

MAYER • BROWN

Deliberate Non-Compliance

Construction Law for Surveyors Conference

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Deliberate Non-Compliance – Meaning?

- deliberate breach of contract
- deliberate default
- wilful breach of contract
- wilful default
- neither JCT (2011 and 2016) nor NEC3 standard forms of contract use this terminology

Deliberate Non-Compliance – Meaning? (continued)

EXCEPT

- Often contained within bespoke amendments
 - An exclusion or limitation clause will often exclude “deliberate non-compliance”
 - The termination provisions will sometimes be extended to provide for termination for deliberate non-compliance
 - Clear words required to exclude deliberate non-compliance

Deliberate Non-Compliance – Meaning? (continued)

- No universal interpretation – turns on facts and interpretation
- Doesn't have to be dishonest or illegal
- Doesn't have to be serious or material
- Must be intentional
- Can be an act or failure to act
- Knowledge of non-compliance at the time

Sanctions

- Damages for breach of contract
 - Compensatory
 - Punitive (very rare)
- Termination
 - JCT (D&B) – many grounds would include deliberate non-compliance:

Employer

- 8.4.1 – suspension
- 8.4.2 – failure to proceed regularly and diligently with his obligations
- 8.4.3 – refuses or neglects to comply with instructions for removal of work etc

Sanctions (continued)

- 8.4.4 – sub-contracting and assignment
- 8.4.5 – failure to comply with CDM Regulations
- 8.6 – bribery and corruption

Contractor

- 8.9.1.1 – non-payment by the final date for payment
- 8.9.1.2 – assignment
- 8.9.1.4 – failure to comply with CDM Regulations

Both

- No deliberate non-compliance provisions

NEC

Employer

- R11 – substantially failed to comply with his obligations
- R12 – not provided a bond or guarantee
- R13 – appointed a sub-contractor for substantial work before the PM has accepted the sub-contract
- R14 – substantially hindered the Employer or Others
- R15 – substantially broken a health and safety regulation
- R18 – instructions to stop or not to start work due to default of Contractor

NEC (continued)

Contractor

- R16 – non-payment by the Employer
- R19 – instructions to stop or not to start work due to default of the Employer

Note insurances

- Loss or damage covered by insurances
- Certain insurances in joint names of Employer and Contractor under the JCT and NEC contracts
- What if loss or damage caused deliberately?
- Effect uncertain as depends on drafting and contract interpretation, but risk it will be insured and therefore Contractor compensated for his deliberate non-compliance
- What if the insurances are not taken out?

Bespoke Amendments

- Key personnel – removal of key personnel in the event there is misconduct (whether deliberate or not)
- Bribery Act – if breach of the Bribery Act then right to terminate the contract or require removal of the person who committed the offence
- Deliberate concealment – extension of the Limitation Act in circumstances where deliberate concealment can be demonstrated in respect of any fact that is relevant

Practical Considerations

- When faced with deliberate non-compliance by either the Contractor or the Employer, what practical steps can be taken?
 - Be careful to avoid any potential defamation or slander
 - Look out for prejudicial use in adjudication or other proceedings
 - Avoidance of satellite arguments
 - Question motives
 - When does it become economic duress or a breach of an obligation to act in good faith?
 - Two most common examples in author's experience:
 - Non-payment by the Employer
 - Slow progress by the Contractor

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