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# The Implications of Using Variation Omissions Clauses to Omit Works

David Sears QC  
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Waller LJ:

“Normally, without some term allowing for variations under a fixed price contract to perform works, the paying party is not entitled to vary the contract by reducing the work to be done; the builder would have a right to say that he had quoted a fixed price to do certain work and he was prepared to carry out all that work in order to receive his payment. . If, of course, the paying party simply waives his right to have the complete works performed the builder will be entitled to his full price for what he has done, and... would not be in breach of contract for not performing”.

- JCT 2016, clause 5.1

“The term Variation means:

- (1) the alteration or modification of the design, quality or quantity of the Works including: the addition, omission or substitution of any work,...
- (2) the imposition by the Employer of any obligations or restrictions in regard to... access to the site or use of any specific parts of the site (etc)”

NEC3, Clause 60.1(1)

“The Project Manager gives an instruction changing the Works Information except:

- A change made in order to accept a Defect or
- A change made to the Works Information provided by the Contractor for his design which is made either at his request or to comply with other Works Information provided by the Employer.”

Held that:

“The clause would authorise the architect, doubtless within certain limits, to direct that particular items of work included in the plans and specification should not be carried out; but it would not authorise him to say that particular items so included should be carried out, not by the builder with whom the contract was made, but by some other builder or contractor. Such a power could be confirmed only by very clear words.”

- ...Abbey Developments Ltd reserve the right to vary the number of units and the construction programme without vitiating the Contract or giving rise to a claim from the Sub-Contractor...
- ...The issue of a Variation Order for additions or omissions to sections of the works will in no way vitiate the Contract, and Sub-Contractors should take special note that no additional payments will be made except where a Variation Order has been issued, prior to the commencement of the works in question...
- The company reserves the right to reduce or increase the quantity of the works or to suspend or accelerate the progress of the works or to instruct works to be executed out of sequence, to meet the particular requirements of the development, and such alteration, if instructed shall not vitiate the sub contract

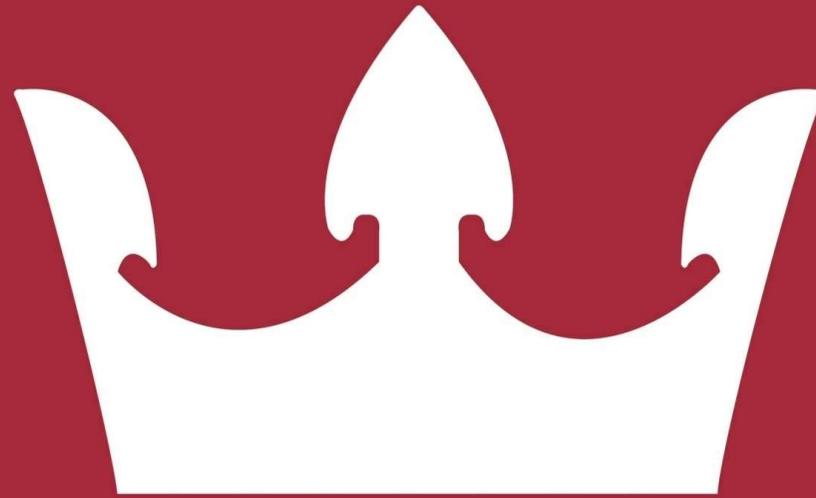
- A duty and a right to carry out the works
- Provisions entitling an owner to vary the works have therefore to be construed carefully so as not to deprive the contractor of that right
- The basic bargain struck between the employer and the contractor has to be honoured
- The purpose of a variations clause is to enable the employer to alter the scope of the works to meet its requirements, nothing more
- For a variation to be valid it must be ordered “for the purpose” for which the right was given under the contract

- “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...
- ...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.”

- “Any change ordered by the architect owner to be made in the plans and specifications will entail an adjustment... of the amount of this contract, in the event of any amendment in the amount of the contract between the owner and the main contractor”
- “It was the appellant company’s obligations, but likewise its privilege, to carry out the flooring contract in question, whether the floors were to be of wood, or owing to changes in the plans and specifications, of some other material. The respondent contends that, as a result of the substitution effected, the subject of the contract no longer existed and, therefore, the respondents were no longer bound toward the appellant. I cannot share this view... The quality of the material to be used can, in my opinion, be determined subsequently without the validity of the contract being affected.

- There is no common law right to omit works from the agreed scope
- The question whether an employer can instruct an omission will, very largely, depend upon the terms of the relevant contract provisions
- But an express power to order an omission does not give an unrestricted right
- A variation is only valid for the purpose for which it is given – which does not include instructing an omission so that another contractor can do the work
- An employer will not be allowed to omit so much work that the basic bargain between the parties is altered
- An employer will be allowed to omit work and then bring new contractors on to site to carry out additional work (i.e. work outside the original contractor's scope)

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