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**JCT Povey Lecture 2023  
'The Terminator'**

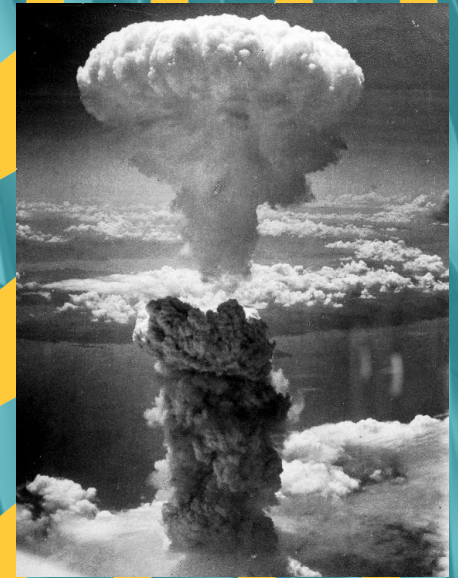
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# The nuclear option?

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# Terminating construction contracts

Termination is a nuclear option! Termination is an exceptional sanction which should only be used for fundamental violations and then only when all possible steps have been taken to limit the potential damage.

Termination is a self-help remedy that enables a party to mitigate the burn of costs and losses.

Before exercising the option, a clear understanding of the key terms of the contract and necessary steps to effectuate the termination are absolutely critical.

The exercise of termination give rise to associated risks requiring very careful consideration and yes legal advice!



"I lost it in a legal minefield."

# Terminating Construction Contracts - key Principles and considerations

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- Before terminating a contract, consider whether you want the relationship to end or whether you should continue with the contract but reserve the right to claim damages for any breach.
- Consider the alternatives to doing so - is there a viable alternative to termination?

As rather than the end of your troubles it may be the start of them!

- Too often things are rushed, and not enough thinking is done.
- Maybe ad hoc descoping or resequencing is possible. Possibly omission of a section of the Works?
- Where the relationship between the parties is still intact, a 'line in the sand' type settlement and a variation to the terms which are causing the problems (such as amending the payment terms or omitting part of the work scope) may restore order.
- So, hitting the preverbal red button should be a last resort.



# What is termination?

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- A contract can sometimes be brought to a premature end by one of the parties, just like a marriage. That is what we commonly call termination, or in the vernacular 'being chucked off the job'.
- When this happens, the contract is said to be terminated or in old JCT speak '*determined*'. Pre JCT 2005.
- A note of caution here regarding terminology. 'Termination of a contract' and 'determination of a contract' are customary shorthand for the ending of the primary obligations under the JCT. These obligations consist of the contractor's obligation to carry out and complete the works and the employer's obligation to pay the contract price in accordance with the conditions of the contract.
- The contract itself does not come to an end because its secondary obligations (i.e. the contract-breaker's liability for damages) remain unaffected. Also, the right to refer disputes to adjudication is not lost.
- Termination can be achieved (i) under the contract or (ii) at common law.

# What is termination?

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Strictly speaking, "termination" means that the contract is "discharged". In other words, the future, unaccrued obligations owed by the parties fall away. The contract does not actually cease to exist. Termination is a remedy for breach of contract.

A varied vocabulary used both judicially and by business as a label to describe the process parties bring a contract to an end before it has been fully performed.

Rights to terminate at common law are confounded by definitional difficulties and inconsistencies. Strictly speaking, "termination" means that the contract is "discharged". In other words, the future, unaccrued obligations owed by the parties fall away. The contract does not actually cease to exist.



# Common law termination – definitional difficulties and inconsistencies

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# Labels for same thing?

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A varied vocabulary has been used both judicially and in business as a label to describe the process by which parties, unilaterally and by their own action, bring a contract to an end before it has been fully executed. Consequently

- **forfeiture**,
- determination,
- termination,
- renunciation,
- **rescission** and
- repudiation



# Labels for same thing?

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1. The different termination labels not truly synonymous in the case of **forfeiture** and **rescission**.
2. Some judges and commentators (especially *Treitel*) persist in using the term '*rescission*' to describe termination of a contract for breach, this is misleading. Rescission means setting a contract aside *ab initio* because of a defect in its formation, e.g. for misrep or undue influence. So not the same as the process of terminating for breach, which is prospective only.
3. The word "*forfeit*" or "*forfeiture*" is used in different contexts. In real property law, a right of forfeiture is synonymous with a right of re-entry under a lease - a proprietary right. Outside reality, the word "forfeiture" is used to describe a loss of rights, say over a license. However, termination under the general law, - for repudiatory breach, is not forfeiture. As it is a right that also exists independently of the written terms of the contract.

## Another label - Renunciation

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A renunciation is a repudiation, and it occurs when one party, by words or conduct, evinces an intention not to perform, or expressly declares that they will be unable to perform their obligations under the contract in some essential respect.

Words or conduct clearly showing a party will not perform a term breach of which goes to root of contract: *Chitty on Contracts 34<sup>th</sup> Ed.* [27-070 and 075]

May occur before time for performance (“*anticipatory renunciation*”). Innocent party can terminate and sue immediately: *Hockster v De la Tour* (1853) 2 E&B 678

Act promptly to avoid frustration or own later repudiation: *Avery v Bowden* (1855) 5 Ex B 714 and *Fercometal SARL v Mediterranean Shipping Co SA* [1989] AC 788, HL

No right to remedy breach (though NB *Borrowman Philips v Free & Hollis* (1878) 4 QBD 500)

# Repudiatory breach

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# What exactly is termination for repudiatory breach?

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- Back to basics... conduct is repudiatory if it “**deprives the innocent party of substantially the whole of the benefit**”, intended to be received for performance of the obligations under a contract.
- OKA as the “*substantially the whole benefit*” test from *Hong Kong Fir v Kawasaki* [1962] 2 QB 26.
- Rights to "terminate" at common law are often thwarted by definitional difficulties and inconsistencies. Strictly speaking, "termination" means that the contract is "discharged". In other words, the future, unaccrued obligations owed by the parties fall away. The contract does not actually cease to exist. Termination is a remedy for breach of contract.
- The process of terminating a contract for breach, is prospective only.
- When the defaulting party breaches the contract, the innocent party may have no intention or indeed time for claiming damages, specific performance or any of the other remedies so termination may be just the ticket.
- There is no compulsion or legal requirement to sue for damages.
- [Terminology...!] The word “determination” was used by JCT from 1963 and until the advent of JCT 2005 to describe contractual cessation. Since the JCT 2005 it has used the word “termination”. This too helps reduce confusion as determination to most people means to decide or resolve a matter or issue.

