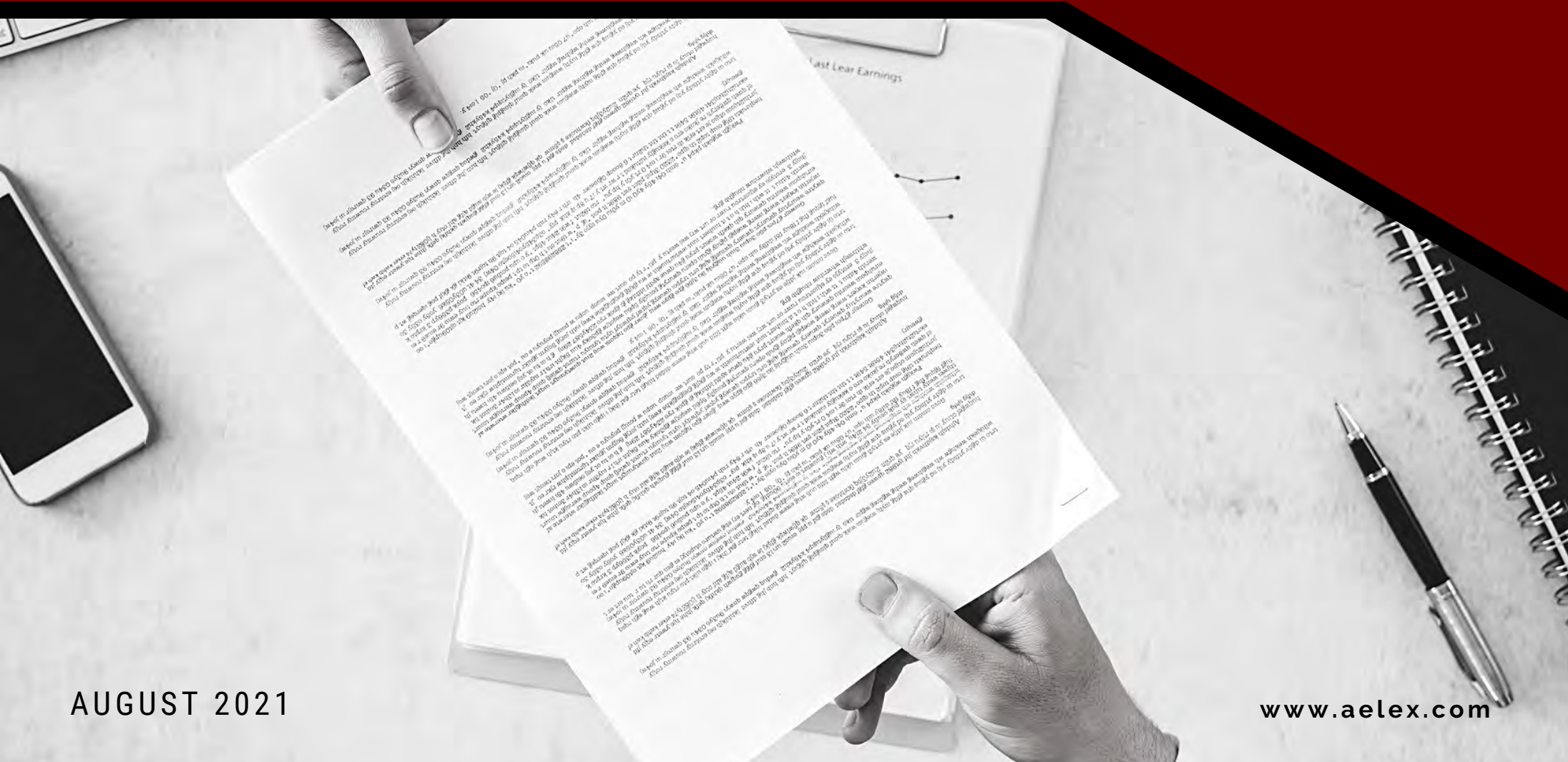


ARTICLE SERIES

WRONGFULLY SUSPENDING PERFORMANCE OF A CONSTRUCTION CONTRACT - WHEN A CONTRACTOR WILL NOT BE LIABLE FOR REPUDIATORY BREACH



INTRODUCTION

Non-payment of contractors by their employers can be frustrating. Therefore, several standard forms of contract allow contractors suspend the performance of their obligations in the contract until employers pay. However, this right is subject to the terms of the contract and contractors may find themselves in a situation where their contracts do not provide any right to suspend over non-payment.

