

## TERMINATION OF CONTRACT: THE NAVIGATION OF UNCERTAIN SEAS

*"And whether we shall meet again I know not.  
Therefore our everlasting farewell take:  
Forever, farewell,  
If we do meet again, why, we shall smile;  
If not, why then, this parting was well made."*

*Julius Caesar (William Shakespeare)*

Not all endings may prove as eloquent or as civilised as the quotation from possibly England's greatest bard.

The following purports to offer a compass in the navigation of the somewhat uncertain and changing seas of English contracts governed by English law and their termination for breach.

### Glossary:

- The common law:** The English common law is a body of unwritten laws or principles. They are to be found in case law: that is, case reports of proceedings and judgments which run from 1189, some 120 years after the Norman Conquests. The common law is a vast repository of precedent and common sense to which the English Courts continue to look today for guidance on similar questions or to respond to novel points of law.
- An example is the Law Merchant derived from the "*Pie-Powder*" Courts, named from a corruption of the French *Pieds-Poudres* ("*dusty feet*") implying *ad hoc* marketplace Courts.
- Statute law:** Legal rights and obligations enshrined within Acts of Parliament passed by both the English House of Commons and House of Lords.
- The common law of contract:** A specific subdivision of the English common law relating to agreements between parties.
- Contract:** For the purposes of this paper, any agreement between two or more parties based on offer acceptance and consideration (that is, value) passing between them with an intention to create legal relations. Its terms may be broadly consistent with the English common law or it may contain terms (provisions) which are inconsistent with or seek to limit or qualify the operation of the English common law.
- Condition:** This is a major term of the Contract. Any breach of condition will usually entitle the innocent party to terminate the Contract.
- Warranty:** In contrast, this is minor term of the Contract. Breach does not entitle the innocent party to bring the Contract to an end.
- Innominate term:** This is neither a condition nor a warranty. The right to terminate for breach of an innominate term depends upon an assessment of how damaging the consequences of the breach may be.
- Types of breach:** There are three types of breach which entitle an innocent party to treat the Contract as ended:
- (1) Breach of Condition.

- (2) Repudiatory Breach (i.e. breach of an innominate term – where the consequences are so serious as to entitle the innocent party to treat the Contract as ended). This is often said to be a breach which effectively deprives the innocent party of the entire benefit of the agreement.
- (3) Renunciatory Breach (that is, where one party by its words or conduct conveys the clear message that he is unwilling to perform the Contract). In such a circumstance the innocent party too may treat the Contract as at an end.

**Implied term:** Where, regardless of the actual words of the Contract, the English common law will imply certain terms into an agreement (for instance, in a construction contract, the common law will readily imply that the building works will be carried out **with expedition** and to a **workmanlike standard**).

**Election:** This always occurs where there has been a breach of condition, repudiatory breach or renunciatory breach; the innocent party **must choose** whether to **affirm** the Contract (reserving their rights in damages for any loss that breach might occasion) or **terminate** the agreement.

**Termination:** The act of bringing a contract to an end earlier than intended by reason of breach. This paper will examine those considerations relevant to termination of contract where breach has occurred.

**Termination of Contract:** What if a breach has occurred?

### 1. Assessment:

Care and forethought are essential companions when it comes to an assessment of breach of a commercial agreement. Might there have been a breach of an innominate term? Alternatively might the breach amount to no more than breach of a warranty? If the latter this might justify payment of compensation, but not support the case for a termination.

An erroneous assessment may rebound with unhappy financial consequences.

For instance, if a supposed innocent party were to elect to terminate a contract on the basis of common law repudiatory breach, and a Court later found that their decision has been mistaken, this would expose them to claims for damages for wrongful termination.

### 2. Termination in compliance with the Contract

The majority of commercial agreements contain written provisions specifying the circumstances in which either party may properly terminate before the Contract may have run to its end.

However termination in keeping with the **written provisions of the Contract** may operate to **exclude** any claims for additional damages at common law.

One classic instance is to be found in the reported case of *Phones 4 U Limited (in administration) v. EE Limited* [2018] EWHC 49 (Comm).

In this case P4U went into administration. The contract with EE stipulated that an act of insolvency entitled the innocent party (EE) to terminate. P4U was no longer able to meet its obligations (marketing EE's brand and services and procuring customers for EE). EE terminated the contract under a specific provision of the Contract which enabled them to do so if P4U was insolvent.

The question for the Court was this: did the manner of EE's termination pursuant to contract act to prohibit it from subsequently making a claim for damages at common law for repudiatory breach?

The Court decided that EE could not bring a separate claim for damages at common law; it had chosen to rely upon the terms of the Contract in order to bring about termination.

The Court reasoned thus: EE had exercised a **contractual right to terminate** which was **not founded on breach**. Accordingly EE could not seek to re-characterise their decision as one based upon a termination for repudiatory breach. Accordingly their claim for repudiatory loss was disallowed.

