

Construction Contracts: the site

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Construction and engineering work is mostly performed on real property. The area within which physical work is carried out is referred to as the “the site”.

A contractor occupying a site typically lacks proprietary rights, so, he is in the position of a licensee.

In broad terms the right to occupation of land which is not sufficient to create a true tenancy is said to create a licence. This is essentially a right to do some act which would otherwise be a trespass. Despite physical presence, legally, contractors aren't considered "in possession" of the land like lessees. Contractor's possession is limited to work-related activities, resembling a licensee's rights.

Contractor without proprietary interests, working non-contractually, holds a "bare" licensee status, subject to revocation of land access at any time.

Construction or engineering contracts commonly grant contractors the right to be on-site until project completion, either explicitly or implied by circumstances and contract terms.

A subcontractor's right to access land is derivative, stemming from the main contractor's right.

Construction and engineering contracts often provide that, upon taking possession of the site, the contractor assumes responsibility for the care of the works, as well as all plant and materials present. Additionally, the contractor is obligated to repair any damage to the works during their possession of the site. This obligation typically persists until one of the following conditions is met:

- (a) the owner retakes possession of the site upon the contractor achieving practical completion of the works or relevant sections,
- (b) the owner lawfully occupies the works prematurely, or
- (c) the owner lawfully terminates the contractor's employment.

Even without an explicit provision the contractor is to take care of the works, it may be implicit from the arrangements that the contractor is to take the risk of damage being caused to the works.

By taking possession, a contractor may accept the risk of damage to the site and works caused by perils such as fire or water damage, regardless of fault, until they hand over the completed works to the owner. In some cases, contractors may even agree to bear the risk of damage caused by the owner's negligence. When expressly obligated to care for the works, the contractor may also be required to indemnify the owner for any loss and expense resulting from their negligence or that of their agents or subcontractors.

When the owner expressly agrees to "bear the risk" of loss or damage during construction, the contractor may be exempt from liability for such events.

While construction contracts typically assign site responsibility to the contractor, owners may also have explicit obligations to ensure the site's condition upon handover.

Possession of a site which has been given to a contractor will ordinarily be resumed by the owner upon the contractor handing over the works, or sections of them, to the owner.

The risk of damage to the works reverts to the owner when possession is resumed. The fact that the owner has resumed possession does not, however, mean that the owner has accepted the works as adequate, or that the owner waives its right to claim damages from the contractor for defective works.

Many construction contracts express permission an owner to retake possession of the works, or parts of the works, prior to their completion.

Such actions may deem the works, or the reclaimed part, practically complete. Without a specific term, owner's possession doesn't automatically indicate that the contractor is not liable for any shortcomings in its works.

If a contract permits an owner to enter upon the site before practical completion to perform work of its own, it may be contemplated by the parties that the owner, by performing this contemplated work, will not be retaking possession.

If a construction or engineering contract does not permit the owner to retake possession of the works before they are practically complete, any attempt by the owner to retake possession will constitute a breach of contract.

When a contract permits owners to enter the site before practical completion for their work, it might not constitute retaking possession. Conversely, attempting to retake possession against contract terms can constitute breach or even repudiation, especially if it aims to exclude the contractor or hinder work completion. However, if the owner's unauthorized resumption doesn't prevent work completion, it may not constitute contract repudiation, allowing the owner to demand completion of the works.

Bibliography

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