ARTICLE: Termination


Most standard forms of construction contract provide for termination. Such provisions are beneficial, firstly because they seek to set out clearly the circumstances and procedure applicable; secondly they preserve the agreement setting out what is to happen following the termination.

Such provisions for termination often include the need to issue two notices, and also that such termination shall not be unreasonable or vexatious.

When an event occurs that gives right to a party to terminate, the power must be exercised within a reasonable time or that party will be deemed to have waived its right unless the event is a continuing breach of contract per Marsden v Sambell (1980) 43 L.T.

As to the two notices, the first generally is in the form of a notice of default the second a notice of termination. The first is to warn the party of the threat of termination, which if not headed may result in termination. Following Architectural Installation Services Ltd v James Gibbons Windows Limited [1989] 46 BLR 91, such notice need not be too specific, but must be sufficiently worded that the party receiving it is in no doubt that the other is exercising or purporting to exercise the contractual power of termination.

As to the second notice, the notice of termination, for it to be compliant there must be a sensible connection between it and the notice of default, both in content and in time. If the period between the two notices is too long or the event(s) complained of in the two notices are different then the termination would be ineffective and would normally amount to repudiation.

As to whether a notice is considered not to have been given unreasonably or vexatiously will depend upon the circumstances; in John Jarvis v Rockdale Housing Association (1986) 36 B.L.R. “Vexatiously” was said to connote “an ulterior motive to oppress, harass or annoy”.

Conclusion

To minimise the chances of your notice being defective:

- Read the contract carefully, including where it is a standard form, any bespoke amendments. Read not only the termination clause, but also (for example) the notices clause, the interpretation clauses and whether bank holidays do not count as “days” when calculating notice periods.
• Calculate the time periods with utmost care, especially the period required between the issue of the notice of default and the notice of termination.
• Following the wording in the termination clause as close as possible when drafting the notices.
• Consider stating in the alternative that the notice is to be considered as a notice of termination at common law.

Ultimately, the other party will almost certainly argue that at least one of the notices are ineffective and thereby represent a repudiation of the building contract, so it may be sensible to first call our free helpline for advice.

For further information please contact Richard Silver in Epping on 0845 345 1244 or email rns@shemmingsllp.co.uk.

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