

Making sense of the owner/contractor relationship

When is it OK for an owner to correct deficient work with an alternate contractor?

Encountering deficiencies on a construction project is not just routine, it is expected. Also expected is that the contractor responsible be afforded the opportunity to correct deficiencies. Failure to provide the opportunity to repair can cost an owner the right to pursue damages against the contractor.

However, this right to correct deficient work is not absolute. Where the contractor has fundamentally breached the contract, they may rightfully be denied the opportunity to correct and still be responsible for the cost of repairs sought elsewhere.

A review of recent court decisions can help assess whether an owner is justified in denying a contractor the opportunity to repair deficient work.

DENYING THE RIGHT TO REPAIR? 'SIGNIFICANT DEFECTS' ONLY

A contractor's fundamental breach of a construction contract, amounting to a repudiation, justifies an owner denying the opportunity to repair deficiencies without jeopardising their entitlement to damages. Courts do not take the assessment of such claims lightly as a fundamental breach may entitle the innocent party to terminate the contract, claim damages and be discharged from the obligation to pay the contractor, including for work already performed.

Mere bad or defective work, or insignificant non-compliance, will not meet the threshold of a fundamental breach. The deficiencies must amount to the contractor failing or refusing to carry out their contractual obligations. This requires "significant" deficiencies going to the root of the contract and denying the owner the substantial benefit of the contract.

Ancillary deficiencies will not justify denying the opportunity to repair. In *Newfore Inc. v. BCHQ Barton Holdings Inc.*, deficiencies in painting and cleaning "did not take away the very thing...contracted for, a renovated residential building," and therefore were not fundamental breaches. While an owner would be justified in seeking damages, minor deficiencies on their own do not void the obligation to provide an opportunity to repair.

Establishing "sufficiently significant" deficiencies requires analyzing both the contract and the con-

tractor's performance. The evidence used to support the claim that deficiencies have denied owners of the benefit of their contract is therefore critical.

Objective, independent expert opinions on the extent to which workmanship has fallen short of accepted industry standards is helpful in establishing significance. In *Dezsi v. Walker* ("Dezsi"), a contract for framing was found to be fundamentally breached after evidence of the standard installation of joist hangers and "normal" squeaking in floors was compared to the actual work and actual squeaking. The comparison emphasized the deficiencies in the installation and highlighted how the contractor failed to provide the very thing contracted for — properly installed framing.

Reference to the cost and work required to repair is also very helpful. This may be objective evidence of the repair work conducted by a qualified replacement contractor or recommended in an independent expert assessment such as in *Graci v. New Steel Roofers Inc.*, where a roofing expert determined that a defective roof needed to be entirely replaced after a series of unsuccessful patchwork repairs. This expert assessment underscored the significance of the deficiencies as the owner was essentially left in their pre-contract position.

Failing to provide an opportunity to repair where the significance threshold was not met may instead leave the owner in breach. Owners are well advised to consult an expert early to assess the possibility of a fundamental breach.

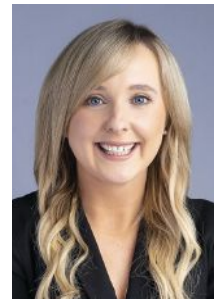
POOR CONDUCT BY THE CONTRACTOR? TAKE THE HIGH ROAD

It is not unusual for the owner-contractor relationship to suffer following unsatisfactory work. This loss of trust often motivates parties to seek advice in forwarding a claim. A full understanding of the scope of the dispute, including the part potentially played by the owner, is essential.

Besides the "significance" threshold, an owner-contractor relationship incapable of proceeding is strong evidence that a contract was fundamentally breached. However, any such breakdown must be directly attributable to the contractor.



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An owner who denies the opportunity to repair will not be penalised where the contractor does not intend to fulfill the contract. This lack of intention might be exhibited by a pattern of unwillingness or inability to remedy significant deficiencies, consistently failing to respond to opportunities to repair in a “timely and reasonable” manner or being careless and/or inattentive to an owner.

While not required to provide infinite opportunities to repair, it is best practise to provide some notice of deficiencies.

This failing was a key error for the owners in *Beta Construction Inc. v. Chiu*. In that case, not only was there no breach by the contractor (because the alleged deficiencies were not “significant”), but it was the owners themselves who breached the contract by, in part, failing to provide the contractor with a list of deficient items.

Despite a deteriorating relationship, owners should continue to comply with their obligations and co-operate with their contractor. This was evidenced in *2002759 Ontario Ltd. et al. v. Koropouloski*

et al., where the owners were found in breach of contract by refusing to engage or collaborate with a willing and co-operative contractor to resolve or address deficiencies, despite at least some of those deficiencies being found significant.

PROCEEDING WITH REPAIRS? BE REASONABLE AND DON'T CRY WOLF

A termination of a contract can have significant financial repercussions for the offending contractor. As such, courts carefully consider all evidence to ensure the consequences are fair and proportionate to the harm caused.

Owners must mitigate damages because only those that are unavoidable are recoverable. The selected repair option must be reasonable and cost effective. In *Dezsi*, the owners were awarded only \$45,000 of the estimated \$550,000 claimed because they delayed necessary repairs in favour of finishing the project, resulting in an exponential increase in costs to fix the deficiencies. The Court found this unreasonable and refused to require the contractor to compensate the owners' poor decision.

Terminating a contract, withholding payment and seeking repairs elsewhere because of a perceived fundamental breach is risky business. If an owner does not carefully consider the deficiencies, acting too hastily may result in their own breach of contract.

To mitigate this risk, owners should put the contractor on notice of any alleged deficiencies and provide at least one opportunity to repair. Owners should then engage an independent expert to assess the significance of the deficiencies.

Finally, while significant deficiencies may release an owner from the obligation to provide the opportunity to repair, there remains an obligation to act reasonably when engaging with their original contractor and when incurring costs of repairs sought elsewhere.

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