, it will still be necessary to ascertain whether the basic bargain between the parties has been violated. To answer that question one can take guidance from the case of *Thorn v London Corporation*[8] in which the court held that a change must be of a kind contemplated by the contract – again highlighting the need to preserve the integrity of the bargain.

What if an employer wrongfully omits work?

As set out above, the right to omit work is grounded in a contractual right to vary. If an employer exceeds its contractual right to omit works or does not comply with the contractual mechanism for doing so, it will be in breach of contract. That will entitle the contractor to a claim for damages – typically the loss of profit it would have made in carrying out the wrongfully omitted work. In extreme circumstances a wrongful omission might amount to a repudiatory breach of contract.[9]

How standard form contracts deal with omission from the contractual scope of work

Each of the JCT, FIDIC and NEC suites of contract deal with omissions in different ways. Express amendments can obviously be considered to widen the power to omit works, subject to the contractor's agreement, which it might only be granted if compensation will be paid for the omitted work.

JCT

The JCT standard forms have explicitly incorporated omissions into their variations ("Changes") clause, clause 5.1. This defines a 'Change' as a change in the Employer's Requirements which "*makes necessary [...] the addition, **omission** or substitution of any work*"[10] [emphasis added]. The same wording appears in the JCT Design and Build 2024 contract. However, the JCT suite of contracts is silent as to (i) whether omitted work can be redistributed to other contractors or whether the employer could carry out those works itself; and (ii) the amount of work an employer may omit. A common amendment by employers using the JCT suite of contracts is to amend the variation provisions to expressly permit work to be omitted and redistributed.

[5] [2003] EWHC 1987 (TCC), para 47.

[6] [2004] EWHC 3286

[7] [2004] EWHC 3286, para 36

[8] (1876) 1 App. Cas. 120

[9] See Section 7.29 of Julian Bailey, *Construction Law*, 4th edition. See also *Carr v J A Berriman Pty Ltd* (1953) 89 CLR 37 at 348 per Fullager J.

[10] JCT Design and Build Contract 2016, JCT Standard Building Contract with Quantities 2016 at clause 5.1.

FIDIC

Clause 13.1 (of the 2017 editions of the Red, Silver and Yellow Books) states that "*a Variation shall not comprise the omission of any work which is to be carried out by the Employer or by others unless otherwise agreed by the Parties*".

FIDIC therefore permits an employer to omit work, but not to enable the employer to carry out that work itself, or redistribute that work to another contractor – unless expressly agreed with the original contractor. The FIDIC suite provides for the pricing of omitted work[11] and, if the parties have agreed the omission of any work which is to be carried out by others, then the contractor is entitled to any loss of profit or other losses and damages suffered as a result of that omission.

NEC

Clause 14.3 empowers the project manager to "*give an instruction to the Contractor which changes the Scope or a Key Date*".[12] Like the JCT wording, it is silent as to (i) whether omitted work can be redistributed to other contractors or whether the employer could carry out those works themselves; and (ii) the amount of work an employer may omit.

The recent Scottish case of *Van Oord UK v Dragados UK*[13] considered the provisions of an NEC3 ECC Option B subcontract (subject to amendment by way of Z clause). NEC4 contains provisions that are very similar to those considered in the Dragados case.

The case arose after the parties agreed a blended rate for all dredging works. Dragados sought to manipulate that blended rate by omitting the 'cheaper' works (and giving it to another contractor), thereby leaving Van Oord to undertake the more expensive work, but without changing the blended rate.

At a preliminary issue hearing, the Court of Session's Outer House (first instance) considered the *Abbey Developments* case and, applying those principles, decided that issuing several instructions to omit parts of the contractor's work and awarding those works to another contractor, amounted to a breach of contract. The court confirmed that clear words were needed to permit the employer to omit work and redistribute it to other contractors. When it came to quantifying the contractor's losses, the court decided that, although the instruction to omit works was a breach of contract, the only remedy available to the contractor for valuing variations of any kind was the valuation of the work under the NEC's 'compensation event' valuation mechanism (clause 63.10 which permits the prices to be reduced). That mechanism resulted in a significant reduction in the amount payable to the contractor (meaning that its victory was somewhat of a pyrrhic victory) and so it appealed.

The Inner House[14] (Scotland's Court of Appeal) found that the compensation event mechanism (which favoured Dragados, rather than Van Oord) applied only to a lawful instructions (i.e. those in accordance with all contractual provisions, including the duty of good faith), not to unlawful instructions. This decision meant that Van Oord would be able to advance its case at trial with further evidence of the unlawfulness of the instruction and the quantification of Van Oord's entitlement.

Practical tips

An employer's power to omit and redistribute work is dependent upon the express wording of the contract. That being the case, it is important that parties consider their requirements when drafting the contract and as and when any work is omitted.

Considerations when entering into a contract

If an employer can see at the outset that it might want to omit works, and redistribute them to another contractor, then it should ensure the variation provisions expressly allow that.

Employers may also want to include express wording that a contractor is ***not*** entitled to claim loss of profit where works are omitted and given to another contractor. Contractors typically resist

[11] See clause 13.3.1(c) of the FIDIC Red, Silver and Yellow Books.

[12] NEC4 Engineering and Construction Contract, Clause 14.3

[13] [2020] CSOH 87

[14] [2021] CSIH 50

such wording because of their concern that the employer could omit the most profitable elements of the work (the *Van Oord* case being a prime example of this practice). Consequently, omission clauses are often negotiated. Compromises can include agreeing to pay loss of profit but only up to a cap, or permitting the employer to omit up to a certain percentage of the contract sum without paying loss of profit and then paying it at an agreed rate for omissions beyond that value.

In addition to a right to omit, employers sometimes seek a right to terminate parts of the works 'at will' (i.e. for any reason). Such provisions (if accepted) have the same effect as a right to omit.

Considerations when omitting works

Before instructing an omission, an employer should refer to the contract to check its instruction is valid. Equally, on receiving an instruction to omit works, a contractor should check whether the instruction is valid. If either of them is unsure, they should take advice. By seeking advice early, understanding the legal position and the parties' commercial positions a dispute might be avoided or better managed.

It is of course possible that a contractor might accept an instruction to omit works, only to subsequently become aware of circumstances that render the instruction outside the employer's right to omit works – for example, if the contractor subsequently finds out that the omitted work is being (or has been) redistributed. In those circumstances, it might be too late to undo the omission but (subject to being able to establish the employer's breach of contract) the contractor may still be able to make a claim in damages.

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