

Insight

Insight provides practical information on topical issues affecting the building, engineering and energy sectors.

Inside this issue

Can I omit that?



Can I omit that?

In this *Insight* we provide an overview of the rules governing an employer's right to omit works from a contractor's scope.¹ In particular, we explore the principles underlying the common law governing, and restricting, the exercise of the power to omit. Understanding these is the key to avoiding a dispute as to whether such powers can be exercised in the first place, or indeed a dispute as to their extent and the circumstances in which they can be exercised.

The common law position

There is no right to omit work from the scope of work provided for within a Construction Contract at common law. Accordingly, there must be a power to omit within the contract in order to do so.²

The rationale behind this is to protect the underlying purpose of entering into a contract in the first place, by preventing the employer from unpicking the bargain he has made. If an employer has entered into a bad bargain, then that is the bargain he should be stuck with. The contractor should have the right, as well as the obligation, to undertake all the works described in the scope in return for payment.

As stated by HHJ Humphrey Lloyd QC in *Abbey Developments Ltd v PP Brickwork Ltd*:

*"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 be able to complete the work which it contracted to carry out.** To take away or to vary the work is an intrusion into and an infringement of that right."³ [Emphasis added]*

This is important because a contractor may have diverted resources from elsewhere or invested significant money into providing specialist equipment. It will have done this in the expectation of earning back that investment based on how much work

it is entitled to carry out under the Construction Contract. If this changes significantly then this can leave a contractor substantially out of pocket. If an employer wants to omit works from the scope of a contractor they must therefore have an express power to do so provided for within their Construction Contract.

Implied limitations on omission provisions

Even if there is an express power to omit works from a Construction Contract, such a clause will be governed by strict implied limitations on its use.⁴ These must be understood in order to assess:

1. Whether an omissions clause can be exercised in the way that is proposed; and
2. How any express wording in that particular Construction Contract should be interpreted.

This is critical because if a power to omit is exercised incorrectly it may, depending on the circumstances, constitute a repudiation of the contract by the employer.⁵ This brings with it a right to bring an end to the contract as well as damages (including damages for loss of profit) on the works omitted.

There are two major limitations on the power to omit. These include:

1. Limitations on the employer's ability to redistribute omitted work

to others and/or carry out that work himself; and

2. The extent of the work that can be omitted.

These are examined in turn below.

Can I use others to complete omitted work or carry it out myself?

Unless there is clear and express wording to the contrary the answer to this question is "No".⁶ Omissions must be genuine omissions in that there must be no intention to carry out the omitted work at all. Furthermore, the employer will not ordinarily be entitled to do the work themselves.⁷ As stated in the American case of *Gallagher v Hirsch*,⁸ the word "omission" only contemplates things to be left out of the contract altogether, not taken out and given to others.⁹ There would be little point in entering into a contract at all if you could abandon your promise to let someone do certain work in return for payment whenever it suited you to do so.

In the leading authority on omissions and redistributions, *Abbey Developments*, HHJ Humphrey Lloyd QC confirmed that in order for a variation to be valid it must be ordered "for the purpose" for which the right was given under the contract, and that variations provisions are there for the purpose of changing the requirements of the project. In that case, the contract allowed for the contractor to reduce or increase the quantity of work offered to the subcontractor. The contractor relied on

this provision to remove work from the subcontractor due to the subcontractor's poor performance and other breaches. It was held that the contractual provision was not clear enough to enable work to be removed due to poor performance. The clause only allowed the contractor to reduce work where this was no longer required for completion of the project (as opposed to passing it on to another).

Humphrey Lloyd emphasised that:

"The basic bargain struck between the employer and the contractor has to be honoured, and an employer who finds that it has 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..." [Emphasis added]

Express wording is therefore required to give omitted work to another, even where the contractor has performed poorly.

Similarly, in the case of *Amec Building Company Limited v Cadmus Investment Company Limited*,¹⁰ the Court reviewed an arbitral award and held that a power to omit had been wrongfully exercised. The decision in this case was unrelated to performance but instead pertained to cost. Once again, the question was whether the employer was entitled to omit works from Amec's scope with the aim of giving them to another contractor. The employer (Cadmus) had sought to omit work relating to a food court (which had been included within the contract as a provisional sum) and give it to another contractor who would do the work at a cheaper rate. It was held that the employer was not able to withdraw work from the original contractor (Amec) in order to give it to another contractor. The original contractor was entitled to compensation in the form of their loss of profit on that element of the works.