While some contractors try to maintain the terms of the contract, others suspend the performance of their obligations under the contract with no hesitation. However, where contractors suspend the contract when they have no right to do so, it is important for these contractors to consider if they will be liable for repudiatory breach of the contract for 'wrongfully' suspending the performance of their obligations under the contract.

THE BASICS

Suspension for non-payment is a right that must be provided for under the contract. Where the contract does not sanction this right, the contractor cannot suspend the performance of its obligations.

Several standard forms of contract allow the contractor to suspend the performance of its obligations for non-payment. For instance, under the FIDIC Red Book 1999, a contractor can suspend performance if the employer does not pay it within 56 days after issuing an interim or final certificate [1]. Under the JCT Standard Building Contract with Quantities 2016 [2], the contractor can suspend performance if the employer does not pay after the last date for payment has expired [3].

The contractor can also suspend 7 days after the contractor has notified the employer of its intention to suspend the performance of its obligations [4].

Many bespoke construction contracts are likely to have similar provisions allowing the contractor to suspend the performance of works over non-payment.

The above notwithstanding, it is a common practice for employers to exclude the contractor's right to suspend for non-payment in bespoke contracts. It is also common for employers adopting the standard form of contracts to delete the contractors' right to suspend for non-payment. Here, the contractor cannot suspend for non-payment. So what happens if this right has been excluded but the employer has failed to fulfill its payment obligations? In some cases, contractors will opt to suspend performance of their obligations pending payment, which leads to the next questions.

[1] Sub Clause 16.1 (c) of the FIDIC Red Book 1999.

[2] JCT SBC/Q 2016.

[3] Paragraph 4.13.1 of the JCT SBC/Q 2016.

[4] Ibid

What are the consequences of suspending the performance of works when the contract does not provide for this right?

The suspension is wrongful. This wrongful suspension may most likely amount to a repudiatory breach [5].

What is a repudiatory breach? What are the consequences of a repudiatory breach?

A party is guilty of a repudiatory breach where its conduct implies that it no longer intends to be bound by the contract or, perform its obligations under the contract. A contractor will be in repudiatory breach if:

- (a) It refuses to carry out work;
- (b) It abandons the site or removes its plant or machines; or
- (c) It employs other contractors to carry out the same work.

Similarly, an employer will be in repudiatory breach if it fails to allow the contractor access to the worksite.

Where a party is in repudiatory breach, the innocent party can end the contract. The innocent party can also bring to end any future obligation under the contract. The innocent party can also claim damages.

Is it possible not be liable for repudiatory breach after wrongful suspension of my contractual obligations for non-payment?

It is possible that a wrongful suspension may not amount to a repudiatory breach. A contractor's wrongful suspension will not amount to a repudiatory breach where the contractor's conduct shows that it is willing to return to the site and resume contractual obligations once the employer pays it.

If the contractor's conduct reveals that it no longer intends to be bound by the contract, the suspension will amount to a repudiatory breach. The facts and court's decision in the *Optimus* [6] case describes this subject beautifully.

THE OPTIMUS CASE (OPTIMUS BUILD LIMITED V. MATTHEW SOUTHALL & JADE MCMANUS)

Matthew Southall ("Southall") engaged Optimus Build Limited ("Optimus") to carry out building works at its residential property. In the contract, parties agreed that the contractor would receive payment upon submission of interim evaluation. Optimus would submit its interim evaluation every month. Southall would then act on the interim valuation and pay Optimus. This payment procedure continued until Optimus submitted its 3rd interim valuation. Southall refused to pay this time, complaining that the valuation was expensive.

