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Blog

Recently I have had three separate client files where builders had been engaged on labour only contracts or carpentry labour only. Half-way through each of the new housing project the contracts for one reason or another, were cancelled by owner project managers and the carpenters locked out from the site. Experts were then brought in to inspect the works and schedules of alleged defects prepared. Inevitably a stalemate between the parties arose and the matter went to Adjudication under the CCA or to a Judicial Settlement Conference or courtcase.

My involvement in such cases has led me to look at case law around, "When is a defect actually a defect; when has a carpenter an obligation to remediate, or is the work simply incomplete?"

Often there will be a mix of defective works that require remediation, in addition to other items of work that should properly be described as "incomplete works".

Regarding defective works, in most contracts there is an obligation or entitlement in respect of the contractor that has caused the defect, which allows that contractor to carry out the necessary remedial work, albeit at his own cost.

Certified Builders Contract

Typical relevant contract clause: RMB's Warranties

The RMB warrants that works it is responsible for will be carried out:

a) in a tradesman-like manner,
b) with reasonable skill and care,
c) in accordance with the drawings and specifications,
d) in accordance with building consent,
e) using materials that are fit for purpose,
f) using materials that are new,
g) in accordance with all laws and legal requirements.

NZS 3910

Removal and Making Good

a) The Engineer may at any time prior to the expiry of the Defects Notification Period, by notice in writing, instruct the Contractor to remove and re-execute or to make good any work which, in respect of materials or workmanship, is not in accordance with the Contract. The Contractor shall comply with the instruction at their own cost.

b) If the Contractor fails to carry out any work instructed under a) (above) within any time stated in the notice or other reasonable time, the Engineer may, (after giving 5 working days further written notice to the Contractor stating that it is given under the clause), direct others to undertake the work.

c) The reasonable cost of the work undertaken by others under b) (above) shall be recoverable by the Principal from the Contractor. As soon as practicable after completion of the work, the Engineer shall notify the Contractor of the work undertaken and the relative cost.

There can be no doubt that if a Contractor is notified in writing that there is a defect, he has an obligation under the Contract to fix it.

The Contractor also has the right to reasonable time to undertake the remedial works.

When assessing building works that are incomplete as opposed to alleged defects, in my opinion it is important to be careful to also differentiate between what is "a defect" and what may be "incomplete works". It is also important to identify if the Contractor, under the terms of the Contract, has rights and obligations to remediate a particular element of the works.

"Incomplete building works" are not "defective building works". On a Charge Up Labour Contract, they are works the owner was going to need to pay for in any event. If "incomplete works" are confused in with the defects, then this distorts or exacerbates the scope of the defects and inflates the amount of compensation sought to put the owner back in the position they would have been in, but for a contractor's mistakes and/or omissions.

Occasionally, building projects become derailed because the relationship between the owner/project manager and the builder or labour-only contactor breaks down. As a result, the work grinds to a halt and the parties reach a stalemate. The follow-on is usually a claim from the builder for the money he is owed, then a counter claim from the owner for alleged defective works. Owners tend to terminate the contract or withhold payment based on alleged defects in workmanship or materials; however, the conceptual difficulty the owners may face is that if the building work is "incomplete", then it cannot yet be "defective works". How could the building works be defective when the Builder could have, and presumably would have, completed it to a satisfactory standard were it not for the dispute.

There have been judgments that focus on this matter, which are summarised in the 2016 judgement of G.M. Harrison in the Waitakere District Court:-

Tugage v West End Painters Ltd.
(as held by the High Court)
In particular, in Tugage v West End Painters Ltd., the judge said:

"The standard of workmanship is judged at the completion of the project, not at the time when the owner prematurely brings it to an end, and prevents the Builder from achieving the standard of workmanship that he is capable of."

In the event a dispute ripens over the scope of defective works and goes on to a form of dispute resolution, then an award of compensatory damages for breach of contract is designed to place the plaintiff in the position he or she would have been in had the Contract not been performed. The assessment of damages is essentially a statement of fact, i.e. the loss actually and reasonably suffered by the plaintiff.

Marlborough District Court v Altimarioch Joint Venture Limited

The Supreme Court in *Marlborough District Court v Altimarioch Joint Venture Limited* considered whether the cost of cure was reasonable to achieve conformity with the Contract. The Court considered that the *"cost of cure must be reasonable to be the appropriate measure."* The Court referred to the Australian case of *Bellgrove v Ellridge* where that Court held the work must not only be *"necessary to produce conformity"*, it must also *"be a reasonable course to adopt".*

The Court in *Marlborough District Court v Altimarioch Joint Venture Limited* went on to consider the case of *Ruxley Electronics and Construction Limited v Forsyth* which was a building contract case where the cure measurement was disproportionate to the benefit to be obtained. The Court considered that the reasonableness of cost of cure is then a necessary test of whether it is an appropriate measure of damages.

Ultimately, the cost of reinstatement to produce conformity with the Contract must be reasonable.

In summary, when engaged as professionals, it is important to be independent and impartial when engaged to carry out an inspection of alleged defective works. Careful consideration should be given to the facts. It is appropriate to identify defects and, if it is appropriate, also to be fair and honest in terms of stating what parts of the works are better designated as "incomplete" or the responsibility of the other party.

Writer – Noel Jellyman