JCT Povey Lecture, 22 November 2023 ‘The Terminator’

Simon Tolson will discuss the latest case law and developments and legal issues surrounding the termination of construction contracts …

Nobody enters into a new relationship assuming it will fail but stuff happens – Simon will be addressing some of the key detail in that ‘stuff’.

Termination for breach of contract releases the parties from their contractual obligations to perform. It is a powerful and definitive device that discharges all unperformed primary obligations under the contract yet to accrue and ends the contractual relationship, often instantaneously.

Termination of construction contracts requires great care and respect much like how one should treat a firearm and its exercise or discharge by a terminator.

Profound commercial and financial consequences for the parties can ensue. This can be acute for the defaulting party. Not only is he deprived of the benefit of the contract; in many cases, but he must also compensate the injured party in damages for losses caused by breach, possibly including the loss of the bargain. But equally getting it wrong for the ‘innocent’ party is also very dangerous.

There have been a number of important decisions from the Courts in this area since 2022 and we shall of course consider them.

JCT

Setting the standard for construction contracts

Contents

1. Introduction

The decision to terminate an agreement cannot be taken lightly.

Termination is an exceptional sanction which should only be used for fundamental breaches and violations and then only when all possible steps have been taken to avoid it.

When Courts construe termination clauses they start by looking at the consequences – they start from point that termination is a draconian remedy – which brings the contract to end with dramatic consequences - so over the years courts evolved principles of construction to mean one cannot terminate contracts by accident!

Traditional judges approach - sanctity of contracts - *pacta sunt servanda*. In the 1953 Hamlyn Lecture, *English Law and the Moral Law*, Professor Goodhart stated that " *the moral basis of contract is that the promisor has by his promise created a reasonable expectation that it will be kept.*" Generally, judges respect the sanctity of contract and the latin maxim *pacta sunt servanda* pervades - agreements must be kept.

The parties to a contract must, unless legally excused from performance, perform their respective duties under the contract.

However, termination is also a powerful self-help remedy that enables a party to get out of a bargain and mitigate the burn of costs and losses on a failing project in certain circumstances.

The exercise of the right and remedy to terminate gives rise to associated risks (of getting it wrong) requiring very careful consideration and legal advice. This paper seeks to identify the chief issues but does not claim to cover them all, it is a live dynamic running with commerce itself.

In exercising the termination option, understanding the key terms of the contract in question and necessary steps to effectuate the termination is paramount.

Hence it is a legal minefield and often referred to by lawyers as the ‘nuclear option’.

"I lost it in a legal minefield."

2. Background to the right to terminate

Termination is usually predicated on the contractor fundamentally failing to discharge its obligations to deliver the works. An employer exercising the right will usually deprive the Contractor of its entitlement to payment for the remainder of the works. As a result, disputes very often arise over whether or not a termination of this type was in accordance with the terms of the contract.

As most of this audience will know and generally speaking, all parties to a contract must precisely perform their obligations or there is a breach of contract and, as a minimum, damages can be claimed. However, as a starting point, to claim that someone else has breached *their* side of a bargain, one must have at least "substantially performed" their own obligations. For example, in *Sumpter v Hedges*[1] a builder performed £333 worth of work, but then abandoned completion of the contract. The Court of Appeal held he could not recover any money for the building left on the land.

The principal way contracts are brought to a premature end is when one party does not perform the major primary obligations on their side of the bargain. As a rule, if a breach is modest the other party must still proceed and perform his obligations, but will then be able to claim compensation, or a "secondary obligation" from the party in breach.[2] If, however, the breach is very material, i.e. a "fundamental" one or that hackneyed legal phrase goes "to the root of the contract", then the innocent party gets the right to elect to terminate his own performance for the future. The same goes where one party makes clear they have no intention of performing their side of the bargain, in an "anticipatory breach or repudiation", so the innocent party can go straight to court to claim a remedy, rather than waiting until the contract's date for performance which never arrives.[3] The test for whether a term's breach will allow for termination essentially depends on construction of the contract's terms as a whole by the court, following the same rules as for any other term.

Some in this audience may recall the 1876 case of *Bettini v Gye*[4], Blackburn J held that although an opera singer arrived 4 days late for rehearsals the opera owner was not entitled to turn the singer away, given that the contract was to last three and a half months, and only the first week of performance would be slightly affected. The opera owner could have withheld some payment to reflect his loss from the breach but should have let the show go on. The intentions of the parties revealed in the contract showed that such a breach was not so serious as to give rise to the right to terminate. As Lord Wilberforce said in *The Diana Prosperity* [5] the Court must, 'place itself in thought in the same factual matrix as that in which the parties were.'

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[1] *Sumpter v Hedges* [1898] 1 QB 673, CA. Sumpter contracted to build a house for Hedges for £565. Sumpter did work to the value of £333, received part payment and then abandoned the contract. Hedges completed the house, incorporating the work carried out by Sumpter. Sumpter sued for the difference between the money he had received and the value of his work but did not recover. It was said that:
"*there are cases in which though the plaintiff has abandoned the performance of a contract, it is possible for him to raise the inference of a new contract to pay but in order that that may be done the circumstances must be such as to give an option to the defendant to take or not to take the benefit of the work done … The mere fact that a defendant is in possession of what he cannot help keeping or even has done work upon it affords no ground for such an inference. He is not bound to keep unfinished a building which in an incomplete state would be a nuisance on his land*."

[2] Language being used in *Photo Production Ltd v Securicor Transport Ltd* [1980] UKHL

[3] See *Hochster v De La Tour* [1853] EWHC QB J72, *White and Carter (Councils) Ltd v McGregor* [1962] UKHL 5 and *The Alaskan Trader* [1984] 1 All ER 129.

[4] (1876) 1 QBD 183 is contract law case concerning the right to terminate performance of a contract.

[5] *The Diana Prosperity or Reardon Smith Line Ltd v Yngvar Hansen-Tangen and Sanko SS & Co Ltd* [1976] 1 WLR 989.

If the contract expressly deals with the matter the courts' general approach is to follow the parties' wishes. However, if a contract is silent a court must essentially make an informed choice about whether a right to terminate should exist.

The leading common law textbooks distinguished between "conditions" (major terms, which when breached confer a right to terminate) and "warranties" (minor terms, which do not). There is a third kind; an "innominate term", which is in general a vague term like citrus pulp pellets being "in good condition"[6], or a vessel having to be "seaworthy". Because such a term could be breached in both a major way (e.g. the ship capsizes) or a trivial way (e.g. a winch is missing) the court will determine whether the right to terminate arises based on how serious in fact the consequences of the breach were.

A termination for default (doing something wrong / culpable) will always require a substantive factual case to support the grounds for termination – it is not enough to simply point to a ground of termination; the terminator should be able to identify cogent evidence which supports its decision, if it cannot it is in trouble…

Termination clauses in most building contracts will set out the express grounds upon which a contract may be ended/terminated. They are also sometimes known as "break clauses" in some spheres.

In the business environment, termination clauses will invariably specify rights to bring a contract to an end for specified reasons.

The right to terminate a construction contract is a crucial aspect of any contractual relationship in the construction industry. It provides parties with a legal mechanism to end the contract under certain circumstances. To understand this right better, it is essential to explore the background, reasons, and implications associated with termination.

Given construction contracts are complex agreements that govern the rights and obligations of various parties involved in a construction project and often long-term in nature (sometimes measured in years) and involve significant financial investment, 'killing' them needs great care. That said, given the complexity and scale of such construction projects, several factors can lead to the need to terminate and the below is by no means an exhaustive list.

1.1 **Breach of Contract:** One of the primary reasons for contract termination in construction is a breach of contract. When one party fails to fulfil its contractual obligations, it can result in delays, defects, or other issues that can jeopardise the project's success. Common breaches include failure to meet project deadlines, milestone dates, sectional dates, substandard workmanship and/or design, or non-payment for work done[7].

1.2 **Insolvency:** Another critical factor leading to contract termination is the insolvency of one of the contracting parties. The construction sector has always been one of the most vulnerable to insolvency. If a contractor or subcontractor becomes financially unstable or enters insolvency proceedings, it is likely will be unable to continue work on the project. In such cases, the other party will terminate the contract to protect its interests.

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[6] *The Hansa Nord* or *Cehave NV v Bremer Handelsgesellschaft mb*H [1976] QB 44.

[7] According to the BCIS in the year to August 2023, the total number of construction firms becoming insolvent was 4,263. This was an increase of 8.3% on the 3,938 insolvencies recorded in the year to August 2022, and a 32.5% increase on the 3,218 in 2019. https://bcis.co.uk/news/construction-insolvencies-latest-news/#:~:text=In%20the%20year%20to%20August,on%20the%203%2C218%20in%202019.

1.3 **Unsatisfactory Performance:** Unsatisfactory performance by one of the parties, be it quality of work design, or culpable delay, or a mix of the same, can also often trigger termination. This might include consistent breach of quality, performance requirements, breach of health and safety regulations, environmental standards etc.

1.4 **Termination for convenience or at will:** In some instances, the parties may decide to terminate a construction contract for their own convenience, even in the absence of a breach. This might happen due to changes in project requirements, budget constraints, or other strategic or geopolitical reasons. Such terminations typically involve adherence to specific contractual provisions and often require only limited defined compensation to the terminated party.

1.5 **Force Majeure events:** Force majeure events, such as natural disasters, pandemics, or unforeseeable circumstances beyond the parties' control, can disrupt construction projects. Many construction contracts[8] include force majeure clauses that outline the procedure for handling such situations, which may include termination.

1.6 **Failure to Obtain Necessary Approvals:** Construction projects often require various approvals, permits, and licenses from regulatory authorities. If a party fails to secure these approvals, it can lead to a situation where the project cannot proceed as planned, prompting termination.

1.7 **Change in Law or change in government policy[9]:** Changes in applicable laws or regulations can significantly impact construction projects. If new laws render the project unfeasible, or necessitate substantial changes, it may lead to contract termination.

Terminating a construction contract obviously has significant implications for all parties involved. These implications may include:

Termination often involves financial consequences, such as compensation for work done to date, additional costs incurred, and potential claims for damages. The terminated party may seek compensation for lost profits or incurred expense;

Contract termination will most often lead to project delays, as a new contractor or subcontractor may need to be engaged. Delays can have cascading effects, impacting project timelines and potentially increasing costs;

Termination can give rise to disputes between the parties. Resolving these disputes may involve negotiation, mediation, arbitration, or litigation, depending on the contract's dispute resolution provisions;

If the terminated party is reinstated or replaced with a new contractor, there may be additional costs associated with re-mobilizing and reorganizing the project; and

[8] For example, Clause 2.26.14 of the JCT Design and Build Contract identifies 'force majeure' as a Relevant Event which would entitle the contractor to an extension of time and an event which would entitle either party to terminate the contract under clause 8.11.1.

[9] On 4 October 2023 PM Rushi Sunak cancelled the construction of a key section of HS2 high-speed railway, Phase 2, Birmingham to Manchester, will not now go ahead, and a new management team will take over the development of the Euston station site. Between November 2021 and October 2023, the project has been progressively cut until only the London to Handsacre and Birmingham section remained.

The parties must be aware of the legal ramifications of termination. Terminating a contract without valid grounds or failing to follow the contractually prescribed termination process can lead to legal action and liability for repudiatory breach.

Thus, the right to terminate a construction contract is a crucial safeguard in the industry, allowing parties to protect their interests and manage risks effectively. However, it must be exercised judiciously and in accordance with the contractual requirements. A standard form contract like JCT as well as well-drafted bespoke construction contracts typically include detailed termination clauses that outline the circumstances, procedures, and consequences of termination, providing clarity and guidance in the event of a dispute or termination. Effective management of termination situations is essential to minimise disruption, financial losses, and legal complications.

3. Terminating Construction Contracts - key principles and considerations in averting it

As termination is often so 'nuclear' in its effect I always caution my clients to undertake an options analysis and to brainstorm it. I will ask before terminating:

- 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.
- 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.
- Before terminating consider the alternatives to doing so - consider the options, is there a viable alternative to termination?
- 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?

So, hitting the preverbal red button should be a last resort.

Termination and replacement of a contractor is a drastic measure that often leads to significant delay to the project and a substantial increase in cost, such that it rarely improves things for the project or the purse. It should be a very last step process.

Employing a new contractor to step into the boots of the terminated contractor may seem like an attractive solution, BUT newco may also charge a mobilisation fee and will invariably add a premium to its price - even if the new contractor will do it for a lump sum but often the path ahead is cost reimbursable in nature or daywork in form. Generally, it will take many months before these costs can be recouped from the terminated contractor, if ever. By that juncture, the terminated company may have gone bust and, even if flush, it is likely to assert the costs incurred are excessive and should have been better mitigated by the employer – who can easily end up in adjudication or further proceedings.

The practical hurdle of sounding out a replacement contractor prior to termination, needs to be undertaken with extreme caution as it can in its own right cause an anticipatory breach situation if leaked to the present incumbent. Homework needs to be undertaken out of hours and off site. Obviously, no one should want to terminate before a plan b is in place. However, the general law is that you cannot omit work and give it to another party without risking being in breach under the existing contract –

probably repudiatory breach. In a termination situation this can be difficult to traverse - particularly where the market is small and there is only a few contractors from which to select.