[5] Please note that in the UK, the Local Democracy, Economic Development and Construction Act 2009 gives the contractor the right to suspend performance of its obligations for late or non-payment. Where UK Law governs the contract and it is silent on the right to suspend works, the contract can validly suspend works for non-payment.
[6] *Optimus Build Limited v. Matthew Southall & Jade McManus* (2020) EWHC 3389 (TCC)

Thereafter, Southall requested that Optimus itemize its valuation, showing how it arrived at its 3rd interim evaluation. Optimus immediately complied with Southall's request. Still, Southall refused to pay and this refusal to pay the valuation continued regardless of several meetings and requests by Optimus.

Frustrated by Southall's conduct, Optimus then writes to Southall, inviting him for a meeting to resolve the payment issues. In the concluding part of its email to Southall, Optimus made the below statement:

"until parties meet to resolve the issue of payment, we will not be carrying further works on the project".

Southall saw Optimus' statement as a wrongful suspension amounting to a repudiatory breach. He immediately terminated the contract and engaged another contractor to carry out the remaining works. Optimus had no contractual right to suspend the performance of the works.

Having terminated the contract, Optimus immediately sued Southall claiming damages for repudiatory breach. Southall equally brought a counterclaim against Optimus claiming damages for repudiatory breach.

THE COURT'S DECISION

The court agreed that Optimus suspended the performance of the works. The court likewise agreed that the suspension was wrongful. The next point waiting for the court's determination was whether Optimus' wrongful suspension of its performance amounted to a repudiatory breach.

Remarkably, the court noted that for Optimus' wrongful suspension to amount to a repudiatory breach, the circumstances surrounding Optimus' wrongful suspension must show that Optimus willfully refused to carry out the works or, Optimus no longer intended to be bound by the contract.

After considering Optimus' email to Southall, the court concluded that Optimus' conduct clearly showed that it was still interested in performing its obligations under the contract.

COMMENTS ON THE COURT'S DECISION

Optimus' message to Southall was clear and did not convey any intention to stop the performance of the works forever. In effect, Optimus was saying that it will only continue the performance of the works once Southall has paid it.

This interpretation is interesting given Southall's refusal to pay the interim valuation. It was on this basis that the court agreed that even though Optimus wrongly suspended works, the suspension could not have constituted a repudiatory breach.

Maybe Optimus needed to be sure that Southall could fund the rest of the project or maybe Optimus needed to be sure that Southall would pay it for performing the remaining works on the project. We can only speculate, however, in the court's view, this could be the reason for Optimus' decision to suspend the performance of the works. The court dismissed Southall's counterclaim.

NOTE TO CONTRACTORS

True, it is not in all cases that a wrongful suspension of performance will amount to a repudiatory breach. Even where the suspension is wrongful, the contractor will not be in repudiatory breach if:

- The employer willfully and persistently refused to pay despite several requests and;
- The contractor is willing to continue the performance of its obligations once it is paid.

First Point to Note:

When contemplating suspending works.

If your contract is silent on suspension as a remedy for non-payment, do not suspend the performance of your obligations under the contract. You must be wary of suspending in the event of a single non-payment. Rather, continue works and opt to terminate the contract where the employer's willful refusal to pay you has become so persistent thereby amounting to a repudiatory breach [7].

Second Point to Note:

After suspending works.

If you have suspended works with no contractual right to do so, it could be possible that your wrongful suspension did not amount to a repudiatory breach. You can be sure of this if you followed all the points highlighted below:

- You communicated to the employer of your intention to suspend the performance of your obligations based on the employer's continuous willful refusal to pay you and this communication was in the mode prescribed under the contract.
- In your communication to the employer:
 - You clearly stated that your decision to suspend did not suggest that you were no longer interested in carrying out your obligations under the contract; and
 -

[7]Emma Kratochvilova, 'When Will A Wrongful Suspension Amount To A Repudiatory Breach?' (2010) 5 Construction Law International.

- You assured the employer that you will return to the site and continue the performance of the remaining works in the contract immediately the employer pays you.

If you followed these steps, then you are most likely not to be in repudiatory breach of contract.



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