## Common law repudiatory breach-based termination

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- There is no specific definition of what amounts to a repudiatory breach.
- The hallowed words are the breach must be sufficiently serious: to “*go to the root of the contract*” or “*deprive the innocent party of the benefit of the contract*”. Think in terms of the contractor refusing to start (*Gold Group Properties v BDW Trading* [2010] EWHC 1632 (TCC)) abandoning the project (*Galway City Council v Samuel Kingston Construction* [2010] 3 IR 95) or an employer barring access to a site *Sandbar Construction Limited v. Pacific Parkland Properties Inc* (1995) 11 Const.L.J. No.2) or possibly or instructing another contractor - *Sweatfield v Hathaway Roofing* (1997) CILL 1235.
- Because there is no one definition of repudiatory breach, and establishing such a breach depends on the precise circumstances, this creates a peril that the terminating party will be held itself to have improperly terminated the contract, for the other side then to be able to accept.
- But where there is a repudiatory breach by one party, the other party will have the right to elect to terminate the contract under common law, by accepting this breach. Of course, it can elect to affirm.
- Termination is not automatic. The wronged party makes the running.
- When a party is in repudiatory breach, the innocent party has a choice: to accept the breach and treat the contract as discharged or affirm the contract and press the party in breach to perform.

# Termination trigger – be careful how you use it!

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The key question with repudiation is whether the breach so serious it *goes to the root of the contract?*

Is it reasonable to leave wronged party to his claim in damages or should he be allowed to bring the contract to an end?

The cases are littered with things that at first blush look like repudiation but in fact when one get down to them have been held by courts not to be common law repudiation.

Two areas most difficult in that area and of interest to construction contracts are:-

1. Delay and
2. Non Payment of sums under the contract

When you think something is repudiatory look twice, and then a third time and if think repudiatory look a fourth time. Do not rush to find something repudiatory.



# Repudiation ?

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- The most easily understood form of repudiation is renunciation (i.e. an express statement by a party to the effect that he no longer intends to perform his obligations under the contract). For instance, in *Multiplex Construction (UK) Ltd v. Cleveland Bridge* (2006) – under a subcontract for the D&C of the Wembley steel, Cleveland contended that MPX's failure to make payment amounted to a repudiatory breach. Jackson J rejected and said no and held it was Cleveland who had repudiated, by serving the notice of termination and then stopping work!
- In *Sutcliffe v. Chippendale & Edmondson* (1971) persistent poor-quality work was treated as repudiatory having regard to the construction of the contract and all the circumstances, the gravity of the breaches was such as to show that the contractor did not intend substantially to perform his obligations.

*Sutcliffe*: “...manifest inability to comply with the completion date requirements, the nature and number of complaints from subcontractors and [the architect's] own admission that in May and June the quality of work was deteriorating and the number of defects was multiplying, many of which he had tried unsuccessfully to have put right, all point to the truth of the claimant's expressed view that the contractors had neither the ability, competence or the will by this time to complete the work in the manner required by the contract.”

## Repudiation?

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When an act or omission of a party is such a serious breach that the innocent party is entitled to treat it as evidence that the contract-breaker no more intends to be bound by it.

Does it go to the ***root of the contract***?

*“deprives the [innocent party] of substantially the whole benefit which it was intended that he should obtain from the contract”* i.e. if it “goes to the root of the contract”: *Hong Kong Fir*, pp.63-64 and 70

Words or conduct that clearly shows a party will not perform a term breach of which goes to root of contract: *Chitty on Contracts 34th Ed.* [27-070 and 075] and is repudiatory at common law.



# Repudiation?

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An example is breach of condition – for example, where a contract expressly provides that **'time is of the essence'** in respect of the performance of an obligation, and the obligation is not performed by the agreed date. Also:-

- An absolute refusal to carry out the work or an abandonment of the works before it is substantially completed without any lawful excuse.
- Rendering completion impossible.
- Failure to give possession of the site at all.
- A clear order for the contractor not to complete the works contrary to the contract.
- Employing third parties to carry out the same work already contracted to the contractor.
- Wrongful termination of the contract itself.

# How termination for repudiatory breach works

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Party A commits a repudiatory breach, showing intention not to be bound

Party B elects to accept the repudiation

Contract and obligations end

**BUT!**

## Risk: wrongful termination = damages liability



"Surely everyone is allowed ONE mistake?"



Ensure the breach is repudiatory  
If not, termination is wrongful

Ensure the contract is not affirmed  
Or it will be too late to accept the repudiation

## Common law termination

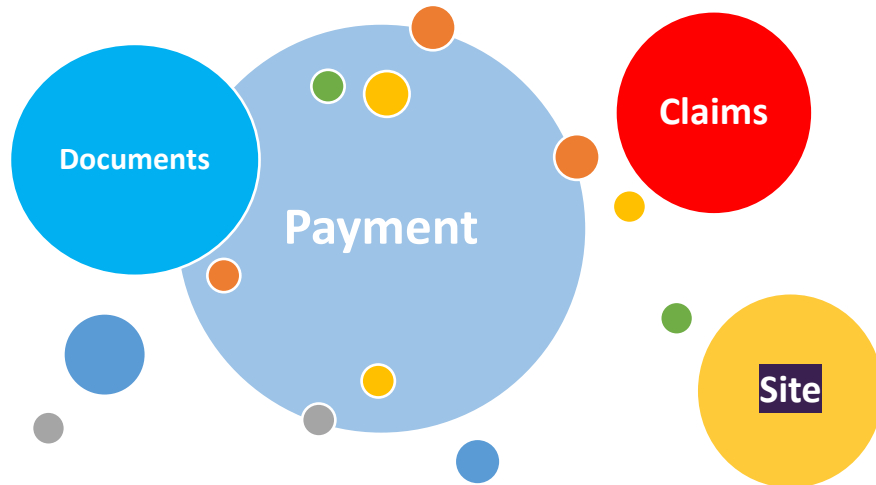
Absent demonstrating a right to terminate under common law that party could themselves be found to be in repudiatory breach of contract if they have no viable contract machinery to terminate under!





# The right to terminate at common law

Future performance ends, but what happens next?



## Effect of repudiation?

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When repudiation occurs, the innocent party has two choices.

- First, he can accept the repudiation and thereafter the party who repudiated can no longer, without the agreement of the innocent party, go back to the status quo ante before the repudiation. Not only is the innocent party discharged from further performance of his obligations under the contract, but he can also sue for damages and immediately. This was established in two leading House of Lords cases: in *Heyman v. Darwins* [1942] AC 356; *Photo Production v. Securicor* [1980] AC 827.
- Secondly of course, the innocent party can elect to affirm and press the party in breach to perform as termination is not automatic.

## Risks of repudiation?

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Should a party faced with a repudiatory breach elect to terminate, then it faces two significant risks.

- First, if the breach relied upon is not repudiatory the purported termination will be wrongful and constitute a repudiatory breach in its own right, entitling the other party to terminate and claim damages!
- Second, if the innocent party affirms the contract, then it will lose its right to terminate. In that event, a belated attempt to terminate will be a repudiatory breach.
- THINK: Unless the breach is so significant that it demonstrates a clear intention not to be bound by the terms of the contract, it will not justify termination.



Think big mistake, grave error,  
reckless disregard

# Remedy for repudiation?

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A party that accepts a repudiatory breach may seek either:

- damages for loss of the contract (“loss of bargain” damages); or
- a reasonable price for the works which it has performed (quantum meruit).

## *Loss of bargain damages*

- A claim for an amount to compensate the innocent party for the lost opportunity to receive future performance of the contract.
- Typically, a loss of profit claim based on the contract price.
- See: *Lombard North Central plc v Butterworth* [1987] QB 527. The contract contained a term requiring punctual payment of each quarterly rental payment made 'to the essence' of the contract. CA upheld it.