4. What is termination?

Whilst construction projects should always aim to create a harmonious supply chain marriage and this ideal is achieved in the majority of building contracts, 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[10] JCT speak 'determined'.

Termination can be achieved under the contract or at common law.

A note of caution here regarding terminology. The terms 'termination of a contract' and 'determination of a contract' are customary shorthand for the ending of the primary obligations under the JCT and most standard form contracts in England. 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. Strictly speaking, 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.

Rights to "terminate" at common law are also 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.

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

Consequently

- forfeiture[11],
- determination,
- termination,
- renunciation,
- rescission and
- repudiation

Renunciation – is where one party expressly or by implication states that they will not perform their outstanding obligations or do so any longer. It is a repudiatory breach of contract justifying termination at common law.

[10] Pre JCT 2005.

[11] The word "forfeit" is used in different ways in different contexts. In the context of real property law, a right of forfeiture is generally understood to be synonymous with a right of re-entry under a lease. This is a proprietary right. Outside the context of real property, the word "forfeiture" is used to describe a loss of rights, say over a license or a finance agreement. However, termination under the general law, such as for repudiatory breach of contract, is not forfeiture. In the first place, it is a right that exists independently of the written terms of the contract. Forfeiture and termination for breach are not synonymous.

Rescission – whilst taken in context the different termination labels above can often be regarded as synonymous, they are not in the case of forfeiture and rescission. In my opinion, whilst 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 misrepresentation or undue influence. So is very different and is not the same as the process of terminating a contract for breach, which is prospective only.

Repudiation - also referred to as a 'repudiatory breach' of a contract, occurs when an act or omission of a party to the Contract 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. This position can come about even though the contract-breaker did its best to avoid the breach. When this 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.

Second, the innocent party may elect to treat the contract as continuing notwithstanding the breach and claim damages instead. He is then said to 'affirm' the contract. Upon affirmation, the innocent party's right to accept that particular repudiatory breach is lost unless the breach is repeated or is of a continuing nature.

Affirmation is very readily assumed if there is delay in accepting the repudiation. As the court is unlikely to order a party to perform a contractual obligation, in fact the court is more likely to award damages for the breach. Affirmation works only where the party in breach is still willing to continue performance. In construction that drawbridge often comes up early.

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 any of his obligations under the contract). For instance, in *Multiplex Construction (UK) Ltd* v. *Cleveland Bridge UK Ltd and Another*,[12] which arose from a subcontract for the design and construction of the Wembley steel arch spanning the length of the Wembley Stadium, the defendant contended that the claimant main contractor's failure to make payment amounted to a repudiatory breach, that Multiplex undervalued the steelwork by the subcontractor, and served notice to terminate the subcontract. Jackson J rejected the contention and held that it was rather Cleveland who had repudiated, by serving the notice of termination and then stopping work, and so committed a repudiatory breach.

Repudiatory breach can also occur from a breach of a condition of the contract as opposed to a breach of a warranty. In addition, persistent and casual breaches of a warranty may also constitute repudiation. For example, in *Sutcliffe* v. *Chippendale & Edmondson*[13] persistent poor quality work was treated as repudiatory having regard to the construction of the contract and all the facts and circumstances. The gravity of the breaches is such as to show that the contractor does not intend to or cannot substantially perform his obligations under the contract, it was said there:

"*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*."

[12] [2006] EWHC 1341(TCC).
[13] (1971) 18 BLR 149.

But a breach consisting of mere negligent omissions or bad workmanship where the work is substantially completed does not go to the root of the contract so as to be repudiatory in the ordinary lump-sum contract[14], nor does nonpayment of itself. But a pattern of non-payment (or underpayment) of hire with no explanation or a refusal by charterers to explain the underlying reasons may be viewed by the tribunal as a repudiation.

Two paths to glory?

By this I mean there are two bases or termination paths, one under the contract the other at common law. A contract may be terminated either under the common law or by exercising rights of termination expressly provided for in it and both can be activated and neither, both or either can succeed!

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[15]. What this means is that the party concerned may choose to bring the Contract to an end on common law grounds.

Termination thus relates to the halting of a parties' obligations to perform their primary contractual responsibilities, either under the terms of the contract, or at common law. In a construction context this usually means the obligation on a contractor to carry out works and the employer to pay for those works. However, the contract does not cease to exist and there may be contract terms which continue to operate – for example, confidentiality or dispute resolution provisions[16].

Termination under the contract and at common law

In order to depend on the contractual termination rights, exact drafting is needed in the contract. In contrast, rights to terminate under common law do not need to be stated or preserved in a contract - the contracting party has such rights if they are not expressly excluded.

It is a common law principle that contractual termination provisions will not preclude a party from terminating at common law for repudiation by the other party unless the Contract itself expressly or impliedly provides that it can only be terminated by exercise of the contractual right - see *Lockland Builders Ltd* v. *John Kim Rickwood* (1995) 77 BLR 38.

With termination at common law, supposing repudiation has really occurred, there are no special procedures to follow. A straightforward notice to the effect that the contract has been terminated for stated reasons would be sufficient. By contrast, contracts like JCT often lay down elaborate procedures

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[14] *Hoenig v Isaacs* [1952] 2 All E.R. 176, CA

[15] 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.

[16] See *Yasuda Fire & Marine Insurance Company of Europe Limited v Orion Marine Insurance Underwriting Agency Limited* [1995] QB 174. Such termination discharges both parties from future performance of their primary contractual obligations. This is not the same as discharging the contract in all respects. The contractual function of the dispute resolution clause did not involve the parties in future performance of any of their primary obligations which formed the subject or substance of their bargain.

Colman J in *Yasuda* then referred to Lord Diplock in *Photo Production Limited v Securicor Transport Limited* [1980] AC 827 where he stated that references to discharging future performance must be read as confined to primary obligations which are not merely ancillary or collateral to the subject matter of the contract, such as an arbitration clause.

to be followed. For this reason, a party who has failed, or is unable, to comply with procedures laid down in the contract may elect to bring its operation to an end by exercising their common law rights.

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

It may occur before time for performance *("anticipatory"*). The innocent party can terminate and sue immediately: *Hockster v De la Tour* (1853) 2 E&B 678.

As a matter of English common law, termination of a contract can usually be achieved by one party either accepting a common law 'repudiatory' breach, or by exercising a contractual termination right in accordance with the contract terms.

The general nature of this choice is therefore now briefly explained.

Termination at common law for repudiation

- 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.
- Otherwise known as the "*substantially the whole benefit*" test from *Hong Kong Fir v Kawasaki* [1962] 2 QB 26.
- On termination 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…!] As I say the word "determination" was used by JCT from at least 1963 and until the advent of JCT 2005 to describe contractual cessation. Since the JCT 2005 suite 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.

The table below aims to explain the differences between contractual based and common law termination. In order to rely on the contractual termination rights, specific drafting is needed in the contract. In contrast, rights to terminate under common law do not need to be stated or preserved in a contract – the contracting party has such rights if they are not specifically excluded.

Termination at common law	**Termination under the contract[17] terms**
.1 Requires a repudiatory breach – not clearly defined and Courts apply tough test	1. Requires an express contractual right to exist as set out in the relevant contractual clauses allowing termination – so greater certainty
.2 Need to demonstrate that the breach was serious/ went to the root of the contract/ deprived of the benefit intended under the contract etc	2. If allowed by the contract terms, termination for convenience may be possible- lower bar

[17] See further below on Termination under the contract**.**

.3	Possible to terminate for an 'anticipatory' repudiation if it occurs before performance is due	3.	Must adhere to contractual grounds for termination
.4	Delay in exercising the right to terminate could extinguish the right	4.	Contract may allow an opportunity for the breach to be cured before the right to termination accrues – potential cause of delay
.5	Acceptance of the repudiatory breach can be oral - but should be given in writing for clarity	5.	Strictly follow the contractual notice provisions – almost always required to be in writing
.6	Wider losses may be recoverable e.g. general damages to put the party in the position as if the contract had been performed	6.	Remedies likely to be limited to those specified in the contractual terms

5. Termination - why done and when

Remedy of last resort – is the threat enough?

Whenever a party is considering termination, care must be taken to ensure that every step is implemented correctly.

Termination clauses in contracts are typically placed toward the end of the document. This placement might be due to the fact that they signify the conclusion of a project or perhaps because termination is seen as a daunting prospect, something best kept out of sight. When termination is proposed, it often elicits a gasp of shock, and rightly so, as it represents a significant and potentially risky step. Why is it so feared? Because it involves substantial effort and can be extremely costly if executed improperly. It can be a nightmarish scenario. But is it really? Often, the nightmare has already occurred; the other party may have become insolvent or performed poorly. Termination can offer a way out of an unfavourable situation and lead to the best commercial outcome, provided it is carried out correctly.

Termination is particularly poignant in a lump sum environment when interest rights rise and rise again after historic dormancy - given the current bank interest rate (base at 5.25%) and inflationary pressures of circa 6.7% (October 2023) and the resulting escalation in the cost of supplying construction works. Some developer parties to construction contracts will be reassessing the viability of performing and possibly exiting their contracts, in particular faced with a mismatch between the price they agreed a few years ago and the higher, present day real cost of delivering the works.

Some of our clients have been reviewing termination as an option - or being threatened with it - both up and down stream, with a spike in main contractors and service providers wanting to exit their contracts. Indeed HS2 the UK's largest infrastructure had its the northern leg cancelled on 4 October 2023 (the Eastern leg to Leeds is gone too) by PM Rishi Sunak leaving just London to Birmingham already under construction.

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.

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.

For an employer considering terminating its main contractor or a contractor terminating one of its subcontractors, the most substantial consideration is likely to be how to finish the works without the party that is being terminated.

There are typically two main options.

- Appointing a new contractor or
- Stepping in to complete the works direct

Engaging a new contractor to step into the boots of the terminated contractor may appear like an attractive solution. However, it is not without its disadvantages.

Firstly, the new contractor may refuse to take full responsibility for the existing works and is unlikely to provide any warranties or security for those works.

A particular hurdle for many employers on distressed projects is that disputes will have developed between the contractor and his supply chain. By stepping into a subcontract, the employer may be accepting liability in principle at least for all the sums due to the subcontractor.

There are also problems in managing the supply chain. Unless the employer is experienced or employs a specialist construction manager, the project could plummet further out of control and the all-important O&Ms and ‘as-built’ documentation may not be properly corralled and cross checked at the end of the job.

Equally, care is also required to identify which members of the supply chain genuinely need to be retained. Replacing a labour-only subcontractor undertaking groundworks may not be controversial. Finding an alternative process subcontractor on a large plant will be difficult, if not impossible, once the project has reached a certain stage.

Termination of a contract is a critical step in any business relationship, and it should be handled with utmost care to ensure that it is done accurately, robustly, and defensibly. This process involves evaluating the work completed up to the point of termination, understanding the remaining work's value, and dealing with financial reconciliations and potential liabilities. In this discussion, we will explore the importance of accurate valuation, steps to take during termination, potential pitfalls to avoid, and how the terminated party can protect its rights and interests.

Accurate valuation of the work done to date is essential because it provides a clear picture of the value of completed work and what remains unfinished. This valuation is crucial for both parties involved in the contract. The terminating party needs to determine the additional costs of completion and any losses incurred due to termination. These sums will be set off against monies due to the contractor, leading to a financial settlement.

One critical aspect of termination is ensuring continued access to project-specific information and intellectual property held by the terminated party. This access is necessary for the non-terminated party to continue the project seamlessly. Ownership of materials and equipment should also be addressed,

ensuring a smooth transition. Additionally, the transfer of relevant insurance is vital to ensure that the site remains insured, reducing potential risks.

Understanding which rights and clauses will survive termination is crucial. Contracts are typically drafted in a way that certain provisions remain in effect even after termination. Both parties must be aware of these post-termination rights and liabilities to avoid any misunderstandings or disputes.

It is important to note that many of these considerations apply to the party on the receiving end of a termination as well. Understanding the complexities involved and being aware of one's rights, remedies, and options is essential for the terminated party to protect its interests and ensure that the terminating party does not have all the advantages.

Now, let's explore potential pitfalls in the termination process:

1 **Procedure:** Following the correct procedure is crucial when terminating a contract. The terminating party must strictly adhere to the contractual termination process. The termination notice should be clear, include references to the relevant contract clause, and be addressed to the correct recipient using the appropriate method of service. Different contracts may have different termination procedures, such as a two-stage process involving a notice of default before a termination notice. Failure to follow the procedure correctly can lead to disputes and potential damages.

2 **Election:** Parties can terminate a contract under the terms of the contract itself or at common law in the event of a repudiatory breach of contract. However, attempting to terminate using multiple grounds can be risky. If inconsistent termination rights are relied upon, a party may inadvertently waive its right to terminate by election. Careful consideration of the grounds for termination is necessary to avoid this pitfall.

