



Termination of Construction Contracts

Termination of construction contracts is a common cause of dispute across the construction industry. This article outlines the types of events that can lead to termination and highlights practical steps to help reduce the risk of disputes.

Defaulting on contracts

Most construction contracts contain express provisions setting out when and how either party may terminate. Standard form contracts typically allow termination where specified events occur, for example, unlawful suspension of the works or failure to proceed regularly and diligently.

If a party defaults on a construction contract, often the contract will contain a specific termination procedure that the terminating party must adhere to in order to terminate the contract lawfully. For example, the contract may state that if a sub-contractor commits any of the specified defaults listed in the contract, the contractor must give notice to a sub-contractor specifying the defaults, and if the sub-contractor continues the specified defaults for 10 days from the receipt of the first notice, the contractor may on or within 21 days after expiry of the 10 day period, terminate employment by serving a further notice.

If the contractual procedure is not followed, the termination may be treated as wrongful termination. This can expose the terminating party to significant claims, including damages for loss of profit.

Termination at Will

Construction contracts can also contain termination at will clauses, which may also be referred to as termination for convenience clauses. Termination at will is not an automatic right by law and must be an express term of the contract. These clauses allow a party, usually the Employer or Main Contractor (if you are a sub-contractor), to terminate the contract for any reason, at any time, at their own discretion regardless of whether the party being terminated is in breach.

Termination at will clauses are particularly onerous. If exercised correctly, the terminated party may be required to leave site without any fault on their part. These clauses also commonly exclude entitlement to loss of profit. For that reason, contract reviews are an effective way to identify and understand these type of clauses before work begins.

Termination at Common Law

A repudiatory breach is a breach that is so serious that it strikes at the heart of the contract and deprives the injured party of its benefit. Examples of a repudiatory breach include a contractor abandoning site, or the employer refusing the contractor access to site.

If a repudiatory breach occurs, this does not automatically end the contract. It allows the injured party to either accept that a repudiatory breach has occurred but carry on with the contract i.e. affirming the contract or accept the repudiatory breach of contract and treat the contract as ended, and seek damages for the breach. The remedy of damages aims to put the injured party back in the position they would have been had the breach not occurred. So, for



example, if a sub-contractor has been awarded a contract for a new home development for 100 plots, but only completes 30 plots and are then told that they are no longer allowed on site and a third party will be carrying out the works, depending on the wording of the contract, this could amount to a repudiatory breach. The sub-contractor can accept the breach and notify the main contractor that the contract has been breached and therefore it has come to an end. The sub-contractor would then be entitled to pursue the main contractor for damages for loss of profit on the remaining 70 plots they were entitled to complete under the contract. This is a very complex area of the law and advice on this area is very fact specific. If you are therefore seeking to argue that a party is in repudiatory breach, it is very important to seek legal advice because getting it wrong can be very costly.

Getting it wrong

Getting termination wrong can have serious consequences. A frequent issue we come across is parties misunderstanding the termination provisions in their contract or contractors leaving site or employers removing workers from site without serving the correct contractual notices. Any failure to follow the agreed process can make the termination unlawful. A wrongful termination is itself a breach of contract, often treated as a repudiatory breach and it can expose the terminating party to substantial claims. These can include damages for loss of profit, demobilisation costs, prolongation or disruption related losses, and any other consequential costs that the other party can demonstrate flowed from the unlawful termination.

Key Takeaway Points

1. Know what your contract says. Termination rights and procedures vary widely between different types of contracts and standard forms.

2. Follow the contractual process carefully. Failure to comply with notice requirements and time periods can turn a rightful termination into a wrongful termination. Ensure you know what to do if you receive a notice of default/termination.
3. Be alert to termination at will clauses. These can significantly affect your commercial risk and your ability to recover loss of profit.
4. Seek early advice. Termination is a frequent cause of costly disputes, and early input can help protect your position and limit consequences.

The Holmes & Hills Construction Division offer both contract reviews and in-house training which covers termination of construction contracts. We would be more than happy to host a training session at our Commercial Hub in Marks Tey, attend your offices in person or remotely to offer training on a variety of topics.

Please do not hesitate to contact our team of construction lawyers if you would like to discuss anything in this article further or have any construction law or construction dispute queries that you would like to discuss.

How We Can Support You

If you require expert assistance in reviewing or drafting contracts which work well for you, or have any queries in relation to termination, the Lead Contractors Association's National Legal Partner, Holmes & Hills can assist. Their specialist team of construction lawyers can be reached on **01206 593933**, or by emailing the team at: enquiriesconstruction@holmes-hills.co.uk.



Holmes & Hills