The employer does have the right, however, to bring new contractors on board to undertake additional work, not forming part of the original scheme. This is subject to express provisions in the contract preventing or restricting this (for example, where the original contractor is entitled to exclusive possession of the site).¹¹

How much can I omit?

Even if there is an express power to omit works under a Construction Contract, there are implied limitations on how much work can be omitted using that power. An employer cannot remove all the works from the contractor's scope or omit such a large element of work so as to effectively terminate the contract.¹² Nor can he operate the provision so as to undermine the basic bargain struck between the parties.

In *Stratfield Saye Estate Trustees v AHL Construction Ltd*,¹³ Jackson J considered and approved the approach taken in *Abbey Developments*. This is namely that the "basic bargain" struck between the employer and the contractor must be honoured, and that the employer cannot use the omissions clause to escape from what he considers to be a "bad bargain" so as to get a better bargain with another.¹⁴

Jackson J then examined the "basic bargain" struck by Stratfield and AHL Construction. He noted:

"... The 'basic bargain struck between the employer and the contractor' was this: AHL would carry out works to make Heckfield Wood House wind and weathertight. The employer, acting through Mr Glover, was fully entitled to give instructions which would vary the details set out on the drawings or the works described in the site minutes. However, the employer's power to omit works was subject to a clear limit. AHL had been employed to carry out the phase 1 works. 'Phase 1' was understood by everyone to mean works

which would convert Heckfield Wood House from a derelict property into a building which was wind and weathertight. The employer, acting through Mr Glover, had no power to issue omission instructions which would detract from or change this fundamental characteristic of the works." [Emphasis added]

In Stratfield the scale of the omission undermined the "basic bargain" between the parties and, accordingly, the architect had no power to issue the omission instruction he did. The fundamental bargain between the parties could not be changed.

What do the standard forms allow for?

With these implied limitations in mind, it is worth noting what the standard forms provide for in relation to omissions. Express amendments can then be considered to widen the power of omission should the employer consider this necessary (assuming the contractor will agree to the proposed amendments).

By way of example, the JCT Design and Build 2016 allows for the valuation of omissions and expressly defines Change as including "the addition, omission or substitution of any work"¹⁵. However, there is no provision for the work to be given to others, meaning that this would not be permissible under that contract unless express wording to the contrary was added.

Clause 13.1(d) of the FIDIC Red Book (1999), in contrast, expressly clarifies that a variation may be an omission unless the works are to be carried out by others.

In most of the standard forms express provision would be required if an employer wanted to give omitted works to another party for whatever reason.

Summary

Anyone tempted to remove work from their contractor's scope should not only review their contract terms carefully, but also be sure that they understand the default common law position. In particular, if the reason behind the omission is to allow you to contract with others at a cheaper price, or the extent of the omission is such as to entirely change the nature of the contract and/or effectively terminate it, then very clear and express wording will be required within the contract to allow you to carry out such an omission. If this is not present (or indeed if there is no right to omit works within the contract at all) then omitting works from your contract will be a breach of contract and may also, depending on the circumstances, render you in repudiatory breach of contract.

Claire King, Partner
Fenwick Elliott

Footnotes

1. By Claire King. With thanks to Catherine Simpson for her assistance and research.
2. *Abbey Developments Ltd v PP Brickwork Ltd* [2003] EWHC 1987 (TCC); (3002) CILL 2033 at para 49.
3. See *Abbey Developments Ltd*.
4. See Section 5-027 of Hudson's *Building and Engineering Contracts*, 14th edition, 2019 ("Hudson").
5. See Section 7.29 of Julian Bailey, *Construction Law*, 2nd edition, 2016 ("Construction Law"). See also *Carr v J A Berriman Pty Ltd* (1953) 89 CLR 327 at 348 per Fullagar J.
6. See Section 7.29 of *Construction Law*.
7. See Section 5-027 of Hudson.
8. *Gallagher v Hirsch* (1899) 45 AD 467.
9. See Peter R. Hibberd, *Variations in Construction Contracts*, 1986, p. 72.
10. *Amec Building Company Limited v Cadmus Investment Company Limited* (1996) 51 ConLR 105.
11. See *Variations in Construction Contracts*, at 5.162.
12. See Section 7.32 of *Construction Law*. See further *Stratfield Saye Estate Trustees v AHL Construction Ltd* [2004] EWHC 3286 (TCC).
13. See *Stratfield*.
14. See *Abbey Developments*, at para 46.
15. See Clause 5.1.1.1 of the *JCT Design and Build Contract 2016*.