

Building Contracts – Why Bother?

by Mark Ferbrache

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Mark Ferbrache, Partner at AFR Advocates, considers some general propositions relating to building contracts.

For most people, with the exception of their house loans, the cost of building work is often their greatest expense. As is well known, the completion of building works often leads to disappointment and dispute and the seeking of legal advice. The nature of the complaints tends to be shoddy workmanship, the length of time that the building work took, and unreasonable costs – all leading to the disappointment of the householder.

In a series of articles these and related issues will be examined.

Shoddy work

Although shoddy work may result from ‘cowboy’ builders this is not always the case. Defects do arise, sometimes without any real negligence on the builder’s part. It was stated by His Honour Judge Newey QC in *Emson Eastern Limited (In Receivership) v EME Developments Limited* [1991] that:

“Building construction is not like the manufacture of goods in a factory. The size of the project, site conditions, use of many materials and employment of various types of operatives make it virtually impossible to achieve the same degree of perfection as can a manufacturer. It must be rare for a new building to have every screw and every brush of paint correct. Some work will be snagging to complete post-completion”.

Length of time and unreasonable costs

Time and cost can increase in many ways, not least with the householder changing his mind about what he wants or the builder discovering a problem which needs to be rectified. Any change, however small the householder thinks it is, can cause delays and an increase in costs.

The disappointment factor

Although clients may be guided at great length through the specifications for their works, some may not appreciate that they are not getting what they wanted until construction is well under way or even complete. Somehow, 23 Le Bouet has to be transformed into a show home from the pages of *Country Life*.

Conversely, many clients order their building works with very little preparation and only discuss the timescale for completion in the most general of terms.

Absence of a contract

In the absence of a written contract between the parties, it will be necessary to rely on implied terms to evaluate the relationship between the builder and the householder. Terms may be implied by custom, statute, the court, trade practice and the business efficacy/officious bystander test. In respect of the business efficacy/officious bystander test, the term must be so obvious that “it goes without saying” (*Shirlaw v Southern Foundries* [1926]). So, as stated by MacKinnon LJ “if while parties were making their bargain an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, ‘Oh, of course’”.

Lump sum contracts

Building contracts are contracts for labour and materials. Where there are no written terms the law has developed a number of principles which affect their operation. Contracts are usually lump sum contracts as opposed to fixed price ones. In a lump sum contract the contractor is required to carry out and complete the entirety of the identified contract works for a fixed sum agreed in advance. It may surprise the builder to learn that the general position is that the builder is entitled to recover nothing on the contract before the work is completed.

However, this rule can be negated in certain circumstances. Thus, the contractor can recover nothing if he abandons operations when only part of the work is completed, since his breach has gone to the root of the contract. But if, for example, the contractor has completed the erection of the buildings, there has been substantial performance and the other party cannot refuse all payment merely because the work is not in exact accordance with the contract (H Dakin & Co Ltd v Lee [1916]). Therefore, the contractor would be entitled to payment less the costs of making good defects and omissions.

In *Hoenig v Isaacs* [1952] an interior decorator contracted to refurbish a flat for £750. The defendant had paid £400 in advance, but then refused to pay the remaining £350, arguing that the design and workmanship were defective. The court agreed that there were problems with the work done, but the cost of putting these right would only be £56. Consequently it was held that the decorator had substantially performed, and was entitled to the balance of the contract price, less the £56 needed to put right the defects.

Usually completion will mean bona fide completion free of known or patent defects so as to enable the owner to enter into occupation. The words 'practical' or 'substantial' probably do no more than indicate that trivial defects not affecting beneficial occupancy will not prevent completion.

Payment in instalments

Sometimes the building contract allows the client to pay in instalments as the works progress. In this situation the builder may be tempted, if the client fails to pay him, to treat the client's non-payment as a repudiatory breach of contract. Under English common law there is no right to suspend performance or terminate for non-payment. It is likely that the position under Guernsey customary law would be the same. Again, this is an error commonly made by builders in Guernsey.

Summary

- It is very important that the householder enters into the building contract with realistic expectations.
- It is of the utmost importance that the builder continues to manage those expectations.
- Unless there is an express term to the contrary, the builder cannot treat a client's non-payment as an excuse to view the contract as being at an end and walk off site.
- The general position is that contracts are lump sum contracts such that the builder is entitled to recover nothing on the contract before the work is completed.
- All of the above points make it clear that it is sensible, whenever reasonably practicable, to reduce key terms of the agreement to writing.

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