3 **Cure:** The right to terminate can be lost if the defaulting party "cures" the breach before termination[18]. The breach must still exist at the time of termination. This can be complex, especially when the contract requires a notice of default and a period for rectification before termination. Clear records and evidence are essential to demonstrate that the defaulting party has not rectified the breach effectively.

4 **Affirmation:** Once a breach occurs, a party cannot act as if the contract is still binding without potentially losing its right to terminate. Even if valid grounds for termination exist, they can be lost through the parties' subsequent conduct. Therefore, parties should be cautious in their post-breach actions to preserve their termination rights.

In summary, terminating a contract is a critical and potentially complex process. Accurate valuation, careful adherence to procedures, awareness of potential pitfalls, and a clear understanding of post-termination rights and obligations are essential for both parties involved. Properly managed, termination can lead to a fair resolution of the contract and a smooth transition for the project. However, mishandling the process can result in disputes, financial losses, and legal complications. Therefore, it is imperative to approach contract termination with diligence and get advice.

[18] See *Providence Building Services Limited v Hexagon Housing Association Limited* (so far unreported).

6. Types of Termination

1 Termination for cause/default
2 Termination for Convenience or “at will”
3 Termination by Agreement
4 Impossibility of Performance/ frustration?

As we have already seen there two 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 (i.e. fundamental) breach of contract at common law.

Termination for cause is termination for a satisfactory reason, usually a reason expressly provided by the contract. Grounds could include breaches of contract, insolvency, or failure to perform.

A leading case on terminating without proper cause amounting to repudiation by an Employer is *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* [2017] EWHC 1763 (TCC) where it was held that the Employer had repudiated the contract for attempting to terminate without proper cause[19].

Termination for convenience allows a party to terminate the contract unilaterally without needing to specify a reason and at its sole discretion, in the absence of a breach. This might happen due to changes in project requirements, budget constraints, or other strategic desires and reasons. Such terminations typically involve adherence to specific contractual provisions and often require only limited compensation to the terminated party.

Termination by Agreement is what it says on the tin. When both parties, the employer and the contractor, mutually decide to end the contract before the project is completed. The terms of the settlement will vary case by case.

Failure to complete due to *impossibility of performance* or *frustration* covers such things as events which can prevent physical completion or operation of a plant and include:

- War[20], revolution, riot or civil commotion;
- Nationalisation or appropriation of the property or assets of the employer;
- Action by the host government which has the force or effect of law and prevents completion of the project;

[19] Fraser J was condemning of the approach taken to the project by ICI, holding that the reason for ordering MMT from the site was nothing to do with the quality of the welds at a paint manufacturing facility for ICI but rather a “commercial route” chosen to avoid having to pay MMT any more money. He held that there were no proper grounds for alleging repudiatory breach and this was used as a way of removing MMT from the site. The judge held that although ICI had a contractual right to terminate, they had not properly exercised it in this case. They were therefore themselves in repudiatory breach of contract which was accepted by MMT.

[20] The far-reaching control which during the period between the declaration of war and the signing of the armistice with Germany over the production, consumption, and movement of commodities brought about an unprecedented disturbance of the ordinary contract relations between producers and consumers of almost every conceivable article of commerce in the UK. A mainstay in force majeure clauses in modern contracts, the force majeure of ‘war’ has been interpreted to require a lower causation threshold in comparison to other events. Most events specified in force majeure clauses require that such an event should “prevent performance” of the contractual obligations. In comparison, the condition of “war” mostly requires that the war “materially affects” performance, not requiring the prevention of performance by the event.

- Action by the government of the employer which prevents it from continuing activities in the host country;
- Fire, flood, earthquake and other natural disasters and Acts of God.

A classic example of a contract failing to be completed due to impossibility of performance or frustration is in the context of a music concert. So if a band was contracted to perform at a rock concert on a specific date finds due to unforeseen circumstances, the lead singer suffers a serious injury and is unable to perform that is frustration. In this case two possibilities arise:

- **Impossibility of Performance**: If the contract specifies that the band must do their act with the lead singer, and there is no suitable replacement available, it becomes impossible for the band to fulfil the contract due to the singer's injury. This is plain case of impossibility of performance.

- **Frustration of Purpose**: Alternatively, if the contract allows for a substitute performer, but the band is known for its unique head banging sound and the audience primarily bought tickets to see the lead singer, the purpose of the contract (a successful concert) is frustrated. The substitution might not satisfy the expectations of the festivalgoers or the festival organizers, making the performance not worthwhile.

In either case, the contract could be considered frustrated or impossible to perform due to unforeseen events, such as the injury of a key performer.

7. It may be a statement of the obvious but these things below need addressing <u>before</u> terminating

Do you have the justification and 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 and could be repudiatory.
- 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?

What contractual steps must you pursue 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![21]

[21] Just because a party is in delay it does not mean that they were not proceeding regularly and diligently. Has the CA or Employer's Agent properly and fairly considered whether there are factors known to him/her which might justify an extension of time even though the Contractor may not have given written notice of them? In *Sindall v Solland* (2001) 80 Con. LR 152 Humphrey LLoyd QC said in the *Solland* case:

"*at this point I remind myself that, not just as a matter of law, as set out by Vinelott J. in London Borough of Merton v. Leach (1985) 32 B.L.R. 51 at pages 89-90, but as a matter of established good practice, that a person in the position of a contract administrator* [or here the Employer's Agent] *has always to consider whether there are any factors known to him which might justify an extension of time, even though the contractor may not have given written*

- 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.

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 if evidence supports them?
- 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 or one the employer hindered or delayed?

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.

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 and complete the balance of the works?
- Carefully documenting negotiations with any replacement contractor may help an employer defend the reasonableness of its completion costs and settlement terms[22].

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notice of them in accordance with a provision. This is all the more important if it is necessary to decide whether the contractor is proceeding regularly and diligently …"

and *London Borough of Merton v. Leach* (1985) 32 BLR 51 whether a Contractor is making regular and diligent progress is to be determined objectively by reference not only to the facts known or even notified to the CA/EA but also to the objective facts.

[22] *Biggin & Co Ltd v Permanite Ltd* [1951] 2 KB 314 also *Bovis Lend Lease v RD Fire Protection* (2003) 89 Con. LR 169, the Court drew from them the principle that a claimant could elect to rely upon advice given in order to establish the reasonableness of the settlement. Where legal advice is taken as to the settlement, it is prudent for the paying party to record the fact of such advice, by internal memorandum or otherwise. Likewise, it is prudent to record, by internal memorandum or otherwise, as many as possible of those factors which were weighed in the balance and which go to show the reasonableness of the settlement with the replacement contractor. It is not necessary to seek to support every term as reasonable; rather it is desirable to record that the agreement was the best that was on offer and that it was reasonable taken as a whole.

What financial security do you have available? Might that be pulled?

- Are bonds, guarantees or any other security provided by the contractor 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?

Liquidated damages would ordinarily be leviable against the contractor up to the date of termination and the Employer (or main contractor as the case may be) would thereafter 'only' be entitled to general damages (i.e. its actual losses) i.e. ones it proves every last penny of. The infamous case of *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29 had the Supreme Court answer the question about what parties are entitled to by way of liquidated damages in the event of termination of a contract. "*It is ordinarily to be expected that, unless the clause clearly provides otherwise, a liquidated damages clause will apply to any period of delay in completing the work up to, but not beyond, the date of termination of the contract."*

The issue ultimately remains a point of contractual interpretation. Confirmation that liquidated damages are likely to apply until the date of termination, unless the relevant clause clearly says otherwise, provides a much greater degree of certainty of the consequences of termination.

What do you owe the Contractor?

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

What planning 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 permissions will you have over on-site plant, equipment and MOS and any offsite?
- What 3D models, drawings, manuals, 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? Are subcontracts properly back-to-back?
- How rapidly can the replacement contractor mobilise and actually commence productive work?

Has legal advice been obtained?

- Given termination is such a harsh measure which can have significant repercussions it is imperative to ensure that you have judiciously considered your rights and obligations and that the documented record supports your actions, together with the notice to terminate, the appointment of a replacement contractor, and the recovery of the costs of completion.

8. Termination under the contract

As I have already stated above termination often takes place where circumstances arise that change the commercial landscape for one or both of the parties, to the extent that it changes what they originally bargained for. These circumstances include issues such as insolvency, serious failure to perform work and or services, or continued, even persistent, failure to pay.

Most standard forms contain express contractual provisions relating to termination. There are two main benefits to this. First, at the outset when negotiating the contract, the parties can identify risk which will alter the commercial position so fundamentally that they require a right to terminate. Secondly, when operating the termination clause, the consequences of the termination (and the type of termination) will be specified, giving parties more certainty as to the commercial and practical position after termination.

There are generally two types of termination provision: clauses that allow for termination for convenience or "at will" and clauses that allow for termination where there has been default on the part of one of the parties. In the default situation there is often a further subdivision: defaults that allow immediate termination. For example the reaching of a long stop date for delay, or aggregate liquidated damages, and defaults where notice of the default is given, and the opportunity is provided, for the default to be cured.

A circumstance that is generally included in the list of "defaults" in contract termination clauses is insolvency. There is no common law right to terminate in the event of insolvency or missed payments[23] but it counts as a significant commercial risk. Contractual termination clauses allow the parties to address this risk.

Consider that the latest Begbies Traynor Q3 *Red Flag Alert* report (1 November 2023) into British corporate health says that 5,919 construction companies are now in 'critical' financial distress and 72,257 – 20% of the total – are in the only slightly less dire 'significant' financial distress. Begbies Traynor partner Julie Palmer said: "Tens of thousands of British companies are now in financial dire straits now that the era of cheap money is firmly behind us." Such report helps explains why so many developers and house builders have stopped developments or terminated on the back of current interest rates.

Normally, the consequences of a termination for convenience and a termination for default will be different. Thus, where an employer terminates for convenience, you might have provision for the contractor to be paid its lost profit from the remainder of the contract. In a default situation this is unlikely to be the case.

Unless there are clear words to the contrary in the contract, the common law right to terminate continues to exist in parallel with the contractual right and it is open to a party to terminate on the basis of its contractual right or in the alternative at common law.

Contractual provisions are likely to allow for termination by either employer or contractor but the circumstances in which the right may be exercised will be different depending on who is exercising the right. It is not unusual for the contractor's right to terminate to be limited to insolvency or repeated failure to pay on the part of the employer, but for the employer's right to terminate to be referable to a much wider range of contractor defaults.

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

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[23] The surviving principle of legal policy is that it is a legal presumption that in the ordinary course of things a person does not suffer any loss by reason of the late payment of money. This is an artificial presumption but is justified by the fact that the usual loss is an interest loss and that compensation for this has been provided for and limited by statute, see Nicholls LJ in *President of India v Lips Maritime* [1988] A.C. 395 at 413, CA.: *"The surviving principle of legal policy is that it is a legal presumption that in the ordinary course of things a person does not suffer any loss by reason of the late payment of money. This is an artificial presumption, but is justified by the fact that the usual loss is an interest loss and that compensation for this has been provided for and limited by statute*."

- 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…

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.

Care must be taken to ensure the work to date is valued accurately, robustly and defensibly as at the planned point of termination.

Accurate valuation and recording is essential to understanding the value of works correctly performed up to the point of termination; as well as the value of work remaining still to go.

There are four main ways that termination can go awry:

(i) procedure,
(ii) election,
(iii) cure and
(iv) affirmation.

These can result in lost termination rights or void termination.

If a party claims to terminate a contract but takes the wrong procedure, it has waived its right to terminate by election. We shall look at some cases in a moment below.

If the breach has been cured by the contractor (it does happen!) or the innocent party has affirmed the contract prior to attempting to terminate the right to terminate is lost. This is because post-breach, a party cannot act inconsistently - if the contract is still binding on it without potentially losing its right to terminate. This is noteworthy as, even where there are – or were – valid grounds to terminate, those grounds can be lost as events move on and through the conduct of the parties.

In order to rely on contractual termination rights, specific drafting is always needed in the contract. JCT obvious contains this in Clause 8 of the SBC.

However, 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.

There are 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.

Most standard form construction contracts such as JCT, NEC and FIDIC, and other well-drafted bespoke contracts, contain express termination clauses for cause or fault.

It is to be noted that some contractual termination clauses operate by expressly classifying terms as conditions or warranties so as to make clear those circumstances in which the contract can be brought to an end and those which only give a right to claim damages. Some contractual provisions attempt to give rights to terminate for "*material*" or "*substantial"* or "*material breache*s", for "any" breaches (however minor) or for repeated breaches. Careful attention should be paid to the way in which the courts approach such provisions.

To briefly recap there is no hard and fast rule about what breach may give rise to an entitlement to terminate. Although it is sometimes said that the breach would need to be a substantial failure to perform, given that through the express terms of the contract the parties can agree that any term gives rise to the right to terminate under the contract. There is no general rule about what breaches are serious enough that can be really specifically formulated.

Under English law, termination for breach 'under the contract' is only permissible 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.