# Remedy for repudiation?

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*Quantum meruit* - claim for 'what the job is worth'

- Typically involves the valuation of work performed, by a builder on a 'cost plus profit' or 'reasonable value' basis without regard to the contractually agreed price.
- Provides maybe an alternative if the project was not profitable at the price contracted? But see against this House of Lords' reasoning against this in *Taylor v Motability Finance Ltd* [2004]
- See: *Lodder v Slowey* [1904] AC 442.

The High Court of Australia has held in *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32) that a contractor's claim in *quantum meruit* following repudiation of a contract will generally be limited to the contract price (This departs from the Privy Council in *Lodder v Slowey* [1904] AC 442 and a line of Australian cases since that imposed no such limit. This accords with House of Lords' reasoning against this in *Taylor v Motability Finance*).

# “..Without prejudice to any other rights or remedies” ...preservation of rights

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Many of the contractual rights to terminate under the JCT suite of contracts are for example expressed to be without prejudice to any other rights or remedies that the terminating party may possess.

For example, under JCT DB 2016 Clause 8.3.1 states: *“The provisions of clauses 8.4 to 8.7 are without prejudice to any other rights and remedies of the Employer. The provisions of clauses 8.9 and 8.10, and (in the case of termination under either of those clauses) the provisions of clause 8.12, are without prejudice to any of the rights or remedies of the Contractor.”*

So, let's look at repudiatory breach as it is one of the two bases termination is achieved.



# Conditions, warranties and innominate terms?

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# Conditions, warranties and innominate terms?

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As we have seen not every breach gives the innocent party the right to terminate. The breach has to be a "repudiatory breach" which depends on a range of factors, including the nature of the term that has been breached, the nature of the breach, and the consequences of breach. In the past the courts focussed on the nature of the term, but in recent years the focus has shifted towards the seriousness of the breach and its consequences.

Each of the following constitutes a repudiatory breach of contract justifying termination at common law:

- a breach of **condition** (as opposed to warranty);
- a **sufficiently serious breach of an intermediate/innominate term**; and
- a **refusal to perform**, known as "renunciation".

Conditions, warranties and innominate terms: *Hong Kong Fir v Kawasaki* [1962] 2 QB 26 (CA).

# Conditions, warranties and innominate terms?

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*Hong Kong Fir v Kawasaki* [1962] 2 QB 26 (CA).

The court introduced the innominate term approach. Rather than seeking to classify the term itself as a condition or warranty, the court should look to the effect of the breach and ask if the breach has substantially deprived the innocent party of the whole benefit of the contract.

## *Conditions*

Classification depends on objective intentions and substance - *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] HL - The fact that a term is labelled as a 'condition' is not conclusive in legally classifying the term as a condition instead of a warranty.

# Categorising Terms

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## Innominate Terms and Repudiatory Breach thereof

- Right to termination depends on seriousness of consequences of breach, at time of breach: *Amparius Nu Homes Holdings Ltd. V Telford Homes (Creekside) Ltd* [2013] 4 All ER 377, esp. [64]
- “deprives the [innocent party] of substantially the whole benefit which it was intended that he should obtain from the contract” i.e. if it “goes to the root of the contract”: *Hong Kong Fir*, pp.63-64 and 70

# The sine qua non of termination prep and groundwork

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# It may be a statement of the obvious but these things below need addressing

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## 1. Do you have the right to terminate?

- Contracts often allow for termination only in certain circumstances.
- It is important to ensure that the facts and documentary record support your right to terminate. An unjustified attempt to terminate for cause would have significant consequences.
- Contracts may also permit termination ‘for convenience’, but there will usually be no ability for an employer to recover its completion costs.
- Are there any other termination rights available to you under the governing law?



# It may be a statement of the obvious but these things below need addressing

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## **2. What contractual steps must you follow before terminating?**

- Are you required to give notice to the Contractor/Employer?
- Is there a cure period for the Contractor/Employer to remedy the relevant issue?
- Have you carefully considered and determined any claims for additional time? Do not leave an EOT hanging out!
- Do you need to provide notice or obtain approvals from anyone else? Consider whether there any requirements to provide notice, or obtain consents, pursuant to other agreements such as finance documents.

# It may be a statement of the obvious but these things below need addressing

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## 3. Is your termination notice adequate?

- Does it clearly articulate the grounds for termination? A party who purports to operate a contractual determination clause when it is not entitled to do so either factually or legally may thereby repudiate the contract - *Architectural Installation Services v James Gibbons* (1989). There an ordinary, commercial businessman would not see a sensible connection between a warning notice and a termination notice that were issued some 11 months apart.
- Does it identify all potential grounds for termination, including putting them in the alternative?
- Does it avoid demanding that the contractor 'do the impossible', such as complying with a baseline programme in circumstances where it would not be physically possible to do so or defying the construction logic like plastering a wall before it is built?

# It may be a statement of the obvious but these things below need addressing

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## 4. Have you carefully recorded key decision-making?

- Have you maintained careful records of compliance with the relevant contractual procedures or requirements, and the grounds for termination? Check!
- If a formal dispute arises, the party with more complete records is time and again at a significant advantage.

# It may be a statement of the obvious but these things below need addressing

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## **5. Have you identified an appropriate replacement contractor?**

- What procurement processes must be complied with to get them on board, are they really able to deliver?
- Carefully documenting negotiations with any replacement contractor may help an employer defend the reasonableness of its completion costs.

# It may be a statement of the obvious but these things below need addressing

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## **6. What financial security do you have available? Might that be pulled?**

- Are bonds, guarantees or any other security provided by the contractor, is it still valid? Consider whether to call them, including establishing valid grounds for calling them, determining the amount to be called, and complying with any contractual requirements, CPs etc.
- Are you entitled to delay liquidated damages? If so, what impact will termination have on your entitlement?

# It may be a statement of the obvious but these things below need addressing

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## **7. What sum do you owe the Contractor?**

- Are you entitled to deduct LDs and/or other costs/L&/orE arising out of termination?
- What is the process for payment for work carried out to point of termination? Do not slip up!

# It may be a statement of the obvious but these things below need addressing

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## 8. What preparations need to be made for handover?

- What steps will be taken to secure the site after the Contractor's exodus, and protect the works from damage?
- What rights will you have over on-site plant, equipment and MOS and offsite?
- What manuals, models, drawings, records will need to be provided by the Contractor?
- Have you made arrangements to record the state and condition of the job (by way of audit and in imagery) on-site plant, equipment and materials, and the status/value of works completed by the Contractor? This will be relevant to the Contractor's final account, as well as the replacement contractor's scope of work.
- Will sub-contractor agreements be novated or assigned to the employer, or to the replacement contractor? Where subcontracts back-to-back?
- How rapidly can the replacement contractor mobilise and commence work?

# It may be a statement of the obvious but these things below need addressing

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## **9. Have you obtained legal advice?**

- Given termination is such a drastic measure which can have significant repercussions. It is imperative to ensure that you have judiciously considered your rights and obligations and that the documentary record supports your actions, together with the notice to terminate, the engagement of a replacement contractor, and the recovery of the costs of competition.



