

CONSTRUCTION : BULLETIN

Termination Notices:

5 Key Tips to Avoid the Pitfalls of Termination

The recent case of *Vivergo Fuels Ltd v Redhall Engineering Solutions Ltd* highlights the problems a party can face when exercising its right to terminate. Terminating a contract is risky – ensure you know what is required **before** you exercise your right to terminate. It is also important to understand what you can do if someone wrongfully terminates your contract.

The Right to Terminate

Construction contracts often include a termination provision allowing the parties to terminate the contract in certain circumstances, for example breach of specific contractual obligations, by giving written notice.

Alongside a contractual right to terminate, the parties have a common law right to terminate for repudiatory breach – a sufficiently serious breach of contract, or demonstrating an intention not to be bound by the contract (for example, the employer barring the contractor from site, or the contractor putting down tools and walking off site). Repudiation in itself will not bring the contract to an end automatically - the innocent party must elect to either affirm the contract or accept the breach and terminate the contract.

In the event you have a common law and contractual right to terminate, generally you do not have to choose between the two. However, if exercising your contractual right is inconsistent with accepting the repudiatory breach, you will be deemed to have affirmed the contract and will no longer have a common law right to terminate. Your contractual right to terminate will not be effected.

If you have a contractual right to terminate and choose to exercise this

right, you must ensure that not only your right to terminate exists at the time you terminate, but also that any contractual requirements have been complied with and a valid notice (or notices depending on the requirements of the contract) have been given.

Termination Procedure & Notice

The basic rule for the service of notices is that all contractual requirements must be strictly complied with, otherwise the termination may be deemed wrongful. As Lord Hoffman said in *Mannai Investments Co Ltd v Eagle Star Assurance [1997]* “If the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been that the [party] wanted to terminate.”

Therefore it is vital to comply with the termination provisions set out in the contract. Check the termination clause for:

- Procedure – what is required under the contract in terms of sequence and timing of the notice(s)? Ensure you follow such requirements strictly.
- Time limits – pay attention to any specified time limits and understand what is deemed to be a “day” under the contract. Are bank holidays included or excluded? What about weekends?
- Method of service – is the stipulated method of service exclusive? If so, you must serve the notice by the method prescribed under the contract.
- Appointed person – if the contract specifies who is to give or receive notices you must ensure the notice is given to/by this person. This is



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particularly relevant where, for example, a warning notice is to be given by the Contract Administrator and the termination notice by the Employer.

In addition to satisfying all the contractual requirements, an effective and valid notice “*must be sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when the notice is intended to operate.*” (*Delta Vale Properties Ltd v Mills*).

In the recent case of *Vivergo*, the court adopted the following principles in interpreting notices:

- unilateral notices are to be interpreted in the same way as contractual documents. They are to be looked at objectively, against the relevant background or context known to both parties. The question is “how would a reasonable recipient understand it?”;
- the reasonable recipient would have the terms of the relevant underlying contract in the forefront of his mind when reading the notice;
- the notice must be sufficiently clear and unambiguous to leave a recipient in no reasonable doubt as to how and when the notice is intended to operate;
- immaterial errors will be ignored if the notice unambiguously conveys the purpose; and
- in the context of clauses which require a warning notice followed by a termination notice, the two notices must be connected both in content and time. *Architectural Installation Services v James Gibbons Windows* held that an ordinary, commercial businessman would not see a sensible connection between a warning notice and a termination notice that were issued some 11 months apart.

Getting it Wrong

Termination is a drastic step. In exercising your right to terminate, you open yourself up to the risk that the other party will challenge its validity and claim that your termination is itself a repudiatory breach entitling them to terminate the contract and claim

damages from you. This is what happened in *Vivergo*.

Vivergo engaged Redhall to carry out work at its biofuel plant in Hull. The work was delayed and *Vivergo* purported to terminate the contract. Under the contract *Vivergo* could terminate Redhall’s employment if Redhall was in material breach by giving notice of its default (the “Warning Notice”), stating that if it did not “*pursue rectification of that default*” within 14 days, *Vivergo* could terminate Redhall’s employment by further notice (the “Termination Notice”).

The judge held that a letter *Vivergo* sent to Redhall dated 22 February 2011 fulfilled the contractual requirements of a Warning Notice. Whilst the letter did not specifically refer to the relevant termination clause of the contract, it did use a phrase that was taken directly from the relevant clause, linking it to a relevant default. Together with the fact that Redhall was aware of *Vivergo*’s threats to terminate, the judge held that the letter was sufficient to constitute a valid Warning Notice.

However, as Redhall had remedied this particular default before *Vivergo* issued its Termination Notice, the grounds for termination had ceased to exist. *Vivergo*’s Termination Notice was therefore not valid. As *Vivergo* had not validly terminated the contract but had barred Redhall from the site, it was *Vivergo* who was in repudiatory breach.

Termination Checklist

Consider the following points **before** you exercise your right to terminate:

1. Firstly consider whether you have a right to terminate in the circumstances. Is it a contractual right or common law right? Can the circumstances you are relying on to terminate be proven?
2. Ensure your right to terminate exists at the time you issue the notice of termination. Has the other party remedied its default by this stage?
3. Comply with the any and all requirements set out in contract, many wrongful terminations occurs

as a result of the correct procedures not being followed.

4. Caution must be taken where there is a two stage notice procedure (i.e. where a warning notice is to be issued followed by a termination notice) to ensure the notices are connected in both content and time.
5. The notice must be sufficiently clear and unambiguous. Consider the following when drafting a notice:
 - title the document as a notice, although as *Vivergo* has shown a letter may suffice as a warning notice;
 - specifically state in the body of the notice that it intended to be a warning/termination notice;
 - refer to the contractual clause the notice is given under and mirror the wording of that clause; and
 - for warning notices, give details of the specific default, state that the party in default has to take steps to remedy its default within the specified timeframe, if applicable, and clearly state the consequences of failing to comply with this.

Want to know more?

As specialist, award winning construction lawyers, Hawkswell Kilvington has a wealth of experience in dispute resolution within the construction industry; successfully representing parties in adjudication, mediation, arbitration and litigation proceedings.

If you would like to discuss any of the above, please contact Jonathan Hawkswell (jhawkswell@hklegal.co.uk).

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