For an employer considering terminating its main contractor, or a contractor terminating one of its subcontractors, the most substantial consideration is likely to be how to finish the works without the party that is being terminated.

There are typically two main options: -

- Appoint a new contractor or
- Step in to complete the works direct.

Engaging a new contractor to step into the boots of the terminated contractor may appear like an attractive solution. However, it is not without its disadvantages.

Firstly, the new contractor may refuse to take full responsibility for the existing works and is unlikely to provide any warranties or security for those works.

A particular hurdle for many employers on distressed projects is that disputes will have developed between the contractor and his supply chain. By stepping into a subcontract, the employer may be accepting liability in principle at least for all sums due to the subcontractor. There are also problems in managing the supply chain. Unless the employer is experienced or employs a specialist construction manager, the project could plummet further out of control and the all-important O&Ms and 'as-built' documentation may not be properly corralled and cross checked at the end of the job**.**

Some common grounds for termination found in construction contracts include:

- material breach[24] [define it!];
- failure to regularly and diligently[25] progress the works;
- the works were being executed generally in accordance with the contract.
- refuses or neglects to comply with a direction from the Contractor requiring him to remove any work, materials or goods not in accordance with this sub-contract and by such refusal or neglect the Main contract works are materially affected
- failure to complete by a certain completion or 'longstop' date;
- insolvency – and often widely defined to enable an earlier termination that when works fully stop.
- Consistent failure by an employer to make payment
- Sometimes provision for automatic termination[26] or by agreement.
- By agreement!

[24] Whether a breach is material is a question of fact. Defined generally by the English High Court as a breach that has "a serious effect on the benefit which the innocent party would otherwise derive" see *Dalkia Utilities Services PLC v Celtech International Limited* [2006] EWHC 63 ("Dalkia"), the common denominator in every case analysis is that a material breach must be substantial.

[25] The Court of Appeal has held in respect of the identical phrase in Clause 25(1)(b) of the 1963 Form that these words require the Contractor to proceed both regularly and diligently, so that he could be dismissed from the site if he failed to do either: *"Taken together, the obligation upon the contractor is essentially to proceed continuously, industriously and efficiently with appropriate physical resources so as to progress the works steadily towards completion substantially in accordance with the contractual requirements as to time, sequence and quality of works …*". From one of my own cases, where Simon Brown LJ in W*est Faulkner Associates v London Borough of New ham* (1994) 71 B.L.R. 1 at 14.

[26] Like JCT used to provide in insolvency cases in its pre 1998 editions like sub-clause 19.4.1 and provided for the automatic termination of domestic sub-contracts. A contract can be automatically terminated in situations where there is an express term to terminate the contract on the occurrence or non-occurrence of a specified event. See *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1. Such contracts should stipulate the events giving rise to a right of termination with sufficient specificity. *New Zealand Shipping* concerned a contract for the construction of a steamer for a shipping company. It was a term of that contract that if the steamer were not completed by a certain date, the contract would become void. Lord Atkinson held that parties could include such a stipulation and it would be effective according to its terms unless circumstances brought about by a party's own acts or omissions or their negligence or wilful default.

These grounds often require a 'warning' or default notice to give the defaulting party the chance to put things right. This causes delay to termination. As a result, intolerant parties often instead go down the common law termination route – with the uncertainty and risks it has.

The other main risk with contractual termination is that the courts have repeatedly held that contractual notice and procedural requirements must be closely heeded. The consequences of not following procedures, such as on timing, format and service of notices, can be serious.

Some construction contracts even permit termination at will or convenience[27] where a party can choose to terminate for its own convenience. As with FIDIC for example, but not with JCT.

These provisions can also provide for generous demobilisation payments and even loss of profit on the balance of the works. But can also be limited to paying for work done and direct costs of demobilisation.

Termination at will, or convenience, has become increasingly common since the financial crisis of 2008-9 in my experience and it is common for employers and owners to terminate for convenience[28] even where there were robust grounds for terminating for default, simply to ensure that the Contractor leaves quickly without the involvement of local courts on international EPC projects. It is not rare in my experience, for Owners to 'buy out' a non-performing Contractor so they leave quickly and on good terms, allowing the project to be continued by others.

Standard forms contain additional rights to terminate

Most standard form construction contracts such as JCT, NEC and FIDIC, and other well-drafted bespoke contracts, contain additional rights to terminate under express termination clauses. Helpfully, these more clearly explain the circumstances and procedural requirements in relation to termination.

9. Notice Requirements to terminate under the contract

The possibility that an invalid notice could be a repudiation which is the *Hudson* 14th edition strict position[29] should be contrasted with *Eminence Property v Heaney*[30]. Eminence concerned repudiation of contracts for the sale of property in England, which were subject to English law, but has relevance to the concept of repudiation in the context of commercial contracts at large.

The buyer Heaney ("Buyer") agreed to purchase 13 flats "off plan" from a property developer Eminence Property ("Seller") for a total price of £1,470,000. Following the exchange of 13 identical contracts and payment of a deposit for the purchase of the 13 individual flats on 10 December 2007, completion should have taken place on 4 December 2008. The Buyer failed to complete. On 5 December 2008, the Seller, through solicitors, served a notice to complete in accordance with the contracts, requiring completion within 10 working days. Unfortunately for the Seller, their solicitors' letter stated: *"We calculate the final date for completion under the notice is 15th December 2008"*. This was incorrect: 10 working days from

[27] FIDIC Silver Book commonly used on international EPC contracts. Clause 15.5 provides for a Purchaser's termination for convenience at any time and without any default by the Contractor. Termination will take effect 28 days after the later of receipt by the Contractor of the Purchaser's notice to terminate or return of the Performance Security by Purchaser.

[28] See *Dalton Group Limited v City of Edinburgh Council* [2023] CSOH 4 regarding the potential limitations of loss of profit claims when a termination for convenience clause is in place.

[29] If a termination notice is issued which later transpires to be invalid, this of itself is likely to constitute a repudiatory breach upon which the other party can rely (Hudson's Building and Engineering Contracts (14th edn) at para 8-068)

[30] *Eminence Property Developments Ltd v Kevin Christopher Heaney* [2010] EWCA Civ 116.

5 December was 19 December. The solicitors had calculated the time period by reference to consecutive days and not working days.

Having failed to notice the error in their completion notices, the Seller's solicitors subsequently served notices on 17 December 2008 accepting the Buyer's failure to complete by 15 December 2008 as a repudiation. The Buyer's solicitors then wrote to the Seller's solicitors advising that the purported rescission by Sellers prior to the expiry of the completion period provided for in the contracts amounted to a repudiatory breach of contract by the Seller, which the Buyer was accepting, the Buyer thus being discharged from performance thereunder and entitled to the return of his deposit.

Issues: The question arose as to whether the seller's mistaken notices of recession constituted a repudiatory breach of contract that entitled the purchaser to terminate the contract

Decision/Outcome: The Court held that the test for repudiatory breach of contract requires an assessment of all circumstances of the contract objectively, from the view of a reasonable person in the position of the innocent party, to determine whether the breaching party has demonstrated an intention to abandon the contract. In so construing, the motive of the breaching party is a relevant circumstance, in so far as it reflects the way in which the alleged repudiatory act would have been viewed by the innocent party or a reasonable party in his/her position. Accordingly, on the facts, the Court held that it could not infer an intention by Eminence as seller to abandon the contract, particularly in light of the contractual clauses and Heaney's awareness of the mistaken date. Thus, the seller's mistaken notices of recession did not constitute a repudiatory breach that entitled the purchaser to terminate the contract.

The Seller appealed this decision to the Court of Appeal. It was argued on behalf of Seller that they could only have been in repudiatory breach if, by their conduct, they had clearly intimated an intention to abandon and altogether refuse to perform the contracts; whether that was the case should be considered objectively from the perspective of a reasonable person in the Buyer's position. The CA agreed that this was the correct test to apply and, in so doing, the Court had also to take into account all of the circumstances and the Seller's entire conduct.

In the circumstances, the Court of Appeal took the view that it was impossible to conclude that the Seller intended to abandon the contracts, rather that they were acting in a manner consistent with their wish to enforce their contractual rights.

Even if *Hudson* is right what actually is an "invalid" notice? Does any technical defect make the notice invalid? Well I do not think so. Contrast the famous "blue paper/pink paper" position in *Mannai*[31] with the "directory/mandatory" requirement debate in, among other cases, *Ener-G Holdings*[32] where the Court of Appeal upheld the less than strict first instance decision of Mr Justice Burton in *Ener-G Holdings Plc v Philip Hormell*, that a breach of warranty claim was out of time because the claimant had not complied with the contractual notice provisions. The Court of Appeal confirmed the first instance finding that the notice clause was non-exclusive, despite it providing for two specific methods of service. Accordingly other methods of service could be used. It may seem unlikely that sending a termination notice on time but by e-mail when the contract requires fax amounts to a repudiation…? Well if the contract is clear re service follow what it says on the tin.

[31] *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] UKHL 19
[32] *ENER-G Holdings Plc v. Hormell* [2012] EWCA Civ 1059

Note the ability to rely on contractual and common law termination in the same notice (as was done in the *EWH*[33] case - see paragraphs 295-299).

Note also the ability to rely on common law termination even if not mentioned in a termination notice; the *Boston Deep Sea Fishing*[34] principle – see, e.g. *Leofelis v Londsdal*[35] at para 16 where a terminating party terminates for the wrong reason, or later discovers a better ground for termination, it is entitled to retrospectively validate its termination on a different ground.

But it is important to recognise that the *Boston Deep Sea Fishing* principle is defensive only. It allows the non-breaching party to defend itself against a claim for loss of bargain damages, if brought by the breaching party.

However, perhaps there is no right to claim damages on a basis other than the one initially relied upon: see *Phones 4 U v EE*[36] at para 132? Where court found if a party terminates a contract in express and exclusive reliance on a contractual right to do so without breach by the other party, it could not then claim loss of bargain damages on the basis that it had terminated for repudiatory breach.

- Incorrectly exercising the right to terminate under the contractual notice provisions can run the risk of an invalid termination – we will look at some of the most recent cases 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.

10. Where and how should the termination notices be served?

Clause 1.7 of the JCT Forms sets out requirements for service of notices it specifies that notices should be in writing (clause 1.7.1) and per 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 if the address specified in the Contract Particulars is not current (clause 1.7.3). Clause 1.7.4 declares when sent by post, a notice should be sent by Recorded Signed For or Special Delivery.

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

[34] *Boston Deep Sea Fishing v Ansell* (1888) 39 Ch D 339 The decision of the Court of Appeal in Boston Deep Sea Fishing is a leading authority for some of the basic principles governing dismissal of an employee for gross misconduct: (1) where an employee is guilty of gross misconduct, he may be dismissed summarily, even before the end of a fixed period of employment; (2) dismissal may be justified by reliance on facts not known to the employer at the time of the dismissal, but only discovered subsequently, even after the proceedings began; and (3) the dismissed employee is not entitled to any wages or salary for the broken period of employment immediately preceding his dismissal, because his entitlement had not accrued by then.

[35] *Leofelis SA v Lonsdale Sports Ltd* [2008] EWCA Civ 640, concerning a claim brought by Leofelis for damages arising from Lonsdale's repudiatory breach of a trademark license agreement.

[36] [2021] EWCA Civ 116

Thomas Barnes & Sons Plc v Blackburn with Darwen BC makes it clear that "nothing less or different" than strict fulfilment with the requirements of clause 1.7 would suffice for the purposes of the Employer's termination notice under clause 8.4.2.

Given the severe consequences of the notice, any "non-trivial" departure from the service provisions must invalidate the notice. In the Thomas Barnes the termination notice was sent to site, as a known address where the Contractor was based, but was deemed to not be sufficient for service as the Contractor had not expressly notified the Employer notices could be sent to that address. It was held that the Employer had failed to terminate the contract in accordance with the contractual termination provisions.

Who should serve the notice?

JCT Clause 8.4.1 specifies who should serve the first default notice on the Contractor. Under the Standard Building Contract this person is the Architect or the Contract Administrator. In the Design and Build form specified person is the Employer.

In *Struthers v Davies* the TCC considered the validity of an initial default notice served on the incorrect entity. The dispute related to a RIBA Contract, but the wording of the relevant clause was substantively the same as clause 8.4.1 of the JCT SBC. The court found that termination clauses should be construed strictly and that whilst the language surrounding who serves the notice was not cast in mandatory terms, there were "*sound reasons for requiring the initial notice to come from the Contract Administrator rather than the client.*" As the initial notice had instead come from the Employer directly, both it and the ensuing attempt to terminate in reliance on the initial notice were invalid.

When should the required notices be served?

Under clause 1.7.4 of the JCT Forms a notice sent by post is deemed served on the second Business Day after the date of posting. In *Thomas Barnes v Blackburn* the Employer sent its notice of termination under clause 8.4.2 by email and by post and ejected the Contractor from site on the same day the notices were sent. The court held that the email notice was contractually ineffective (email not being an effective method of service). The notice sent by post was prima facie effective but, in accordance with the deemed service provisions in clause 1.7.4, only took effect two Business Days after posting, being two Business Days after the Employer ejected the Contractor from site!

