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Contract Determination

Presented By

Richard Silver LLB(Hons), MRICS,
ADBIM, MCIOB, MCIArb, MEWI,
MInstCES, Barrister*, Solicitor

*Non practising

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Contract Determination

The right of the innocent party to terminate a contract because of breach by the other party will arise in the following situations:

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i. Where there is a breach of a term of the contract which is so serious in itself that it would be unreasonable to expect the other party to continue with the contract.

a “fundamental” term or a “condition” as opposed to a “warranty”

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Contract Determination

What breaches are repudiatory?

Fundamental Terms

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Repudiatory breach/breach of a fundamental term

Failure of the owner to give sufficient title to enable the work to be carried out lawfully, or a sufficiently severe and not merely temporary failure on his part to provide information or possession, but in all cases the whole contract will need to be examined, including any express rights to compensation or extension of time which may be afforded to the contractor in the events which have happened.

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Repudiatory breach/breach of a fundamental term

A clear unjustified order not to complete the works is a repudiation.

The engagement of additional contractors to execute the same works already contracted to another contractor was a repudiatory breach.

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Repudiatory breach/breach of a fundamental term

Failure to pay one installment out of many due under the terms of the contract is not ordinarily sufficient to amount to a repudiation. A failure to pay three installments where the employer did not evince an intention never to pay was held not to be repudiatory conduct.

A failure to pay is less likely to be a repudiation if it occurs towards the end of a contract.

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Repudiatory breach/breach of a fundamental term

Abandonment of the site by a contractor or removal of plant or site offices and huts will prima facie be a clear fundamental breach in the absence of some very special explanation.

Failing to proceed with due diligence, if persisted in after reasonable notice, will entitle an owner to terminate for breach of an implied fundamental term.

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Repudiatory breach/breach of a fundamental term

Due diligence is to be measured against any agreed or reasonable contract completion dates.

However, in the absence of express indication, such as "of the essence" wording, completion to time by the contract date, or that date as extended under an extension of time clause, will not generally be a repudiatory breach.

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Repudiatory breach/breach of a fundamental term

An unjustified and continued failure to remedy defective work which requires removal or repair before further work should reasonably take place will also be a breach of a fundamental implied term.

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ii. Where there is breach of a term which, while not by itself sufficiently serious, may be so protracted or repeated, despite protest or notice by the innocent party, that it either evinces a subjective intention not to be bound by the contract, as in the case of deliberate and continued breaches (however minor) or simply an objective involuntary inability to perform the contract properly.

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iii. Where a party actually informs the other that he intends not to perform the contract as a whole, or any part of it, either presently or in the future, or where he acts in such a way as to render his own future performance impossible. These are usually called "anticipatory" breaches.

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iv. Where the parties indicate expressly by the contractual language that a single breach of a particular contractual obligation is to have the same consequences as a fundamental breach entitling the innocent party to terminate the contract, even though it would not otherwise be treated as a fundamental breach justifying immediate termination.

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“Conditions”, “conditions precedent” and “of the essence” obligations.

The mere use of these expressions, and particularly the simple word “condition”, will not by itself be conclusive; the contract as a whole will be examined to see that it is consistent with this intention.

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v. Where the parties insert express termination provisions for the benefit of a party in certain defined events. Such express clauses are, in the absence of express indication to the contrary, additional to and not in substitution for the owner’s rights on a “common law” accepted repudiation, always assuming that a sufficiently serious breach is present to justify a common law termination as an alternative to the contractual right of termination.

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Option to elect

Following a repudiatory breach the innocent party is entitled to choose whether to treat the contract as continuing or to accept the repudiation and treat himself as discharged; if he elects to treat the contract as continuing, he is usually said to have "affirmed" the contract.

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Need for clear and prompt election

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Affirmation

A party will not be held to have elected to affirm the contract unless, first, he has knowledge of the facts giving rise to the breach, and secondly, he has knowledge of his legal right to choose between the alternatives open to him.

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Affirmation

Affirmation may be express or implied.

It will be implied if, with knowledge of the breach and of his right to choose, he does some unequivocal act from which it may be inferred that

- he intends to go on with the contract regardless
- he will not exercise his right to treat the contract as repudiated.

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Contract Determination

Affirmation

Affirmation may be express or implied.

In the case of a breach which is persisted in by the other party, the fact that the innocent party has continued to press for performance will not normally preclude him at a later stage from treating himself discharged.

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Acceptance of repudiation

Must be clear and unequivocal and merely inactivity or acquiescence will generally not be regarded as acceptance for this purpose

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Acceptance of repudiation

Mere delay in acceptance of repudiation will not be a bar, however, the contract must not have been affirmed in any way, or the rights of third parties have intervened, or the other parties have altered his position on the basis that the contract still subsisted.

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Both parties in breach

Where both parties are alleged to have committed a breach of contract, and it is asserted that each breach (taken independently) gives right to terminate further performance of the contract, regard must be had to the order in which the breaches occurred.

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Effects of termination

The primary dual consequences of a rescission or termination for breach will be, first, to release the innocent party from all further performance of his obligations and, secondly, to entitle him to full damages, including loss of the contract, resulting from the termination.

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Effects of termination

Rights acquired before discharge. Although both parties are discharged from further performance of the contract, rights are not divested or discharged which have already been unconditionally acquired.

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Effects of termination

Provisions such as Arbitration and Adjudication will be retained despite termination.

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Effects of termination

Provisions such as Arbitration and Adjudication will be retained despite termination.

If termination under the express terms of the Contract, the Contract may set out the rights of the parties following termination and which is likely to be different to that under Common Law termination.

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Provisions for Termination in Standard Forms of Contract

"Notice of Termination...shall not be given unreasonably or vexatiously..."

This imposes an important limitation upon the power of either party to terminate the contract. What is unreasonable or vexatious depends upon the circumstances and may give rise to lengthy investigation in subsequent proceedings.

"Vexatiously" was said to connote "an ulterior motive to oppress, harass or annoy".

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Provisions for Termination in Standard Forms of Contract

"...without prejudice to any other rights and remedies..."

It is clear that this express reservation of any other rights or remedies preserves the normal rights at Common Law of such a party against the other.

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Provisions for Termination in Standard Forms of Contract

Forfeiture clauses are strictly construed and care must be taken to see that the terms of the contract are properly complied with.

Timing of notices

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Contract Determination

Provisions for Termination in Standard Forms of Contract

Forfeiture clauses are strictly construed and care must be taken to see that the terms of the contract are properly complied with.

Timing of notices
Content of notices

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Contract Determination

Provisions for Termination in Standard Forms of Contract

Forfeiture clauses are strictly construed and care must be taken to see that the terms of the contract are properly complied with.

Timing of notices
Content of notices
Grounds

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Wrong interpretation of contract

Differences of interpretation as to a party's obligations under the contract, should they come to a head, will render a party in real peril of a successful adverse termination should his interpretation prove to be incorrect, assuming that he has, as a result of acting on that interpretation, prejudiced the further performance of the contract, quite apart from the obvious cases where he may have been led into prematurely rescinding or terminating or abandoning the contract himself.

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No reason or bad reason given

If a party refuses to perform a contract, giving a wrong or inadequate reason or no reason at all, he may yet justify his refusal if there were at the time facts in existence which would have provided a good reason, even if he did not know of them at the time of his refusal.

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