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The Temporary Disconformity Concept

Introduction

This article considers the remedies available to an employer who is concerned about poor quality and defective work during the construction period, which may or may not be corrected prior to practical completion. The concern is that shoddy or defective work may simply be covered up. At best the employer is paying over the odds for inferior work. At worst there could be a structural or other material defect lurking. Either way the employer loses trust and confidence in the contractor's ability to do the work and/or supervise its subcontractors.

The employer will want to know how it can get the contractor to improve its performance, whether it can withhold payment and if so by how much, and if it can terminate the contractor's employment. The contractor will say it is entirely up to it to decide how and when to rectify defects so long as the work is compliant at the time of practical completion, and tell the employer (politely) to mind his own business!

The law

Leaving aside for one moment the particular powers under various standard form construction contracts, there are two very different schools of thought on the law;

One extreme is illustrated by Hudson 11th edition 1995 – a “*contractor will be in immediate breach of contract whenever his work fails to comply with the contract descriptions or requirements*”. The problem with this approach is that every minor non-conformity constitutes an immediate breach.

The other extreme stems from a 1972 House of Lords case P and M Kaye Ltd –v- Hosier & Dickinson Ltd where Lord Diplock (dissenting) suggested that “*Provided that the contractor puts it right timeously I do not think that the parties intended that any temporary disconformity should of itself amount to a breach of contract by the contractor.*”

The practical approach involves a consideration of whether the disconformity was in fact “temporary” and whether the contractor was taking steps within a reasonable time, to correct the defect.

In Nene Housing Society –v- NatWest Bank [1980] it was an express term of the contract that the contractor was to “carry out and complete the work” which is a dual test. Thus it will not always be necessary to wait for completion to ascertain if the work is being properly carried out.

During the first decade of the 21st century the theory of “remediability” appeared. In essence this is based on ascertaining whether in the normal course of events the defects could or would be remedied

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by the contractor before completion. If they would, then they fall within the scope of the “temporary disconformity” principle, and the employer would not be entitled to terminate.

However, if the nature of the defect is so serious that the contractor cannot rectify it in time (or at all) or if there are numerous defects which when all taken together cannot be rectified in time, then the defect is irremediable. An irremediable defect cannot be a temporary disconformity. The breach occurs when this state comes to pass, and the employer does not have to wait until completion to look for a remedy.

Examples

The theory can be illustrated by looking at simple examples:

1. Where screed is laid in too wet conditions and needs four months to dry out before a timber floor can be laid on top, if there are still six months left within the contract period then there would normally be sufficient drying out time left and the defect is remediable. The damp is a temporary disconformity. But if there are only two weeks left until completion, the defect is irremediable.
2. In this scenario the brickwork is poorly aligned, the plastering is rough and the windows are not properly sealed. If the contractor can, and normally would, make good the defects during the remaining contract period then these are no more than a temporary disconformity. But there will be a point in time when it is no longer possible to remedy these defects and they become irremediable. Where the defect has a material impact on a following trade this point in time may arise sooner rather than later.
3. Here, the width of a corridor is not compliant with Building Regulations. The contractor continues to construct doorways and window openings in the walls, ignoring the fundamental non-compliance, and proceeds to plaster the walls and fix handrails and fittings. This is not a matter of routine remediation; it is a fundamental error not a temporary disconformity.

It can immediately be seen that each case will be fact specific and care needs to be taken when considering whether to impose an irreversible remedy such as termination.

JCT 2011

Using the Standard JCT 2011 contract by way of example let us look at how an Employer might deal with its concerns about shoddy workmanship:

First, it is an express term of the contract that the Contractor shall “carry out” and “complete” the Works in a proper and workmanlike manner thus the dual test applies.

A failure to comply may result in an instruction that is “reasonably necessary” with no addition to the Contract Sum.

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If within 7 days of a notice from the Contract Administrator requiring compliance with an instruction the Contractor does not comply, the Employer may employ others to execute the work and make an appropriate deduction from the Contract Sum.

Further, under the termination provisions the Contract Administrator may give a 14 day warning notice for failure to proceed regularly and diligently and/or the 2-limb test of neglecting to comply with an instruction or notice requiring removal of work, materials or goods not in accordance, if by such refusal or neglect the Works are materially affected. If the default continues for 14 days the Employer may then terminate the Contractor's employment.

Pay Less notices

The other issue that may arise in the circumstances of work falling within the “temporary disconformity” concept is whether the employer can serve a Pay Less notice to cover the risk of the work not being carried out properly or where the contractor is unable to prove e.g. by photographic evidence or third party confirmation, that the work was done properly before being covered over. The Contract Administrator may value the work at less than the contractor has applied for however the employer may be justified in wishing to withhold additional sums against the risk that the temporary disconformity will not in fact be rectified before completion, or indeed against the suspicion that shoddy work has been covered up. This is particularly relevant in circumstances where the signs are that the contractor or the key subcontractors are in financial difficulties and this is affecting the quality of the work.

Diligence

In order to avoid inevitable termination and/or deduction of significant sums from payment applications a contractor has to ensure that it is carrying out work diligently at all times and take immediate steps to rectify any non-conformity.

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Ryland Construction Law Services Ltd, January 2014

Please feel free to re-print this article, but kindly acknowledge the source. This article acknowledges previous papers on the subject by Ellis Baker and Anthony Lavers of White & Case.