

THE LEGAL MINEFIELD OF WRONGFUL SUSPENSION

By Janine Stewart

When payment claims are not paid or other issues arise on site, many contractors consider suspending works, particularly when resources could be reallocated to more profitable projects. But the financial consequences and reputational damage of wrongful suspension can be costly, and contractors should take care if considering the suspension of works for non-payment. When can a contractor validly suspend a construction contract? The issue is not always straightforward.

Non-payment

Section 24A of the Construction Contracts Act 2002 (CCA) allows a contractor to suspend work for non-payment of an unanswered payment claim, a payment schedule or an adjudicator's determination.

The contractor must first serve a notice of intention to suspend works in accordance with the CCA. The defaulting party then has five working days to pay the outstanding amount.

A contractor properly exercising its right to suspend will not be in breach of the construction contract and will be entitled to an extension of time to complete the contract works.

This is a powerful tool at the contractor's disposal to sanction non-payment. But what happens when the builder uses it incorrectly?

Wrongful suspension

If a contractor wrongfully suspends works, it will be in breach and, depending on the circumstances, will have repudiated the contract.

When faced with repudiatory conduct, it is common ground that an innocent party has an election to terminate or affirm the contract and will be entitled to damages.

This means a contractor wrongfully suspending works is risking a substantial damages claim. It would include losses resulting from a delay in

finding a replacement contractor, and any difference between the replacement and original contractor's price to do the work.

Where there is a clear case of an unpaid, unanswered valid payment claim, or scheduled amount in a valid payment schedule responding to a valid payment claim, the right to suspend is unambiguous.

A grey area arises when the validity of a payment claim and/or schedule is at issue, and the contractor acts in a manner which might otherwise be considered abandonment but is open to interpretation.

If the principal exercises its perceived right to terminate, it also faces the risk of wrongful termination and damages.

Repudiation

There are some straightforward examples of what conduct amounts to repudiation in the construction context.

These include:

- an absolute refusal to carry out work that is clearly within the scope of the construction contract;
- abandonment of the site before work is complete;
- a principal employing other contractors to do the same work; and
- a principal failing to give the contractor access to the site.

A common question, however, is where wrongful suspension fits on the scale. The answer is not straightforward.

When does wrongful suspension amount to repudiation?

The objective intention of a contractor purporting to suspend works needs to be considered.

The question is whether there is an unequivocal indication that the contractor would not take any further steps to perform its obligations under the contract.

Wrongful suspension and repudiation have not been examined in detail by the New Zealand courts; however, the English High Court has considered this point.

In *Mayhaven Healthcare Limited v Bothma (trading as DAB Builders)* the court found a wrongful suspension would not automatically constitute repudiation.

In that case, disputes arose between the parties and were referred to adjudication. The adjudication decision directed Mayhaven to pay DAB a sum of money. DAB contended Mayhaven failed to pay, and on that basis suspended work.

It transpired Mayhaven had, in fact, paid. Its solicitor notified DAB that the suspension was wrongful and constituted a repudiatory breach, bringing the contract to an end.

The court found a contractor relying on an express provision of the contract (in that case, to suspend performance of works) is not, by that fact alone, to be treated as having repudiated its contractual obligations if it turns out to be mistaken about its rights.

That is only one factor and the suspension must be viewed in the light of all the facts and circumstances of the case.

The court considered the fact that DAB made a genuine mistake, and had in a letter to Mayhaven expressed a willingness to complete the work if payment were made.

It is easy to foresee a similar situation in New Zealand where a contractor purports to suspend works on the basis that an (invalid) payment claim has not been paid and/or answered by a compliant payment schedule.

Based on *Mayhaven v DAB*, this will not automatically mean the contractor has repudiated the contract because it is not necessarily an unequivocal statement that the contractor does not intend to perform its contractual obligations.

All the circumstances will be considered.

But without the clear intention to complete work if payment were made, we question whether the New Zealand courts would, or should, be sympathetic to such a mistake, given the potential serious costs consequences to the principal of a wrongful suspension.

If a party persists in adopting a position at odds with its contractual rights, that conduct may amount to a repudiation.

While works are suspended, a contractor must remain able to recommence if payment is made or any mistake about its contractual rights is corrected.

If it can be shown the contractor has permanently reallocated its resources to another project, such that those resources cannot be pulled from the new project, then this will likely be considered abandonment of site and a repudiatory breach.

Hence it can be said that actions speak louder than words.

What should a principal do when a contractor wrongfully suspends works?

It is not safe to assume a wrongful suspension will always amount to repudiation, thereby entitling the principal to terminate the contract.

As identified in *Mayhaven v DAB*, such a conclusion is not straightforward and there is risk for a principal in adopting that position.

If it purports to treat the contract as repudiated because of a wrongful suspension that is not, in

fact, repudiatory, the principal will itself have committed wrongful termination.

In *Mayhaven v DAB*, DAB's solicitors and the contract administrator knew the "outstanding" sums had been paid before DAB suspended works, but did not inform DAB of its mistake.

The suspension and ensuing dispute (and associated costs) could have been avoided had DAB been informed of its mistake.

When faced with a situation where a contractor has improperly suspended works, it would be wise for a principal to consider notifying the contractor of its mistake and allowing it a reasonable opportunity to recommence works.

If the contractor does not rectify its mistake after an authoritative exposition of its contractual obligations and rights, its conduct may well amount to repudiation.

The termination process under NZS 3910:2013 provides a further opportunity for the principal to set out the issue and for the contractor to ascertain whether it has made a mistake in suspending works.

So, contractors are advised to proceed cautiously when considering suspending works for non-payment.

If it is found the claimed amounts are not due or the notice provisions in the CCA have not been complied with, the suspension will be wrongful and may amount to repudiation of the construction contract.

But when a wrongful suspension amounts to repudiation is not always clear-cut, and the courts will consider all the circumstances of the case.

A principal should, likewise, be cautious when taking steps to terminate a contract on the basis of a contractor's wrongful suspension.

It would be safer to notify the contractor of its error and allow it a reasonable time to rectify its mistake.

In our current climate, where both contractors and principals are under considerable time and cost pressure, legal and contractual compliance are not always front of mind.

We may see these issues tested in times to come.

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