# Types of termination

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# Types of termination

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- Termination for cause/default
- Termination for Convenience or “at will”
- Termination by Agreement
- Impossibility of Performance/ frustration?

There are broadly two bases or avenues for terminating a contract.

- The first is by exercising a right to terminate provided for in the contract aka contractual termination;
- The second is by terminating for a repudiatory (ie, fundamental) breach of contract at common law.



# Termination under the contract

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# Termination under the contract

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A statement of the obvious: exercising a contractual right of termination under any commercial contract is often not as straightforward as one might expect.

- To start with, the law requires that any valid termination notice must comply strictly with any termination conditions set out in the contract. To borrow the analogy of Lord Hoffman in the aforementioned leading case of *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] UKHL 19 concerning notice validity, “[i]f the clause [in a contract] had said that the [termination] notice had to be on blue paper, it would have been no good serving a notice on a pink paper”. Identifying and satisfying termination conditions is often more complex than just using the right coloured paper!
- Secondly, even where a termination notice is correctly drafted and validly served, a right of termination can be inadvertently lost where a party acts in a manner which is inconsistent with the termination of the contract. A common example is where a party demands payment of arrears which have accrued under a contract, causing them to 'waive' the right to terminate for those arrears.
- The stakes are high when it comes to correctly terminating a contract: if a party incorrectly terminates then they will, in general, be liable to the other party for the losses resulting from that incorrect termination on a repudiatory basis. In high value commercial contracts, the losses could be substantial...

# Termination under the contract – contractual termination

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The most common contractual rights of termination in construction contracts are for specified breaches of the contract. Upon the occurrence of a specified breach, the defaulting party is typically given a cure notice requiring that either:

- a) The breach be rectified within a certain period of time
- b) The defaulting party show cause as to why the contract should not be terminated

The right to terminate will only arise upon the defaulting party failing to adequately act or respond to the notice in the manner required by the contract.

However, the terminating party must adhere to the contractual provisions when terminating the contract to ensure they are not seen as repudiating the contract.

# Termination under the contract – contractual termination

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There are three main ways that termination can go awry:

1. Procedure;
2. Election;
3. Cure

These can result in a loss of termination rights or invalid termination.

# Termination under the contract – contractual termination

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- Not every breach of contract gives an innocent party the right to bring the contract to an end which would cut short the requirements for the parties to perform future primary obligations.
- Express termination clauses which provide for termination in certain specified circumstances, including for breaches other than repudiatory breaches. These termination rights operate in addition to common law rights to terminate unless the latter are clearly excluded.



# Termination under the contract

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Under English law, termination for breach ‘under the contract’ can be permissible only in situations where there is an applicable express right to terminate the contract. When the qualifying breach occurs, the defaulting party is usually given a notice requiring the defaulting party to either:

- rectify the notified breach within a certain period of time; or
- show cause as to why the contract should not be terminated.

The key difference from common law termination is that contractual termination almost always requires compliance with requirements for termination, such as notice provisions.

Usually, the right to terminate ‘under the contract’ will arise only if the defaulting party fails to adequately act or respond to the notice in the manner required by the contract.



## Must dos with contractual termination

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- In addition to ensuring the works are valued accurately, robustly and defensibly up to the termination steps should be taken to safeguard continued access to project-specific information and IP that the terminated party holds and ensure continued rights to use materials and equipment – rights of which should, if appropriate, vest with the non-terminated party.
- Unbroken transfer of relevant insurance should also take place, so that the site is always insured too!

# Unreasonable or vexatious?

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# Termination must not be unreasonable or vexatious

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As is well known under JCT contracts - both employer and contractor are expressly forbidden from terminating the contract “*unreasonably or vexatiously*”, otherwise the purported termination may be void.

In context ‘vexatiously’ has been taken by the courts to imply an ulterior and underhanded motive to oppress, harass or annoy (see HHJ Gilliland QC in the TCC case of ***Reinwood Ltd v L Brown & Sons Ltd*** [2007] BLR 10). The test is how a reasonable party would act in all the relevant circumstances. It may be relevant to consider whether the termination will disproportionately affect the other party. Having considered the authorities, HHJ Gilliland QC then went on to give the following six propositions.

# Gilliland's six propositions

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1. *"It is for the employer to show on the balance of probabilities that the contractor has determined the contract unreasonably or vexatiously.*
2. *By vexatiously is meant that the contractor determined the contract with the **ulterior motive or purpose of oppressing, harassing or annoying the employer.***
3. ***The test of what is an unreasonable determination is to be ascertained by reference how a reasonable contractor would have acted in all the circumstances.***
4. *It is **not for the court to substitute its own view of what is reasonable for the view taken by the contractor if that is one which a reasonable contractor might have taken in the circumstances.***
5. *Although the motive or purpose which a contractor had in exercising the right of determination is a relevant consideration, **the test of what is unreasonable conduct in this context is objective** and the fact that the individual contractor may have thought that his conduct in determining the contract was reasonable is not conclusive.*
6. *The effect on the employer of determination by the contractor is a factor to be taken into account and **a determination may be unreasonable if it disproportionately disadvantages the employer.**"*

# Contract cure periods

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# Watch out for the 'cure' as contractors can rescue themselves!

- Whilst a party does not need to comply with a notice and cure period requirement when terminating for repudiatory breach as the innocent can treat the contract as terminated with immediate effect and sue for damages for breach of contract (*Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75). The cure period will only apply where the breach is capable of remedy.
- The right to terminate can be lost if the defaulting party 'cures' the breach prior to termination! The breach must be extant at the date when the injured party purports to terminate the contract.
- The terminating party can easily trip up here, principally where the contract requires a notice of default and period for rectification prior to termination as with JCT.
- For a delay-related breach, clear records are needed to show that the rate of progress is less than it should be or that resources on site are fewer than they ought to be as at the date of termination.
- It can help to have a 'measured mile' from earlier in the project, showing what could be achieved - so that the terminating party can point to this as evidence that the contractor or subcontractor is no longer proceeding regularly and diligently with their works. Even then, the position can become murky if the terminated party can point to instructions, variations or purported acts of prevention as vindications for the loss of productivity.





# Notice Requirements to terminate under the contract

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# Getting the termination right: termination notices

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- The possibility that an invalid notice could be repudiatory - contrast strict position in Hudson 14<sup>th</sup> edition with *Eminence Property v Heaney*.
- Even if *Hudson* is right what actually is an “invalid” notice? Does any technical defect makes the notice invalid? We don’t think so. Contrast the famous “blue paper/pink paper” position in *Mannai* with the “directory/mandatory” requirement debate in, among other cases, *Ener-G Holdings*. Seems unlikely that sending a termination notice on time but by e-mail when the contract requires fax amounts to a repudiation...?
- Note ability to rely on contractual and common law termination in the same notice (as was done in *EWB* –see paras 295-299).
- Note ability to rely on common law termination even if not mentioned in a termination notice; the *Boston Deep Sea Fishing* principle – see, e.g. *Leofelis v Lonsdal* at para 16. However, perhaps, no right to claim damages on a basis other than the one initially relied upon: see *Phones 4 U* at para 132?