An additional example of premature termination comes in the TCC case of *Manor Co-Living Limited v RY Construction Limited*. In this case, the Employer sought prematurely (i.e., before the expiry of 14 days specifying alleged contractor defaults under clause 8.4.1) to serve a notice under clause 8.4.2 terminating the contract and barred the Contractor from the site. The Employer's termination notice was therefore ineffective.

The consequences of the Employer getting it wrong?

The current 11th edition of *Keating on Construction Contracts,* states *"a wrongful termination by the employer or its agent normally amounts to repudiation on the part of the employer*", permitting the Contractor to terminate the contract itself and claim damages from the Employer. This was the position reached in *Manor Co-Living v RY*, where the Employer's act in baring the Contractor from site after its ineffective termination notice was found by the adjudicator in that case to be repudiatory.

In some instances, however, an invalid termination may not amount to a repudiation. In *Thomas Barnes*, the court found that the Employer's premature removal of the Contractor from site did not constitute a repudiation. The court considered a number of factors including that the Contractor had already ceased meaningful activity on site, that the Contractor was not in a position to perform further work in any event and that there was no adverse effect on the Contractor having to leave site two days early, particularly when the Contractor already knew that the Employer intended to terminate.

An Employer might also seek to rescue an ineffective termination notice by claiming that it amounted to an acceptance of a repudiation by the Contractor at common law. In both *Thomas Barnes* and *Struthers v Davies* the Contractor was found to be in such serious and significant breach at the time the failed contractual notice was served as to be in repudiatory breach and therefore, although the contractual termination failed, the notice still constituted acceptance by the Employer of the Contractor's repudiation at common law.

This finding was aided in *Thomas Barnes* by the Employer having expressly stated in its failed contractual termination notice that it was entitled to and did accept the Contractor's repudiatory breach in the alternative to its contractual termination. In the absence of such drafting, the Contractor in *Struthers v Davies* accepted that the ineffective termination notice could operate as an acceptance of a repudiatory breach. However, the opposite conclusion was reached by the adjudicator in *Manor Co-Living v RY*.

Implications

This troika[37] of cases (expanded upon below) highlight the care needed when seeking to administer the provisions dealing with termination for Contractor default under JCT Forms. The contractual process must be adhered to for each of the two notices required, ensuring that service requirements, timings and the required notifying entity are all complied with. The consequences of failing to meet these requirements can be uncertain at best and nothing short of catastrophic at worst.

Employers should ensure that any termination notice includes language which gives effect to alternative rights of termination, whether at common law or under other clauses of the contract.

11. The JCT and Notices

With respect to the JCT machinery of termination I now come to various aspects of contractual termination in the context of JCT Standard Building Contracts, 2016 Edition (SBC 2016) and JCT Design and Build Contracts, 2016 Edition (DB 2016).

SBC 2016 and DB 2016 are the most commonly used forms of building contract in the construction industry in the UK. According to The RIBA Construction Contracts and Law Report 2022[38] JCT still dominates nearly 60% of domestic contracts which is why it remains so significant[39].

It is worth noting that the 2011 editions of these contracts have almost identical termination clauses to the 2016 editions. The general rules for termination in these contracts will be highlighted, emphasising that termination does not result in the immediate termination of the entire contract. Important rights and liabilities continue even after termination.

Additionally, I should stress that unreasonable or vexatious termination notices are prohibited by these forms, and an adjudicator or court may assess the reasonableness of termination in such cases. The impact of termination on the party being terminated is a key consideration[40] in determining whether it is unreasonable.

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[37] *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)

[38] file:///C:/Users/simt/Downloads/RIBA%20Construction%20Contracts%20and%20Law%20Report%202022.pdf

[39] JCT contract suite (59%), followed by the RIBA building contracts (15%), then the NEC contracts (13%) and bespoke contracts (7%).

[40] The Court of Appeal in *JM Hill v London Borough of Camden* (1980) 18 BLR 31 considered the meaning to be given to these words "Clause 8.2.1: "Notice of Termination … shall not be given unreasonably or vexatiously…" the Employer contended that the Contractor's determination was unreasonable or vexatious because the Contractor had withdrawn a substantial proportion of his workforce from the site before the relevant Certificate became due for payment. This contention was rejected. Ormrod L.J., discussing the meaning of the term "unreasonably", said: "I imagine that it is meant to protect an Employer who is a day out of time in payment, or whose cheque is in the post,

Specific Termination Scenarios

Let's look at various scenarios that can lead to contract termination under SBC 2016 and DB 2016. Under Clause 8.4.1 of both the JCT Standard Building Contract 2016 and the JCT Design and Build form ("JCT Forms") the Employer's right to terminate for certain *specified defaults* on the part of the Contractor are set out.

Contractor Default: 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, unreasonable suspension of work, sub-contracting without consent, and failure to meet safety regulations.

Termination Due to Contractor Insolvency: The contracts allow the employer to terminate if the contractor becomes insolvent. The contractor must notify the employer of insolvency-related actions.

Contractor Corruption or Regulatory Violation: Termination can occur if the contractor is involved in corruption or violates specific regulations.

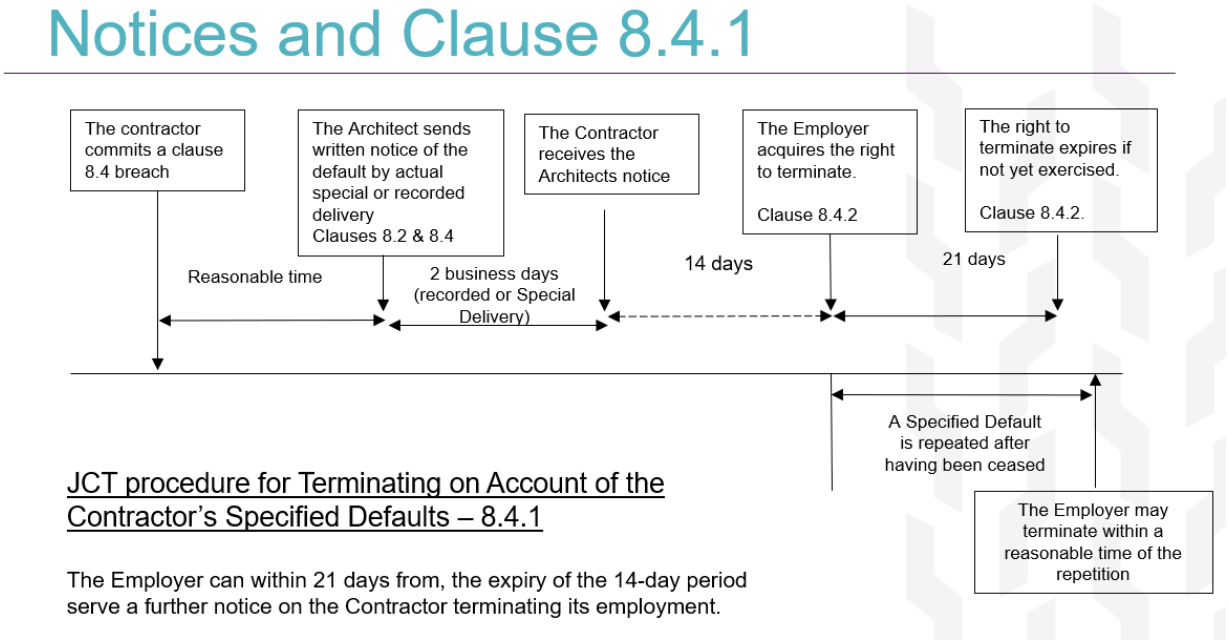
Termination due to Contractor default: Termination due to contractor default can only occur before practical completion of the work.

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 before completion without a reasonable cause (Clause 8.4.1.1); 8.4.1.1);
- Fails to proceed regularly and diligently with the works (Clause Fails to proceed regularly and diligently with the works (Clause 8.4.1.2); 8.4.1.2);
- Refuses or neglects to remove defective work after written Refuses or neglects to remove defective work after written notice and the Works are materially affected (Clause 8.4.1.3); 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).

or perhaps because the bank is closed; or there has been a delay in clearing the cheque or something … accidental or purely incidental so that the court could see that the contractor was taking advantage of the other side in circumstances in which, from a business point of view, it would be totally unfair and almost smacking of sharp practice." See too *John Jarvis v Rockdale Housing Association* (1986)36 BLR 48, CA..

Pictorially this is illustrated below.



Process for termination on default:
Note:

1 Comply strictly with notices or Employer will be in repudiatory breach e.g. *Thomas Barnes v Blackburn* (method), Struthers *v Davies* (serving entity), *Manor v RY* (when).

2 If second notice is not issued, but Contractor repeats the specified breach in notice one, Employer can terminate immediately or on reasonable notice.

Then…

Employer Default: the contractor can terminate the contract in the event of an employer default.

Employer Insolvency: Termination by the contractor due to employer insolvency under clause 8.10 of SBC 2016 and DB 2016, if the Employer is Insolvent, and is the mirror image of the Employer's right under clause 8.5.

Extended Suspension: Termination rights that can be exercised by either party following extended suspension due to force majeure or other contractual events.
Reservation of Rights: Both the employer and contractor have the right to terminate the contract under common law, which can be exercised in parallel with contractual termination.

Contractual Right to Reinstate: The contracts expressly allow for the reinstatement of a terminated contractor, though it may not be common and can be overlooked. The parties could of their own volition

enter into a contract agreeing that they would treat their building contract as having continued, despite a termination. Clause 8.3.2 of SBC 2016 and DB 2016 expressly allows for a building contract to be "reinstated".

Termination Notice, Methods, and Consequences the process and consequences of termination under JCT involves two notices – a first notice specifying the default and a second notice terminating the contract. The requirements for serving these notices and a brief summary of the consequences of getting them wrong are now explained.

WHERE should the JCT notice be served? Basic stuff but important!

- 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 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 invalidates the notice!

Then, of course, there is elective termination for insolvency, see below.

Make sure the notice is served by the right person and in right way.

In choosing the contractual procedure, check you have:

- served the right notices;
- by the right person;
- to the right person;
- using the right form of service; and
- within the required time period.

12. Insolvency of Contractor

While there will usually be a contractual right to terminate if the contractor becomes insolvent, at common law insolvency may not necessarily be sufficient to show that the contractor cannot perform its obligations. For example, the administrator may be willing and able to arrange the completion of the contract. Until 2005 a contractor's insolvency triggered an automatic termination under the JCT Standard Contract but as this was problematic the position was revised so that the contractor's employment continues in the event of insolvency, unless it is terminated by the employer.

Unlike the JCT DB 2016 form of contract the NEC Option A form of contract does not require the insolvent party to inform the other of its position, as signified under JCT DB 2016 clause 8.5.2, clause

91.1 R8 (where an administration order made against the contractor) states that the if a party has had an administration order raised against it either party may terminate.

SBC 2016 provides that if a contractor is insolvent (defined in clause 8.1) the employer may give notice at any time to terminate the contractor's employment (ditto under JCT DB 2016, clause 8.5.1); no warning notice is required but, as it is generally appropriate to have discussions with the contractor upon insolvency, such notice is unlikely to be a surprise.

Thus, termination subsequently takes effect when notice, under clause 8.5.1 and 8.10.1 (in case of contractor termination the Employer for insolvency) is given. This notice however must be in writing, as noted under clause 8.2.3.

From the onset of termination, the Contractor's obligation to carry out the works is suspended (clause 8.5.3.2 and 8.10.3 respectively). The only way for works to continue by the Contractor is by way of an agreement in the form of a novation from a third party who assumes the obligations of the insolvent Contractor or step in arrangements.

The Contractor is obligated to immediately notify the Employer if they make any proposal, give notice of any meeting or become the subject of any proceedings or appointment relating to any of the matters referred to in clause 8.1 (DB 2016, clause 8.5.2).

Clause 8.5 of JCT DB 16: -

1 If the Contractor is Insolvent, the Employer may at any time by notice to the Contractor terminate the Contractor's employment under this Contract.

2 The Contractor shall immediately notify the Employer if he makes any proposal, gives notice of any meeting or becomes the subject of any proceedings or appointment relating to any of the matters referred to in clause 8.1.

3 As from the date the Contractor becomes Insolvent, whether or not the Employer has given such notice of termination:

3.1 clauses 8.7.3 to 8.7.5 and (if relevant) clause 8.8 shall apply as if such notice had been given;

3.2 the Contractor's obligations under Article 1 and these Conditions to carry out and complete the Works shall be suspended; and

3.3 the Employer may take reasonable measures to ensure that the site, the Works and Site Materials are adequately protected and that such Site Materials are retained on site; the Contractor shall allow and shall not hinder or delay the taking of those measures.

Key points on insolvency based termination

Clause 8.5 spells out the position upon insolvency, which applies whether or not the employer has given notice of termination. This clause brings into effect clause 8.5.3 and consequentially (inter alia) 8.7.3 which means, "*no further sum shall become due to the Contractor […] other than any amount that may become due […] under clause […] and the Employer need not pay any sum that has already become due either*", where a pay less notice has been given, or the contractor has become insolvent after the last date that a pay less notice could have been given.