However **contrast** the separate reported case of *Stocznia Gdynia Gdanska v. Latvian Shipping Co. and Others* [2002] EWCA Civ889. This concerned a shipbuilding dispute. The Buyer had agreed to purchase a ship and the shipyard had been engaged to build it. The Buyer terminated the Contract. It relied upon an express contractual termination clause.

At first instance the Judge held that by exercising its contractual rights of termination, the Buyer had affirmed the Contract and had therefore lost its right to rely upon a repudiatory breach.

However the Upper Court allowed the Buyer's appeal and held that the Buyer **was entitled to damages** for loss of a bargain. The Court stated:

*"The nature of circumstances giving rise to (the Buyer's) right to terminate, therefore, was in all cases a serious breach by the Yard of its obligations.. that, together with the provision for payment of liquidated damages for less serious breaches.. provides a strong indication that if the right (to terminate) was exercised the parties intended that the Buyer should have the right to recover losses that it might have suffered as a result of the loss of its bargain".*

Put shortly in *Stocznia* the Court was willing to recognise and confront the realities of the losses caused by the shipyard's failure to perform.

### **3. Termination under Contract or at common law? Differing consequences.**

It is essential to decide whether, where there are facts giving rise to the right to terminate, such termination should be either under the written terms (provisions) of the Contract or whether resort should be had to common law and the right to treat such conduct as a repudiatory breach.

A stark instance is provided by the reported case of *Shell Egypt West Manzala GMBH v. Centurion Petroleum Corporation* [2010] EWHC465 (Comm).

Shell and Centurion had agreed to participate in a joint venture for petroleum exploration in the Nile Delta. The Contract contained provisions which permitted Shell the right to terminate the agreement in certain circumstances.

Shell believed that one of those circumstances had arisen. It accordingly terminated the agreement under a provision which, on the face of it, entitled Shell to a repayment of \$15m.

However Shell was mistaken in believing that the circumstances (giving rise to the right to terminate) had arisen. The mistake was catastrophic.

In a subsequent arbitration Shell accepted that it had been mistaken but tried to argue that Centurion was in any event liable to pay damages because it had been in repudiatory breach.

However the arbitrators concluded that Shell had not relied upon any repudiatory breach by Centurion. Rather, Shell had exercised its contractual right to terminate on mistaken grounds and – by relying upon the Contract – had affirmed the agreement.

Shell appealed.

On appeal the Court re-stated the legal position: a right to terminate a contract **in keeping with contractual provisions** may also be treated as **acceptance of repudiatory breach at common law** but **only where** the contractual provisions were **identical** to the common law **remedies** for breach.

In other words, the **measure of loss** needs to be the same both under contract and common law.

However where the **contract** and the **common law** provided a party with **alternative rights with different consequences** then the terminating party was put on election.

The Court of Appeal found that the Centurion would not have understood that Shell was relying on repudiatory breach but rather the provisions of the contract itself. Accordingly a termination in keeping with the contract was inconsistent with asserting a repudiatory breach.

(Arguably, in the judgment, the Court contemplated that it may be possible to terminate a contract **on alternative grounds** both in keeping with the contractual rights and common law, even though the consequences for assessment of loss might be different).

#### **4. Termination of Contract: measure of damages**

Ordinarily the innocent party who terminates a contract solely in compliance with the express provisions of it will have a reasonably clear idea of their damages or how they are to be calculated. The Contract will usually provide for this. To end a contract solely in compliance with its express provisions (providing of course that the facts support the case for termination) ought not to carry with it any risk of counterclaim.

However by such means one may **preclude** the right to seek greater compensation under the common law.

#### **5. Termination of Contract at common law: measure of damages**

The purpose of compensation at common law is to place the innocent party in the position that it would have occupied had the contract been properly performed i.e. *restitutio in integrum*.

The potential benefit attendant upon a termination at common law (that is acceptance of repudiatory breach) may mean that a much larger amount may be claimed than those amounts to which the contract is limited.

The potential disadvantage is that if the circumstances do not justify acceptance of repudiatory breach one may suffer the unpalatable consequence of a counterclaim damages for wrongful termination.

#### **6. Summary**

Where unhappily circumstances may oblige an innocent party seriously to examine ending its commercial bargain, the following are suggested as essential tools and considerations:

- (1) Pay close heed to the facts which have arisen. If before seeking to terminate at common law for repudiatory breach, why not invite your opponent to agree that the facts have arisen which might justify such a conclusion?
- (2) Consider whether termination should be within the express terms of contract or without.
- (3) If within, be aware of the potential limitations on loss recovery.
- (4) If without, be aware of the possibility of a counterclaim on the footing that you the innocent party have acted in repudiatory breach (by having chosen to terminate on grounds which are not made out or are unsupportable).

(5) Employ careful and considered language.

(6) Consider termination on alternative grounds (both under contract and at common law).

Dated Thursday this 6<sup>th</sup> day of February 2020.

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