# Notice requirements

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- Incorrectly exercising the right to terminate under the contractual notice provisions can risk an invalid termination – we will look at some of the most recent cases with you shortly.
- Contractual termination like under JCT often requires prior notice, and the courts require strict compliance with notice requirements and periods. Getting it wrong may put a party in repudiatory breach of a contract.
- Termination provisions are construed strictly by the courts and therefore any contractual procedures to affect termination must be followed absolutely. Particular attention should be paid to the parties' roles and timeline in effecting termination.
- Those operating the termination provisions under unamended JCT 2016 contracts which contain detailed and prescriptive requirement and should be operated with care. Always check that the circumstances do in fact give rise to the right to terminate.

# The JCT and Notices

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## **WHERE should the notice be served?**

- ***Clause 1.7.1***

Notices should be in writing (clause 1.7.1) and, unless otherwise agreed between the parties (in accordance with clause 1.7.2), be served by hand or pre-paid post to the recipient's address in the Contract Particulars, or their registered or principal business address.

- ***Clause 1.7.4***

When sent by post, a notice should be sent by Recorded Signed For or Special Delivery.



# The JCT and Notices

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- The case law makes clear that “nothing less or different” than strict compliance with clause 1.7 would suffice for the Employer’s notice under 8.4.2
- Any “non-trivial” departure from the service provisions must invalidate the notice!



# Notice Requirements - JCT

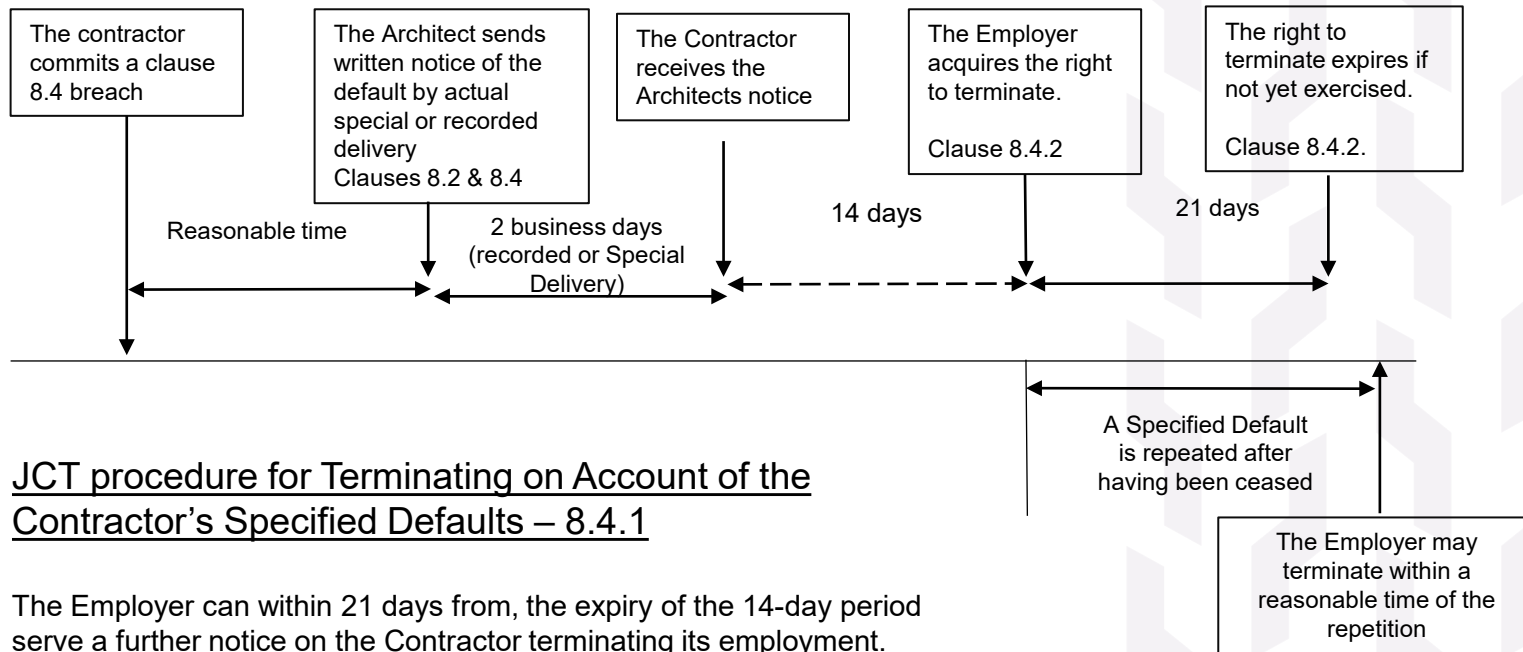
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Under Clause 8.4.1 of both the JCT Standard Building Contract and the JCT Design and Build form (“JCT Forms”) is set out the Employer’s right to terminate for certain specified defaults on the part of the Contractor. These 8.4.1 specified defaults listed include a suspension of the works, a failure to proceed regularly and diligently and/or the failure to comply with a notice or instruction.

JCT Standard Form of Building Contract Clause 8.4:

- Wholly or substantially suspends the carrying out of the work Wholly or substantially suspends the carrying out of the work before completion without a reasonable cause (Clause 8.4.1.1);
- Fails to proceed regularly and diligently with the works (Clause 8.4.1.2);
- Refuses or neglects to remove defective work after written notice and the Works are materially affected (Clause 8.4.1.3);
- Fails to comply with clauses restricting sub-letting, assignment, or dealing with named subcontractors (Clause 8.4.1.4); and
- Fails to comply with CDM Regulations (Clause 8.4.1.5).

# Notices and Clause 8.4.1



## JCT procedure for Terminating on Account of the Contractor's Specified Defaults – 8.4.1

The Employer can within 21 days from, the expiry of the 14-day period serve a further notice on the Contractor terminating its employment.

# Getting the termination trigger wrong

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- Three cases since start of 2022 have come before the TCC considering the operation of this termination mechanism and in each case the Employer was found not to have complied with the contractual requirements.
  - *Struthers & Anor v Davies (t/a Alastair Davies Building) & Anor* [2022] EWHC 333 (TCC)
  - *Thomas Barnes & Sons Plc v Blackburn with Darwen Borough Council* [2022] EWHC 2598 (TCC)
  - *Manor Co-Living Ltd v RY Construction Ltd* [2022] EWHC 2715 (TCC)

# Getting the termination trigger wrong

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- In *Lockland Builders v Rickwood* (1995) 77 BLR 38 there was a contract for the building of a house. Clause 2 of the Building Agreement provided a mechanism whereby, if the owner was dissatisfied with the rate of building progress, then he could apply to the president of the Southend-on-Sea District Law Society to appoint an architect and/or a surveyor, and subject to the Certificate of that architect or surveyor, determine the Agreement.
- The provision provided not merely for the determination of the contractor's employment but for determination of the Agreement as a whole.
- The employer was dissatisfied with the rate of progress but, instead of invoking clause 2, relied upon a common law right of repudiation.
- The Court of Appeal held that an express determination clause even of this type, and the common law right to repudiate can exist side by side, but the common law right only arises in circumstances where the contractor displays a clear intention not to be bound by the contract. **Mere delay in this case did not amount to grounds for repudiation at common law**, and the owner had only himself to blame for not following the contractual procedure.

