

## **DISPUTES UNDER CONSTRUCTION CONTRACTS**

### **Breach**

Where the contractor's work is defective, there will usually be a breach of contract. Generally the amount of compensation the courts will award will be the cost of repair or the diminution in value where it would be wholly uneconomic and unreasonable for the employer to insist upon repair. In recent years, the courts have been more inclined than before to award compensation for physical discomfort and emotional frustration. The employer is obliged to mitigate loss i.e. minimise loss insofar as possible.

The liability of contractors to subsequent owners has proved a difficult area with the Courts changing their minds on key principles. The Defective Premises Act imposes a legal duty on any person taking on work in connection with the provisions of a dwelling, to ensure that the work is undertaken in a good and workmanlike manner, that improper materials are used and the dwellinghouse will be fit habitation when completed. The obligation applies to every person that contributes to the process of design and construction including the property developer. All participants are strictly liable in respect of their respective contribution. There is a six year limitation from the date of completion of the building.

### **Disputes**

There are various mechanisms for resolving disputes. Because of the expense and uncertainty of Court proceedings, alternative disputes resolution (ADR) has become prominent in the construction industry. The JCT 2005 contracts provide that the parties may seek agreement or resolve any dispute through "mediation". The mediator consults with one party then the other with a view to negotiating a settlement. If no settlement results, the mediator will make recommendations to settle based on his findings. Mediation is not binding.

English 1996 legislation gives every party to a construction contract the right to refer any dispute an independent third party for a process called "adjudication". This is different to arbitration or mediation. The Act requires that Contracts must provide a timetable with the object to appointing an adjudicator and referring the dispute within seven days of the notice. It must require the adjudicator to reach a decision within twenty eight days. The adjudicator's decision will be binding unless otherwise specified in the Contract or until the matter is referred to arbitration or litigation.

When reference to adjudication is made, the documents are sent to the adjudicator and simultaneously copied then to the other party. The adjudicator has a wide power to set an agenda and discretion as to take the initiative in ascertaining facts. The adjudicator acts from his own knowledge and expertise rather than on the exclusive basis of what the parties present (as would be the case with an arbitrator or judge). He may visit the site and test the works and take technical and legal advice and make enquiries from the parties. Once the referral to adjudication is made, the non-referring party has a right to reply. Unless and until the agreement is reached or until the adjudicators decision is ratified or reversed in arbitration and litigation the parties are bound by it.

The person referring to adjudication must give particulars of the dispute a summary of its contentions relied on and a statement of what remedy is sought. The adjudicator's decision is binding unless he has acted outside of his role under the terms of the contracts. An adjudicator will either be named in the Contract or there may be a provision for nomination. The parties need not be legally represented.

Arbitration is a time honoured assistant for settling disputes. The two parties who are in dispute between themselves ask an independent third party to settle the matter and agree to abide by his decisions. Arbitration can be a speedy and more cost efficient process than legal proceedings. Another principal advantage is privacy.

The arbitrator must act fairly and impartially. He may decide the procedures and the manner in which submissions and evidence are taken. He may order inspections, photography, custody and sampling of the property. The arbitrator can make orders for

parties to perform their obligations under the Contract. He can make an award and can cap and determine costs.

The parties seeking arbitration must write to the other giving notice of reference to arbitration. If they do not agree and mutually appoint an arbitrator within fourteen days, he or she is appointed by an independent person who will often be the President of Royal Institute of British Architects and Royal Institute of Chartered Surveyors.

Construction arbitration is usually conducted under the JCP 2005 edition of the Construction Industry Model Arbitration Rules. They are set out in a handy booklet which is available on-line.

Where there is an arbitration clause in a Contract either party has an option to require the matter to be determined by arbitration. The Courts will only interfere with an arbitrator where there are justifiable doubts and impartiality or there are errors of law. An arbitrator's award can only be appealed on a point of law.

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This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.