Those provisions (under the JCT Intermediate Building Contract with contractor's design 2011 (ICD2011)) came under Court of Appeal examination in *Wilson and Sharp Investments Ltd v Harbour View Developments* Ltd (2015) EWCA Civ 1030.

That case turned around whether the insolvency provisions applied in all situations of insolvency or just those where insolvency occurs prior to termination of the contract and those where the contract is terminated for insolvency. The point was relevant because the contractor (Harbour View) had become insolvent subsequent to termination. If such provisions did not apply where the contract had previously been terminated by the contractor, then clause 8.7.3 governing the suspension of payments would be inoperative. The Court of Appeal established that the "insolvency" provisions under clause 8.5 of ICD2011 apply, regardless as to whether the insolvency occurs prior to or after termination (and regardless as to whether termination is because of insolvency).

Also, it established that where the "employer accepts that interim payments have become due, because of a failure to serve a pay less notice, (the employer) is not prejudiced by such acceptance when it seeks to raise a serious and genuine cross claim". Insolvency, concurrently with a serious and genuine cross claim means payments on account that arise at any time, regardless of the absence of any pay less notice, can be suspended. That was the position established in *Melville Dundas Ltd v George Wimpey UK Ltd* [2007] UKHL 18. The fact that suspension of payment can apply whenever may appear surprising, but insolvency law generally prevails. Nonetheless the outcome of the *Wilson and Sharp* case whilst it may not meet with everyone's agreement it confirms JCT's intentions.

Also note: -

- Such 'act of insolvency' must meet the contractual definition of insolvency cl 8.1 - 8.3. JCT lists the events and explicitly refers to English legislation.
- If the employer does choose to terminate, the contractor has to provide the employer with all relevant documents, such as design documents, assign subcontracts if necessary, and remove plant and equipment when required.
- However, great caution must be taken if the decision to terminate the contractor's contract is implemented, as to do so before the contractor is deemed insolvent under the terms of the contract is likely to amount to a repudiatory breach of contract which could trigger significant ramifications for the employer. An error I see often.
- Indicators of insolvency are slow progress, poor attendance by subcontractors, key personnel resigning, but they are just flags.
- Do not rely on the industry grapevine! Confirmation needed from administrator / liquidator.
- Do not approach subcontractors (or pay direct).

Remember:

Must meet the contractual definition of insolvency. JCT lists the events and explicitly refers to English legislation.

Indicators of insolvency are slow progress, poor attendance by subcontractors, key personnel resigning.

Do not rely on the industry grapevine! Confirmation needed from administrator / liquidator.

Do not approach subcontractors (or pay direct), omit work, order materials etc.

Termination Consequences: The contractual consequences of termination vary depending upon the clause under which the Contractor's employment has been terminated.

Consequences of termination (JCT Clauses 8.4 to 8.6).

- As a consequence of termination, under clause 8.5 the Employer may, in accordance with Clause 8.7 employ and pay other persons to carry out and complete the Works and to make good any defects of the kind referred to in clause 2.35,
- He and they may enter upon and take possession of the site and the Works and (subject to obtaining any necessary third party consents) may use all temporary buildings, plants, tools, equipment and Site Materials for those purposes. (DB 2016, clause 8.7.1).

Clause 8.7.1 states that the Contractor shall: -

- When required in writing by the Employer to do so (but not before), remove or procure the removal from the works of any temporary buildings, plant, tools, equipment, goods and materials belonging to the Contractor or Contractor's persons.
- Provide the Employer with copies of all the Contractor's design documents then prepared, whether or not previously provided. The Employer is not charged for providing this information.
- If so, required by the Employer within 14 days of the date of termination, assign (so far as assignable and so far as he may lawfully be required to do so) to the Employer, without charge, the benefit of any agreement for the supply of materials and goods and/or for the execution of any work for the purposes of this contract.

Clause 2.3 (i.e. right to Possession) will no longer apply to the Contractor inclusive of the works.

Under clause 7.2 the employment of the main contractor is automatically determined, but may be reinstated, subject to the agreement of the liquidator.

In summary, clause 8.7 of SBC 2016 and DB 2016 addresses the consequences of the Employer's termination of the Contractor's employment under the building contract for:

- Contractor default under clause 8.4.
- Contractor insolvency under clause 8.5.
- Contractor corruption or under regulation 73(1)(b) of the PCR 2015 (under clause 8.7)

Otherwise, the consequences of many of the grounds for termination vary in gravity. For example, the effects of sub-letting without consent may vary from very trifling to disastrous, depending upon the nature of the work sub-let and the calibre of the sub-contractor. The policy in the Contract is to provide a filter in the form of Clause 8.2.1 for minor defaults for which termination, although available technically, is not to take place.

Consequences of termination on payment

Under normal circumstances the Contractor would be entitled to payment for certified sums and if there is no pay less notice from the Employer, which can be enforced through adjudication or through the courts.

However, under clause 8.7.3 no further sums become due to the Contractor under the JCT Contract other than any amount that may become due to him under clause 8.7.5 or 8.8.2 and the Employer need not pay any sum that has already become due either.

The above effect comes from *Melville Dundas Limited v George Wimpey UK Limited & Norwich Union Insurance Limited*, where the Contractor had become insolvent after the final date for interim payment of a sum due and the Employer had then exercised his contractual right to determine. In the case it was held that upon determination of the contract the interim payment was no longer applicable. The clause was not contrary to section 110 of the HGCR Act 1996 whereby payments cannot be withheld unless the correct withholding notices have been served (pre 2009 Act); and Clause 27.6.5.1[41] of JCT 98 was not subject to the notice requirements and that upon determination of the contract the interim payment was no longer payable.

Therefore, it would be construed that, where no pay less notice is given, a sum can be withheld if termination is on grounds of insolvency, due to the express provisions contained within the JCT form of contract.

What about direct payments made by employers when main contractors subbies have not been paid?

About 30 years ago direct payment clauses were in vogue particularly when nominated subcontracting existed under JCT. The law reports from back then are full of horror stories where employers got involved in costly three-way disputes. It has been clear one area where direct payment would not be possible is where the main contractor has gone into liquidation that has been since a House of Lords case in 1975 called *British Eagle Ltd v Air France*[42] that a payment in such circumstances could be seen as an attempt to give a benefit to one unsecured creditor (the subcontractor) over others. In such a case, the liquidator could still claim the money from the employer[43], leaving it in the position of having paid out twice for the same work!

Generally Employers are not entitled nor obliged to directly pay sub-contractors and should avoid being drawn into voluntarily paying sub-contractor applications or costs. No direct contractual relationship exists with domestic subcontractors, unless a collateral warranty is in place or they are nominated. A case that highlights the problems is a Commercial Court case on appeal from an arbitration under s69[44] in *Nobiskrug GmbH v Valla Yachts Ltd* [2019] EWHC 1219 (Comm).

In the complex legal dispute between Nobiskrug GmbH (“Nobiskrug”), a German shipyard, and Valla Yachts Limited (“Valla”) regarding the construction of a super yacht, the central issue revolves around payments made by Valla to subcontractors. Nobiskrug, as the main contractor, was tasked with

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[41] "*Subject to clauses 27.5.3 and 27.6.5.2 the provisions of this contract which require any further payment or any release further release of retention to the contractor shall not apply; provided that clause 27.6.5.1 shall not be construed so as to prevent the enforcement by the contractor of any rights under this contract in respect of amounts properly due to be paid by the employer to the contractor which the employer has unreasonably not paid and which, where clause 27.3.4 applies, have accrued 28 days or more before the date when under clause 27.3.4 the employer could give first notice to determine the employment of the contractor*."

[42] [1975] 1 WLR 758, HL

[43] This could be avoided following *Rayack Construction Ltd. v. Lampeter Meat Co. Ltd* in 1979 and *Re Arthur Sanders Ltd* in 1981 by the employer putting money in a separate trust account and using that account to make any required payments to the subcontractor. The reverberations of British Eagle were nevertheless such that the 1980 JCT main contract was redrafted to provide expressly for the direct payment provision to cease upon the contractor's insolvency. The employer is left with no discretion.

[44] 1996 Arbitration Act, on the basis that the Tribunal had made an error in law in its finding.

planning, executing, organizing, and project managing the works to achieve the Target Delivery Date. Under the contract, Nobiskrug was also responsible for managing subcontractors.

As the project progressed, some subcontractors issued substantial invoices for additional works, leading to threats of work stoppage and legal action. Ismotec, responsible for engineering and cabling, even initiated legal proceedings. Despite Nobiskrug's denial of responsibility for payments and its argument based on German law, Valla, fearing further disruptions, made payments to subcontractors, settling similar claims with other subcontractors. These payments, exceeding €3,500,000, were made with reservations, expressly preserving Valla's right to recover them from Nobiskrug.

Nobiskrug, relying on the absence of a direct payment clause in the contract, refused to repay these sums. Valla, unable to resolve the matter amicably, initiated arbitration proceedings. The Arbitration Tribunal, while acknowledging that Nobiskrug was not contractually obligated to repay, ruled in favour of Valla. The emphasis was placed on Valla's reservation of rights and Nobiskrug's negligent project management, which the Tribunal deemed a breach of contractual obligations.

Despite Valla's failure to prove a direct link between project management failures and subcontractor claims, the Tribunal held Nobiskrug liable. The dispute took a legal turn as Nobiskrug appealed the decision, claiming an error in law, specifically challenging the Tribunal's finding on causation.

In the subsequent court proceedings, Mr. Justice Cranston addressed the key issue of Valla's entitlement to recover payments made to subcontractors on a voluntary basis. The court held that a reservation of rights did not automatically grant recovery unless Valla could establish Nobiskrug's obligation under the contract. Recognizing Nobiskrug's management failures and unjust enrichment, the court emphasized that Nobiskrug's poor management impeded Valla's ability to assess and manage resolution effectively.

However, the court noted a gap in the analysis of unjust enrichment. The Award did not clearly establish a causal link between Nobiskrug's project management failures and additional costs incurred by subcontractors. While the Tribunal suggested damages might be awarded if causation was proven, it did not delve into specifics. Consequently, the court referred the matter back to the Tribunal for further consideration and assessment, acknowledging the complexity and lack of clarity in the initial ruling.

In summary, the legal saga between Nobiskrug and Valla revolves around disputed payments to subcontractors, with the Tribunal ruling in Valla's favour despite challenges to causation. The court's decision, while recognising Nobiskrug's failures, highlights the need for a more detailed analysis of unjust enrichment and causation, leading to a referral back to the Tribunal for further examination.

It will be hum drum to most that a mere reservation of rights was insufficient to entitle the employer to the reimbursement of direct payments. Of much greater significance, however, is the Court’s encouragement of a restitutionary claim based on the contractor’s failure to adequately manage subcontractor claims. If efficacious, such an argument would appear to avoid the need for the employer to prove that (i) the contractor had a liability to the subcontractors in respect of the amounts paid by the employer; or (ii) the contractor’s project management failings had caused or contributed to the sums claimed by the subcontractors. The capacity to make such claims would be of considerable assistance to employers finding themselves in a similar position to Valla Yachts.

The restitutionary argument however is not without problems. Such claims are usually unavailable where contractual remedies already exist. It might be said that the employer should be left to its usual remedy to sue the contractor for damages caused by a breach of any project management obligations. A restitutionary claim, if successful, may also work considerable injustice to the main contractor. Having reimbursed the employer for payments made directly to its subcontractors, it may find itself without any

ability to recover those amounts. Even if it were to afterwards show that the subcontractors' claims were invalid, it is difficult to immediately identify what cause of action would be available to it to claim for the reimbursement of the sums it had paid to the employer.

Another good illustration of the dangers of direct payments came in *Tate Building Services Ltd v B & M McHugh Ltd* [2014] EWHC 2971**,** McHugh were the main contractor to Network Rail for the renovation of the toilets at Liverpool Street station. Tate were McHugh's subcontractors, and Washroom Limited were sub-subcontractors who manufactured and installed tailor-made cubicles on site and were regarded as critical to the refurbishment. Tate got into financial trouble. McHugh therefore omitted the cubicles from the scope of Tate's subcontract works and paid Washroom £145,000 directly for them. McHugh maintained that occurred with Tate's agreement. Tate then went into a CVA and ran a referral to adjudication in respect of the full amount it considered due, including work done by Washroom but paid for directly by McHugh. Tate maintained that it had not agreed to the change in scope, and the adjudicator awarded the sum Tate sought. McHugh promptly issued proceedings to have the dispute dealt with in court. Tate counterclaimed and sought summary judgment for payment of the adjudicator's award. McHugh knew it would not succeed in resisting that, so instead asked the court to use its discretion to stay enforcement of the summary judgment order because Tate's CVA meant it may not be able to repay the adjudicator's award if it lost the substantive dispute. For the most part the stay was agreed and ordered but clearly McHugh were liable to Tate and the message is clear do not cut and snip work and give that work to another and think you avert a liability.