# Termination at common law and under the contract

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## Common law termination

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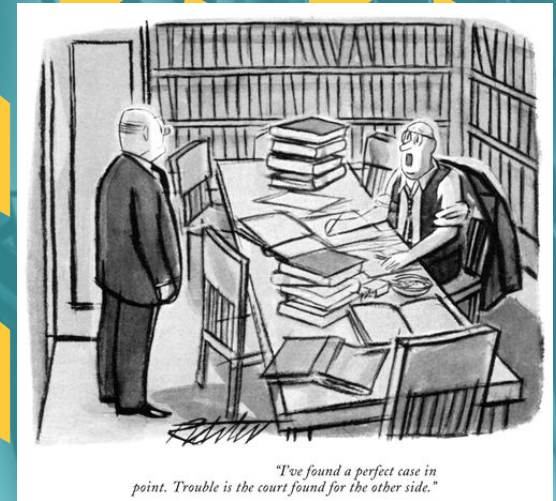
The case of *Vinergy International (PVT) Ltd v Richmond Mercantile Ltd FZC* – [2016] EWHC 525 confirms **there is no general principle that a contractual clause requiring notice before termination** (such as JCT clauses 8.4.1 and 8.9.1) **will apply to repudiatory breaches within the scope of the clause.**

The Court held that the notice provisions were not intended to apply when a party sought to exercise its common law right to accept a repudiatory breach: there were no terms expressly referring to a repudiatory breach or contracting out of the doctrine of repudiatory breach and there was no basis upon which a term requiring notice to be given could be implied.

Therefore, it may be possible to terminate on the basis of a repudiatory breach without reference to the contract. However, the safest course of action will usually be to comply with the contractual termination provisions.

# Case law

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## Recent cases help illustrate the practical differences as to how the two main termination pathways operate in practice

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The upshot in situations where a party which is entitled to terminate under the contract fails to adhere to the precise contractual procedure for termination is the possibility of relying on common law termination rights in parallel.

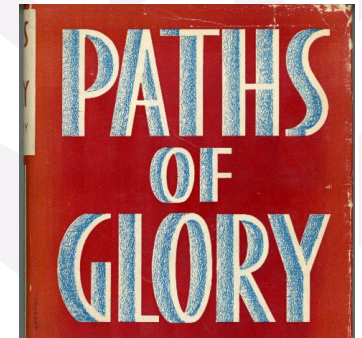
The first case demonstrates there are two paths to glory. It also shows even exceeding the delay damages cap can amount to a repudiatory breach.

*Energy Works Ltd v MW High Tech Projects UK Ltd* [2022] EWHC 3275 (TCC)

The case concerns the termination of an energy-from-waste EPC Contract.

The judge found that the Claimant's termination of the EPC Contract was valid and that the Defendant was in wilful default at the time of the termination.

It shows the practical challenges and risks faced by those that are developing those plants and how exposed they are when in default. The judgment will also be of interest to other infrastructure disputes lawyers as it provides an example of a contractor being in wilful default of reporting obligations.



## *Energy Works v MW*

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In November 2015, Energy Works Hull (EWH) engaged MW High Tech (MW) to build an energy-from-waste plant in Hull for £153 million, with an original completion date of 9 April 2018. Delays and disputes led to EWH's right to terminate the contract when liquidated damages reached the cap of at 15% of the Contract Price. The termination occurred in March 2019 based on delay and common law repudiatory breach.

The notice of termination relied on two grounds, namely under the contract and at common law:

- a. a right of termination pursuant to the Contract (i.e., because the LD Cap had been reached); and/or
- b. a right to terminate the Contract at common law for repudiatory breach.

MW sought an extension of time for alleged contract breaches and failure to provide waste fuel but failed to prove these claims. Mr J Pepperall found that MW's significant delay and suspension of commissioning constituted repudiatory breaches. EWH's termination was upheld.

- The Judge, after ruling in favour of EWH, examined EWH's right to terminate under common law. EWH cited delay, suspension of commissioning, and reporting failures by MW. The delay was 11 months, reaching the Delay Damages cap, barring further damages. The Judge rejected MW's basis for suspension of commissioning, deeming it a repudiatory act even if not due to delay.
- MW's deliberate misreporting of progress and non-compliance with reporting obligations indicated willful default. Which was repudiatory.
- EWH had the right to assign subcontracts post-termination. MW's attempt to pass their claim to Outotec, an assigned subcontractor, was denied.
- MW's only recourse against Outotec was under the Civil Liability (Contribution) Act 1978, but they could only potentially recover delay damages and defect-related losses, not termination losses. MW faced significant financial repercussions due to the termination and assignment of subcontracts. Assignment of the Sub-Contract to EWH transferred all benefits, including accrued rights and the right to sue in respect of those rights, to EW.

## Other points of interest on liability from EWH

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- Programming: failure to report existence of defects promptly and provide a timeline for rectification of defects amounted to a wilful default on the facts: see paras 333 –347. It was left open whether the breach was repudiatory: see para 303. Compare and contrast approach of Ramsey J on a similar issue in *Vivergo v Redhall Fuels* [2013] EWHC 4030 at 504-512. Growing body of law that (deliberate) inaccurate programming is a serious business...
- Scale of delay as repudiatory breach: Analysis of Pepperall J at paragraphs 300-301 was that delay past Delay Damages Cap amounted to a repudiatory breach. Again, contrast Ramsey J in *Vivergo v Redhall Fuels* at 504-512. When does serious delay “go to the root of the contract” or “evince an intention no longer to be bound by the contract”?

## *Thomas Barnes & Sons v Blackburn with Darwen Borough Council [2022] EWHC 2598 (TCC)*

The dispute related to a contract for the construction of a bus station in Blackburn (the “Contract”). The Council the council engaged the contractor to build a bus station, using an amended JCT SBC with quantities 2011 edition. The Council terminated the Contract for alleged delays on the part of Thomas Barnes as contractor by way of termination notice (“Termination Notice”) (sent by email and post). After Thomas Barnes subsequently entered into liquidation, Thomas Barnes’ administrators brought a claim for wrongful termination including loss and expense, alleging that the (purportedly wrongful) termination caused the insolvency of the contractor.

The project faced significant delays and cost overruns, with the contractor suspending work for a while. The council terminated the contract on 4 June 2015, but there were some issues with the termination notice:

1. The notice was delivered to the site address, not the contractor’s registered office, as required by the contract.
2. The notice was sent by email, which was not allowed under the contract. The Judge held that the Council had not validly terminated as it had **failed to properly serve the notice in accordance with clause 1.7.4 of the contract**.
3. A recorded delivery of the notice arrived on June 8 after Barnes removed from site.



- It is clear from this case that an invalid termination notice will not always lead to repudiatory breach.
- But relying on repudiatory breach is never a guaranteed outcome. It worked here because the contractors performance was particularly lamentable.