13. Common law termination

The laws of the relevant jurisdiction will determine whether a right to terminate a contract has arisen at law. The English law position is that where there is a repudiatory breach[45] by one party, the other party to the contract will have the right to terminate the contract under common law, by accepting this breach.

Once a party is in repudiatory breach, the innocent party has a choice: he can accept the breach and treat the contract as discharged or affirm the contract and press the party in breach to perform. Termination is not automatic.

A breach of, or threat to breach a fundamental term of the contract demonstrates an intention not to be bound by the contract's terms anymore. That gives the innocent party a choice. It can elect to carry on with the contract and claim damages. Alternatively, it can "accept" the repudiation, end the contract and claim damages. A straightforward concept, but one that poses a significant challenge.

If the party faced with a repudiatory breach elects to terminate, then it faces two significant risks. First, the purported termination will be wrongful and constitute a repudiatory breach in its own right, entitling the other party to terminate and claim damages, if the breach relied upon is not repudiatory. 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. These risks must be considered as follows.

[45] Where he threatens to, or does, breach the contract in such a way "as to show that he does not mean to accept the obligations of the contract any further" *Heyman v* Darwins [1942] A.C. 356 at 378 & 398, HL. Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations, see *Woodar v Wimpey* [1980] 1 W.L.R. 277 at 283, HL.

1 Ensuring the breach is “repudiatory”. 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. Repudiatory breaches include the contractor failing to start or abandoning site and the employer preventing the contractor from working by not giving possession or instructing another contractor. Not every breach will be sufficient. Delay is rarely a repudiatory breach by the contractor and if payment is just late sometimes then that will not be a repudiatory breach by the employer. It is always a question of fact and degree.

2 Acting quickly to terminate and avoiding any affirmation of the contract. The injured party does not have an unlimited time to decide whether to bring the contract to an end. It must act quickly or lose its right to terminate. Whilst considering its options it should not act in a way consistent with enforcing the contract, such as exercising a contractual right by calling a bond. Any such actions (such as issuing pay less notices) should be expressly “without prejudice” to the right to terminate and, additionally, all rights should be reserved pending a decision on termination.

If these challenges are overcome and the termination is effective, the parties must work out what happens next with regard to payments, securing the site, obtaining documents from the counterparty and so forth. The contract may not provide a map for navigating fallout from a common law termination.

Contractual terminations have an advantage because they tend to prescribe more, and more certain, grounds for termination and usually do clarify what happens next.

In terms of demonstrating whether a common law right to terminate has arisen, one of the reasons why termination so often goes wrong is that, unhelpfully, there is no specific definition of what amounts to a repudiatory breach. It is commonly said that 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”. Some examples of what might be considered a repudiatory breach of a construction contract include a contractor abandoning its works, or an employer preventing access to a site.

Perhaps surprisingly, a failure to pay by the employing party may not be held to be a repudiatory breach on its own, even if there is a significant delay in payment or a failure to pay more than one instalment; but multiple breaches may amount to a repudiatory breach, but when one of the breaches on its own will not. Similarly, what amounts to ‘abandonment’ of the works – rather than a temporary go-slow or one caused by the other party – may not always be evident. Such minor or even excusable breaches will usually not be enough to warrant terminating at common law.

Because there is no single definition of repudiatory breach, and establishing such a breach depends on the precise circumstances, this creates a danger that the terminating party will be held itself to have wrongfully terminated the contract, for the other side then to be able to accept.

The consequences of getting it wrong can be severe. If there is no right to terminate under common law then the party attempting to terminate could themselves be found to be in repudiatory breach of contract. This indicates they will be liable to the other party for damages – for example any ‘extra over’ cost of completing the works or the lost profit on the balance of those works wrongly taken away.

This is sometimes knife edged in the sense if you get it right you are on the side of the knife where you recover your loses; if you get it wrong you are on the other side of the knife and obligated to pay out substantial damages to the other party.

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[46].

Quantum meruit – a 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?
- See: *Lodderv Slowey* [1904] AC 442[47]

Keating on Construction Contracts has long questioned whether a contractor has an option of ignoring the contract and claiming a quantum meruit. This is on the basis of the House of Lords' reasoning in *Taylor v Motability Finance Ltd* [2004] EWHC 2619 (an employment case). Essentially the choice could result in an injustice if a contractor could claim payment for loss-making past work on a more favourable basis in circumstances where the losses were not cause by the employer's breach. The principle from this case is that a restitutionary remedy is not available if the contractual regime subsists is especially well illustrated by *Motability Finance Ltd*. It would give subjective overvaluation and should be denied because it would give the claimant a windfall beyond the expense he has incurred.

In light of *Mann & Anor v Paterson Constructions Pty Ltd* [2019] HCA 32 a decision of the Australian High Court (not binding) that held that contractual rights which have accrued under the contract up to the point of termination remain enforceable and not quantum meruit, this seems the better view.

Quantum meruit may thus only be available where work has been carried out under a contract but the right to be paid for that work has not yet accrued. The amount which may be recovered will generally be established by reference to the agreed contract price.

14. Conditions, warranties and innominate terms

As we have seen not every breach gives the innocent party the right to terminate. The breach has to be a "repudiatory breach" and that 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

[46] The defendant was the lessee of a computer under a contract of hire made with the claimant. The contract contained a term requiring punctual payment of each quarterly rental payment made 'to the essence' of the contract.

The first two instalments under the contract were made promptly, but the next three were late. The claimant terminated the contract and retook possession of the computer. The Court of Appeal held that where a contract contains a condition making time is of the essence, a party will have the right of determination if that condition is breached, irrespective of the magnitude of the other party's breach. Thus, it would appear that an employer under a construction contract containing such a term would be empowered to eject the contractor from site even if the delays are minor.

[47] The High Court of Australia has held that a contractor's claim in quantum meruit following repudiation of a contract will generally be limited to the contract price (*Mann v Paterson Constructions Pty Ltd* [2019] HCA 32). 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.

focussed on the nature of the term, but in recent years the focus has shifted towards the seriousness of the breach and its consequences.

As such, 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). 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: *Bunge Corp. v Tradax Export SA* [1981] 1WLR 711, 725 and *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, HL[48]
- Commonly includes time clauses in commercial contracts: *The Mihailis Angelos* [1971] 1 QB 164 (CA) and *The Astra* [2013] 2 All ER (Comm) 689

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][49]
- *"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

15. Recent case law on termination at common law and under contract

The following are examples of recent cases which illustrate the practical differences as to how the two operate in practice, and the outcome in situations where a party entitled to terminate under the contract fails to follow the precise contractual procedure for termination. The cases also highlight the possibility of relying on common law termination rights in parallel to attempting contractual termination.

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

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

[48] 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.

[49] A property company did not have the right to terminate a development contract even though the developer had failed to meet target dates for completion. A one-year delay in a 999-year lease did not amount to the property company being denied "substantially the whole benefit" of the lease or even "a substantial part of that benefit" so the delay was not a repudiatory breach. The property company's termination was invalid and as no repudiation by the developer said the CA.

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

It shows the practical challenges and risks faced by those that are developing these 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.

In November 2015, EWH engaged MW to build an energy-from-waste plant in Hull for £153 million, with an original completion date of 9 April 2018. The EPC contract was based on the IChemE Red Book, with bespoke amendments.

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 delay could constitute a breach. 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.

Other points of interest on liability from EWH

- Programming: failure to report the 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 the approach of Ramsey J on a similar issue in *Vivergo v Redhall Fuels* [2013] EWHC 4030 TCC at 504-512. There is a growing body of law that (deliberate) inaccurate programming is a serious business. It may well be repudiatory.
- 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. This was another biofuel plant project where before any programme was provided, Vivergo terminated the contract.

Redhall then provided the programme but was subsequently barred from the site. Ramsey J held that Redhall had been entitled to an extension of time, of 15.23 working days. That while Vivergo's request was a valid notification under the contract, Redhall had fully complied with it within 14 days; Vivergo therefore had no right to terminate the contract under the relevant clause. Nor were Redhall in repudiatory breach, and in any case Vivergo had not accepted any such breach as repudiating the contract. When does serious delay "go to the root of the contract" or "evince an intention no longer to be bound by the contract"?

… and more recent termination cases[50]

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

In this TCC case Blackburn with Darwen Borough Council (the Council) engaged Thomas Barnes & Sons plc to construct a bus station, a rather nice looking one at that.

The contract was an amended JCT SBC with quantities 2011 edition. There were significant delays and cost increases to the project. The contractor substantially suspended the carrying out of the works for a significant period.

HHJ Steven Davies robustly expressed his view on a small but important area of the JCT form concerning ***where*** notices need to be sent to comply with clause 1.7.4 of the JCT suite. Clause 1.7.4, a feature of many forms, JCT users will know it. It specifies particular methods for service of notices where the contract requires its enhanced regime, termination being one of them. It states:

"*Any notice expressly required by this Contract to be given in accordance with this clause 1.7.4 shall be delivered by hand or sent by Recorded Signed for or Special Delivery post. Where sent by post in that manner, it shall, subject to proof to the contrary, be deemed to have been received on the second Business Day after the date of posting."*

[50] I have already on subject of notice referred to the troika of cases in 2022 of: -
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).

Relevantly, the termination provisions[51] of the JCT require each notice to be given in accordance with clause 1.7.4. For instance, if notifying that the contractor is not proceeding regularly and diligently, then the default or first notice must comply with the special service requirements of clause 1.7.4. Similarly, the further notice on continued default, the one actually terminating the contractor's employment, must also obey clause 1.7.4.

In *Barnes* v *Blackburn BC*, the Council Employer had served the first notice specifying the default - and having deemed that the default had persisted – wished to serve the second notice, to terminate and to take possession of the site that day. The termination letter was sent to the registered office of Barnes registered office via Recorded Delivery and also delivered to site by hand. Following delivery of the letter, the Contractor was directed to leave site (and did). It was common ground that the deemed service of the Recorded Delivery letter had not yet occurred, but the parties differed on whether the 'By Hand' service to site was a valid notice of termination.

The Council argued that clause 1.7.4 did not specify *where* the notice had to be served (correct it does not), such that the By Hand service at site was a valid termination. The Judge strongly disagreed, explaining that the more general notice provision at clause 1.7.3 required notices to be given at the address stated in the Contract Particulars and it would be "*nonsensical*" if the otherwise stricter regime under clause 1.7.4 allowed service at any address. He found that the address for service relevant to clause 1.7.4 was an "*answer … plainly given in clause 1.7.3*".

Hence, the Judge found that the Employer had failed to terminate in accordance with the *contractual* notice provisions and held, more generally, that "*any non-trivial departure* [from clause 1.7.4] *should invalidate the notice"* of termination.

Even though the Employer Council succeeded on other repudiatory grounds, the case is a useful account of how clause 1.7.4 is intended to work and a prompt to check, check and check again when terminating construction contracts.

There were 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 8 June after Barnes were removed from site.

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

Clause 1.7.4 provides that any notice expressly required to be given in accordance with the clause shall (that is, must) be delivered by hand or sent by Recorded Signed for or Special Delivery post.

[51] Section 8 of the SBC 2016 is headed "Termination". Clause 8.2 is headed "Notices under Section 8" and states that each notice referred to in this section (that is, section 8) "shall be given in accordance with clause 1.7.4".

The fortunate thing for the Council is 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 did not 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 did not adversely affect the contractor, as the contractor had already ceased meaningful activity on the site.

The takeaways are clear from this case. 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.

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

Send the notice to the right person!

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 contractual termination 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.

It was agreed that the first defendant could not be liable for the costs of completing the works unless the contract was validly terminated. 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.

On 23 December 2015, Struthers sent a document, a Notice of Intention to Terminate, to the first defendant's home address by email and recorded delivery. At that time, the first defendant was visiting their home in France as part of his Christmas holidays. On 11 January 2016, Struthers sent a Notice of Termination by recorded delivery arriving on 12 January 2016 and sent the notice by email on the same day. The first defendant pointed out, correctly in the mind of the judge, that the contract required the contract administrator to issue the Notice of Intention, but Struthers had not done this. Without a valid Notice of Intention, no further notice to terminate can be sent.

Struthers relied on the decision of Akenhead J in *Obrascon Huarte Lain SA v. The Attorney General for Gibraltar* [2015] EWHC 1028 (TCC) where, despite a notice being sent to the incorrect address (site office, not head office), the judge had upheld the validity of the notice.

Here, the judge disagreed, noting that there were sound reasons for requiring the initial notice to come from the contract administrator rather than the client. Further, the judge was not referred to any authority where the wrong person had sent a contractual notice triggering termination where, nevertheless, the notice was held to be valid. In the *Obrascon* case, it was the address which was incorrect.

Further, the judge was not satisfied that the first defendant did receive the Notice of Intention a clear 14 days before the Termination Notice was sent to and received, as required by the contract. There was no first-hand factual evidence from Struthers to demonstrate that the Notice of Intention was, in fact, received and when.