## *Thomas Barnes & Sons v Blackburn with Darwen Borough Council* [2022] EWHC 2598 (TCC)

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The contractor argued that its removal from the site on 4 June 2015, before the valid termination notice was delivered, constituted a repudiatory breach of the contract by the council.

The court held that by 4 June 2015, the council was entitled to exercise both its contractual right to terminate and its common law right to terminate for repudiatory breach but because of its failure to follow the correct JCT procedure under the contract, the council failed to terminate the contract in accordance with the contractual termination.

The council's failure to follow the correct procedure under the contract didn't invalidate its acceptance of the contractor's repudiatory breach. Although a mistaken termination could be considered a repudiatory breach, in this case, the council's failure to follow the correct contractual procedure did not amount to a repudiatory breach because it didn't adversely affect the contractor, as the contractor had already ceased meaningful activity on the site.



## *Struthers & Anr v Davies (t/a Alastair Davies Building) & Anr* [2022] EWHC 333

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This case termination case under a RIBA building Contract. It is another example of a case where contractual termination was attempted as well as common law.

In the case of *Struthers & Anr v Davies (t/a Alastair Davies Building) & Anr* [2022] EWHC 333 (TCC), a construction dispute exemplified the importance of strict compliance with termination contractual requirements. Mr. and Mrs. Struthers (the Claimants) had entered into a RIBA construction contract with Davies (the Defendant) in March 2015 for various building works, including the construction of a new extension, with a completion date of 10 August 2015.

Delays occurred on the project, and the Defendant failed to provide a completion programme nor continue work after 10 December 2015. The Claimants, subsequently engaging another contractor, who after advice from an independent expert, had then demolished the extension and rebuilt it due to the issues.

In January 2016, the Claimant employer sought to terminate the contract, claiming the cost of remedial works and related losses from the Defendant. However, the First Defendant builder challenged the termination's validity, correctly pointing out that the contract mandated the contract administrator to issue the Notice of Intention to Terminate. Failure to comply with this requirement rendered any subsequent termination notice invalid.



## *Struthers & Anr v Davies (t/a Alastair Davies Building) & Anr* [2022] EWHC 333

While the Claimants relied on a prior judgment (*Obrascon Huarte Lain SA v. The Attorney General for Gibraltar*), where a notice sent to the incorrect address was deemed valid, the judge in this case disagreed. The judge found valid reasons for requiring the initial Notice of Intention to come from the contract administrator rather than the client. Additionally, there was no precedent where the wrong person had sent a contractual notice triggering termination, but it was still considered valid.

Ultimately however the judge determined that the First Defendant builder had breached the contract in a repudiatory manner before the Notice was sent. This meant that the Notice served as an acceptance of that breach, even if it was not a contractually valid notice in its own right.

This case demonstrates that great care must be taken when terminating a Contract to ensure the Contractual Procedures are followed and termination takes place.



"I get that it was wrong. I don't get why it matters."

## *Manor Co-Living v RY Construction* *[2022] EWHC 2715 (TCC)*

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Another case of premature termination in an adjudication enforcement case on a Part 8.

Emphasises the importance of serving a termination notice correctly. Here it failed.

- Manor Co-Living and RY Construction entered into a JCT SBC XQ 2016 contract. A default notice had been sent to the contractor by email and by post. The Employer sought prematurely (i.e., before the expiry of 14 days of the Contractor's receipt of notice specifying alleged defaults under clause 8.4.1) to serve a notice under clause 8.4.2 terminating the contract and locked the Contractor out of the site ahead of time. The Employer's termination notice was therefore ineffective in addition to which the CA had purported to terminate the contract on behalf of Manor Co-Living.
- RY Construction asserted that Manor Co-Living had not properly exercised its contractual right because the notice needed to be issued by Manor Co-Living and by not the CA. RY Construction alleged the wrongful termination itself amounted to a repudiatory breach of contract. The dispute was referred to adjudication and Part 8 court proceedings were brought after the decision.
- The judge held that there had been no breach of natural justice in the adjudicator reaching its decision that the employer had failed to properly exercise its contractual termination right. The adjudicator had considered the employer's common law termination defence and the letter sent by the CA had not amounted to an acceptance of repudiatory breach at common law. Manor Co-Living was therefore in repudiatory breach.

## *Topalsson v Rolls-Royce Motor Cars Ltd* *[2023] EWHC 1765 (TCC)*

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This a TCC software design case for VR visualising, not construction. But important all the same.

In *Topalsson GmbH v Rolls-Royce Motor Cars Ltd* [2023] the court held that the defendant ("Rolls-Royce") had validly terminated a software agreement with the claimant ("Topalsson") and awarded damages to Rolls-Royce's in its favour. Rolls-Royce's first termination notice, which Topalsson rejected, electing to affirm the contract at that point, was erroneous but its second – and more tailored – termination notice was effective.

RR contracted with software developer Topalsson to develop a new digital visualisation tool allowing potential customers to see photo-realistic renderings of Rolls-Royce cars with bespoke custom configurations, before purchasing.

Under the services agreement, Topalsson was obliged to meet milestone dates contained in an agreed implementation plan, which gave a detailed breakdown of the project programme. The software development and supply was delayed. RR accused Topalsson of misrepresenting its expertise and inadequately resourcing the project, leading to significant delays and poor performance.

In April 2020, RR purported to terminate the Agreement at common law on the basis that Topalsson had failed to achieve set milestone dates (the "First Termination Notice"). Topalsson rejected the First Termination Notice, claiming, amongst other points, that the milestones at issue had never been agreed, and it affirmed the Agreement.

## *Topalsson v Rolls-Royce Motor Cars Ltd* *[2023] EWHC 1765 (TCC)*

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Then later in April 2020, RR sent a 2nd termination notice, without prejudice to the 1st Termination Notice, purporting to terminate at common law or alternatively under the Agreement on the grounds that further milestone dates had not been met (the “2nd Termination Notice”).

Topalsson again claimed that the 2nd Termination Notice was not effective and so RR's termination meant that it was in repudiatory breach of the Agreement. This time Topalsson elected to accept the alleged repudiatory breach and stopped work in May 2020.

Topalsson then issued proceedings, claiming damages for unlawful termination and loss of profits, alternatively for work carried out and/or invoiced as at the termination date.

RR counterclaimed damages flowing from the alleged repudiatory breach, claiming losses of €20m for software replacement costs, lost profits, and other damages.

The court also found that, under the Agreement, time was of the essence. That meant that timely performance was a condition of the Agreement and that any delay goes to the root of the contract, no matter how small or trivial the breach. Topalsson's failure to meet the agreed milestones therefore amounted to a breach of condition anyhow, which entitled RR to terminate either under the Agreement or at common law for repudiatory breach.



## *Lombard North Central Plc v European Skyjets Ltd [2022]*

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The recent High Court case (Foxton J) of *Lombard North Central Plc v European Skyjets Ltd [2022]* provides some important reminders on what may (and may not) be required to validly terminate a contract, as well as when a right of termination may be lost through 'waiver'.

This case shows that a lender must consider carefully what rights it has following a breach by the borrower and decide how to respond, and that its conduct and its reservation of rights letter in respect of a breach of a facility agreement must be consistent with that decision. If it is not, a lender could inadvertently waive rights that it may have consequent on such a breach, on which it may have wished to rely.

The case concerned default by an airline business on a secured loan and the lender's entitlement to terminate (and thus 'accelerate') the loan. Holding that Lombard had been permitted to terminate the loan agreement and accelerate the loan, and that it was entitled to enforce its security by selling the aircraft. The Court also held that Lombard had not breached its duties as a mortgagee when selling the aircraft for the best available price.

The loan agreement had been validly terminated by the lender following the default of a borrower (for MAC aka **material adverse change**), despite the lender having waived rights as to default through its conduct - which included agreeing extra time to make payments, accepting late payments, claiming interest on unpaid payments and agreeing a late payment fee.

Here all Lombard needed to show in order to demonstrate a MAC was that it had formed an honestly and rationally formed view that there had been a MAC.

*Bellis v Sky House Construction  
Ltd [2023] EWHC 1473 (TCC)*

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What a difference a day makes.

This case is reminder of the importance of complying with contractual requirements for termination. Three months earlier Constable J in *Elements (Europe) Ltd v FK Building Ltd* addressed clear days in application for payment case.

Clear days! As in CPR.

## *Providence Building Services Limited v Hexagon Housing Association Limited [2023] (TCC) 7.11.23*

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A striking reminder to trigger happy contractors that jumping the gun during the termination process will have significant consequences.

Provides decisive clarification on termination provisions under JCT DB 2016. The decision is significant for the construction industry, as it sheds light on the interpretation of specific termination clauses within the contract.

The matter was presented to the Court as a Part 8 claim seeking a declaration on the correct construction of clause 8.9.4 of the contract, based on the JCT DB 2016 form.

Clause 8.9 of the contract dealt with the contractor's entitlement to terminate the contract due to the employer's default for non-payment. The dispute revolved around the interpretation of this clause, specifically addressing the circumstances under which the contractor could terminate the under 8.9.4.

Hexagon in committing a specified default by making a late payment, subsequently remedying the default before the right to termination arose under clause 8.9.3. However, Hexagon repeated the specified default in a subsequent payment cycle. Providence, the contractor, sought to terminate the contract under clause 8.9.4 the day after the repeated default.

## *Providence Building Services Limited v Hexagon Housing Association Limited*

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The core issue between the parties was whether, for a contractor to terminate the contract under clause 8.9.4, a prior right to terminate must have arisen under clause 8.9.3. Providence argued against this requirement, contending that an immediate right to terminate existed if the employer failed to make timely payments after a specified default, even if the right to termination had not previously arisen as the default was cured.

The employer, despite various complaints, repeated suspension notices and specified default notices continued to breach their fundamental obligations to pay Providence on time, but paid in the cure period.

The judge held that based on the true and proper construction of the contract, **a right to terminate under clause 8.9.3 must have accrued before the contractor could exercise the right to terminate under clause 8.9.4**. In this specific case, the judge determined that Providence had not accrued such a right under clause 8.9.3 because Hexagon had remedied the specified default before the right to termination arose.



## What about liquidated damages as an accrued right following termination of a contract?

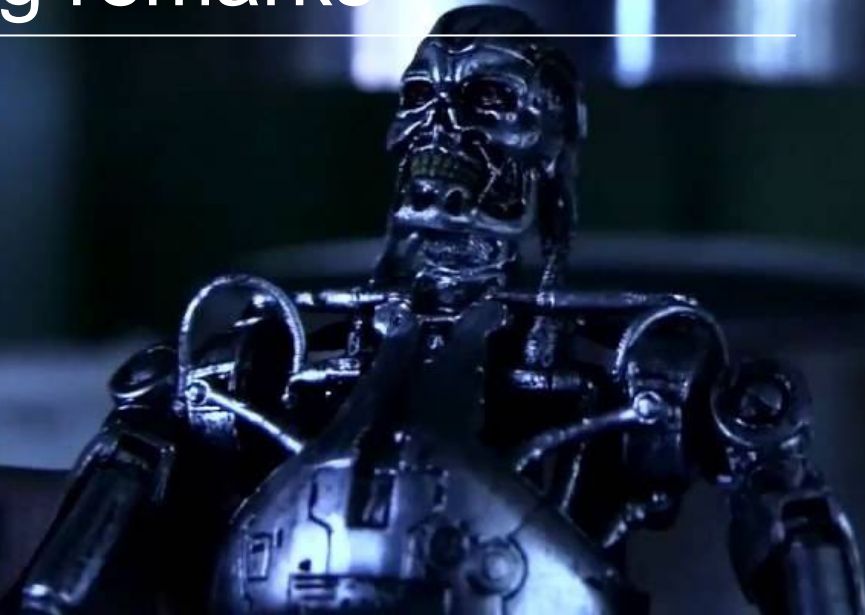
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In the UKSC case of *Triple Point Technology, Inc (Respondent) v PTT Public Company Ltd (Appellant)* [2021] UKSC 29, the SC settled the law on the application of LDs in circumstance where a contract is terminated before the works are completed. The approach taken by the Court of Appeal, which contemplated that a contractor could avoid the payment of accrued liquidated damages for an incomplete milestone in the event of termination, left many in the industry troubled. In overturning the decision of the Court of Appeal, the Supreme Court returned to an orthodox approach whereby the right to liquidated damages accrues until the termination of the contract, and thereafter general damages may be sought.

NB: Open question *EWH v MW High Tech* – what is the proper analysis for post-termination delay-related claims for general damages? Does it require critical path analysis? See *Lodge Holes Colliery Co Ltd v Wednesbury Corporation* [1908] AC 323, Lord Loreburn LC at 325 and *Hall v Van der Heiden (No.2)* [2010] EWHC 586 at 65-66. Possibly not -fight for another day...

# Closing remarks

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## Key takeaways on terminating

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When contemplating terminating either at common law or under the contract terms, it is crucial to consider the following:

- Do the necessary factual and legal circumstances arise – for contractual termination and repudiation? Check, check and check again...
- Is the timing right – has there been an affirmation of the contract?
- In choosing the contractual procedure, have you:
  - served the right notices;
  - by the right person;
  - to the right person;
  - using the right form of service;
  - within the required time period?
- Have you obtained evidence, for example from other members of the project team, a defects report, a delay analysis, meeting notes, correspondence, record photos etc.?

### **Preparation is key:**

- Where appropriate (and it nearly always will be), notify the Employer/Contractor of the issue in writing. This may be your “default notice” but be alert not to affirm!

## Key takeaways on terminating...

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- Give the employer/contractor the necessary time to correct any default or, at the very least, respond to the complaint.
- Then issue the termination notice – but be consistent with your reasons/reasoning. Proof the draft carefully before sending.

Think about the consequences of termination for your client and the project, plan Bs, do some optioneering as invariably (not always) terminating is more expensive than a defaulting contractor completing under the status quo

- Have you got a strategy lined up, e.g. an alternative contractor lined up?
- What will happen to subcontractors – novation/new appointments
- Have you got all the necessary collateral warranties?
- Who has the project insurance?
- Can you novate subbies?
- MOS?
- Can the contractor recover payment through adjudication without terminating, i.e. can he afford to continue pending payment?

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## Thank you. Questions?



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