However, that was not the end of the matter here. The judge found that the first defendant was in a repudiatory breach of contract[52] by 12 January 2016. The result of that here was that the Termination Notice could operate as an acceptance of that repudiatory breach, even though it was not a contractually valid Notice. And the first defendant was, therefore, liable for the additional reasonable costs of completing any of the works which were incomplete as of that date.

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

This is another case of premature termination but rising out of in an adjudication enforcement case on a Part 8. The question of ensuring that the right entity has served the notice came up again here. Manor served a default notice on 11 November 2021, under clause 8.4.1 of a JCT Standard Form Building Contract 2016. The notice was sent by email on 11 November 2021, and by post on 17 November 2021 (received two days later). The contract administrator then prematurely sent a notice (by letter dated 30 December 2021) but sent by email the following day terminating the contract under clause 8.4.2. Under the terms of the contract, the contract administrator was able to serve the first notice under clause 8.4.1, but the employer had to serve the second notice under clause 8.4.2, but here the contract administrator served it.

An adjudicator held that Manor had prematurely tried to terminate the contract before the 14-day period required under clause 8.4.2, so the contractual termination failed and was therefore ineffective. Manor was, therefore, in breach of contract as it had prevented the contractor from accessing the site (changed the locks) and this repudiatory breach of contract had been accepted by RY Construction.

The judgment emphasises the importance of serving a termination notice correctly. Here it failed.

- No part of the case suggested that the conduct in refusing access to the Defendant contractor itself constituted a valid communication of acceptance of a repudiatory breach (para 55). The Adjudicator had rightly rejected the contention that the Termination Letter constituted an acceptance of repudiatory breach for the purposes of a common law termination, and in these circumstances, it was unnecessary for the Adjudicator to consider the substantive question of repudiatory conduct.

- 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 not by the contract administrator. RY Construction alleged the wrongful termination itself amounted to a repudiatory breach of contract which it argued in the adjudication.

- 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

[52] Here, Struthers relied on first defendant's conduct in refusing to purchase materials for the works; using materials they had paid for on other jobs; failing to progress the works and confirming he would not and indeed could not progress the work for the Struthers until finalising other works, as together and separately being repudiatory breach of the contract.

termination defence and the letter sent by the contract administrator had not amounted to an acceptance of repudiatory breach at common law. Manor Co-Living was therefore in repudiatory breach.

Key takeaways

Termination has serious practical, legal and financial consequences – especially if it is done wrongly. Termination at common law can be quicker, but only applies to fundamental breaches. It also needs to be done quickly after such breach or the terminating party will lose that common law right by 'affirming' the contract. The options available should always be carefully considered before any steps are taken to terminate.

Contractual termination can be more certain and can apply in wider circumstances. However contractual termination usually requires prior notice, and as we see the courts require strict compliance with notice requirements and periods. Getting it wrong may put a party in repudiatory breach of a contract.

It will depend on the specific circumstances whether termination at common law or under the contract is available, and which type of termination is most advantageous. It might also be possible to rely on both methods of termination in the alternative.

Just because a right to terminate has arisen does not mean that this route has to be taken. The innocent party may prefer to continue performing the existing contract, or even re-negotiate contract terms, with the continuity advantage of the same parties finishing the project. For example, practically speaking, it may be better to 'nurse' and support a failing subcontractor through to completing their works than trying to procure an alternative and seek to recover the extra direct and delay costs down the line, whatever your strict legal rights.

Given the complexities involved in termination and its serious consequences if wrongly executed, the options available and how to execute them validly should always be carefully considered and specialist advice taken before any steps are taken to terminate a contract.

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

This is a TCC software design case for VR visualising, not construction. But important all the same, a decision of O'Farrell J.

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.

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.

Topalsson asserted against Rolls-Royce that:

- Topalsson was not in breach, as it had achieved Technical Go-Live for some deliverables and would have completed the others but for Rolls-Royce's termination; or alternatively
- there were no contractually binding delivery dates and time was not of the essence, and Rolls-Royce was partly to blame for the delays.

Rolls-Royce counterclaimed, arguing that the December Plan and subsequently the March Plan dates were contractually binding, and Topalsson was responsible for having missed them.

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

The court 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.

Takeaways

Parties should ensure that their key wants and deadlines are clearly recorded in the contract in order to avoid subsequent uncertainty and disputes arising as to whether deadlines are binding and when they have been achieved. Parties should also define and make use of contractual change control mechanisms - whether relating to scope, delivery dates or other requirements - to give clarity about the contractual status of any changes/variations agreed.

Parties seeking to terminate for repudiatory breach or based on a contractual right should, in the notice of termination, take care to rely on valid legal and factual bases to do so, or else risk being in repudiatory breach themselves. Thus, if contractual timelines or scope have been varied by agreement, failure to meet the original requirements may no longer justify termination. In addition, specific requirements for written notice as set out in the contract should be strictly observed.

***James Kemball Ltd v "K" Line (Europe) Ltd* [2022] EWHC 2239 (Comm)**

A case of “wilful, persistent or material breach” ?

In James Kemball Ltd v "K" Line (Europe) Ltd [2022] EWHC 2239 (Comm), James Kemball purported to invoke a contractual termination provision relying on the other party’s alleged wilful, persistent or material breach of a service agreement relating to acquisition of a containerised road and shipping business.

The Court found that on its true construction, the contractual termination mechanism could only be invoked if there was actual, rather than prospective (anticipatory), breach at the time the notice of termination was sent. The fact that common law termination rights may be invoked for anticipatory breach was irrelevant in circumstances where the terminating party had relied solely on the contractual mechanism and had not sought to terminate at common law.

Clear words are needed to remove a party's common law right to accept a repudiation (see Clear wording is needed to displace common law rights). The judge doubted, without deciding, that this wording was clear enough to do so:

HHJ Pelling KC considered the contractual termination triggers relied upon, namely that K-Line was in “wilful, persistent or material breach” of the Service Agreement. He rejected arguments that conduct which may amount to an anticipatory repudiatory breach came within that wording, concluding by reference to other aspects of the termination triggers that this was not intended to apply to prospective events.

The Court noted that the claimant sought to invoke the express termination machinery within the Service Agreement (SA). It did not seek to terminate the agreement relying on any common law rights that it might have had outside the four corners of the SA, therefore the Court did not need to consider what these might be.

The Court dismissed the argument that it would have been difficult or impractical to serve a notice purporting to accept a repudiation at common law as well as purporting to rely on a contractual termination mechanism. The serving of such notices without prejudice to the effect of the other was well-recognised!

Takeaway

A party should thoroughly assess the provisions of the contract to confirm that any contractual termination right relied on is exercisable given the factual matrix. This is particularly so where a contract contains several termination provisions and various possible grounds upon which to rely for termination, including (as in this case) limitations on the use of those grounds.

***Lombard North Central Plc v European Skyjets Ltd* [2022] EWHC 728**

Default on a secured loan facility: the High Court considers a lender's right to terminate.

This recent decision in *Lombard North Central Plc v European Skyjets Ltd* [2022] EWHC 728 (QB) provides some important guidance for lenders and restructuring professionals when communicating with distressed borrowers. Actions will speak louder than words whether that is in the form of a “no waiver” provision in a contract or an express reservation of rights. All this was in the context of a court considering a lender’s response to a borrower’s default on its financing arrangements.

No waiver clauses and reservation of rights statements will not be taken at face value in circumstances where they are contradicted by the parties' conduct.

Although this decision concerns the termination of a loan agreement, the issues which arise from the judgment are relevant to commercial contracts more generally. In particular, the judgment:

- highlights the dangers of relying on "no waiver" clauses and general "reservation of rights" wording, where a party's purported reliance on such provisions/wording may be found to be inconsistent with their actual conduct and behaviour towards their counterparty. In particular, parties should consider carefully how their rights may be affected by (for example) giving concessions to a counterparty that is in default and not rely too heavily on "no waiver" clauses or "reservation of rights" wording as a means through which to preserve legal rights.
- Provides a useful illustration as regards how material adverse change (MAC) clauses are interpreted by the English Courts. In particular the judgment demonstrates the importance placed by the Court on the specific words used in the MAC clause to define whether or not a MAC has occurred. In the present context, 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. The interpretation of MAC clauses is often heavily contested in litigation, specifically in relation to how the relevant "change" should be measured and whether or not a MAC has actually occurred, as illustrated in the leading English authority on MAC (*Grupo Hotelero Urvasco v Carey Value Added* [2013] EWHC 1039 (Comm) Blair J [6]) - where this firm acted for the Defendant.
- Demonstrates the importance of strict compliance with contractual notice provisions in order to ensure that any notices served are valid. The notice provisions of any contract deserve close scrutiny and parties seeking to serve contractual notices should ensure that any and all requirements stipulated within the notice provision (and the contract generally) are satisfied in full, particularly in the context of termination.

- It serves as a useful reminder that a party's right to exercise a right to terminate a contract is not subject to the Braganza duty[53] – and is an absolute contractual right, rather than a discretionary right.

This case 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 demonstrations 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 a lender following the default of a borrower, despite the lender having waived rights as to default through its conduct to rely on certain **other breaches -** which included agreeing extra time to make payments, accepting late payments, claiming interest on unpaid payments and agreeing a late payment fee.

The court found in *Lombard* that the lender had waived its right to rely on the event of 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 that appeared to be in return for not terminating. Because of that conduct, the court held that neither the "no waiver" clause in the loan agreement, nor the "no waiver statement" had any effect.

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

Jason Coppel KC (of 11KBW), sitting as a deputy High Court judge (23 June 2023)

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, see my footnote to it.

As Dinah Washington said - *What Difference a Day Makes*! *24 little hours*… Breakfast at Tiffany, a 1961 Audrey Hepburn and George Peppard etc…

[53] The *Braganza Duty* is an implied obligation (in the absence of clear language to the contrary) that qualifies the manner in which contractual provisions providing for a right to exercise some form of discretion should be exercised, requiring such exercise to be rational and in good faith.

 [54]

This case illustrates the need to make sure to leave 7 clear days between a default notice and a termination notice or otherwise the contract will be terminated on account of repudiatory breach.

Here the Contractor, entered into a JCT Minor Works Building Contract 2016 (the "Contract") with an Employer. The Employer believed that the Contractor was in breach of the Contract and served a "warning notice" in accordance with Clause 6.4.1 of the Contract, on 17 July 2023, specifying the defaults.

The provisions of Clause 6.4.2 of the Contract state that the Contractor has 7 days to remedy these breaches, or the Employer may, "on or within 10 days from expiry of the 7-day period", serve a notice terminating the Contract (the "termination notice").

The Contractor did not accept that the relevant 7-day period has expired and challenged the Employer on the legality of the termination.

According to the recent case, *Bellis v Sky House Construction Ltd*, it was not[55].

Bellis, the Claimant, raised Part 8 proceedings in the TCC against Sky House, the Defendant, to dispute the decision of the adjudicator over the termination. The Claimant, in this case, served a "warning notice" aka default notice on Wednesday, 1 September 2021 at 5:52 pm, and following the failure of the Defendant to remedy the relevant breaches, served a "termination notice" on Wednesday, 8 September 2021 at 7:20 am.

The Defendant argued at adjudication that the JCT standard form requires that the calculation of time periods specified within the Contract is based on a "clear days" approach[56], effectively excluding the day an event occurs from the calculation. Therefore, the earliest date that the termination notice could have been served was on Thursday 9 September 2021. The Defendant argued that Clause 1.4 of the Contract provided for this approach:

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[54] Copyright Truman Capote Literary Trust.

[55] See too in March 2023 in *Elements (Europe) Ltd v FK Building Ltd* [2023] EWHC 726 where Court first determined the meaning of the word 'days' within a JCT Standard Building Sub-Contract Conditions SBCSub/C 2016 Edition (which incorporated bespoke amendments). The parties settled before judgment was handed down. The Court nevertheless proceeded to hand down judgment as it concerned a point not previously the subject of judicial consideration and was considered to relate to an important element of this JCT standard form contract widely used in the construction industry. Mr Justice Constable rejected the arguments put forward by FK in relation to the inference of full or clear days and instead held the content of clause 4.6.3.1 (in respect to submission of payment applications) was to be interpreted to allow one to serve a payment application at any time on the 4th day prior to the Interim Valuation Date. As such, based on the wording of the Sub-Contract, a payment application could be made up until 23:59:59 on 21 October 2021 *so as to be received not later than 4 days prior to the Interim Valuation Date for the relevant payment*.

[56] Notices are interpreted strictly as are timings under JCT, see too JCT DB 2016: -

"Reckoning periods of days

"*Where under this Contract an act is required to be done within a specified period of days after or from a specified date, the period shall begin immediately after that date. Where the period would include a day which is a Public Holiday that day shall be excluded."*

Public holiday = Christmas Day, Good Friday or a day which under the Banking and Financial Dealings Act 1971 is a bank holiday.

"1.4 Where under this Contract an act is required to be done within a specified period of days after or from a specified date, the period shall begin immediately after that date."

The Judge agreed this argument for the subsequent reasons:

- Clause 1.4 reflects the standard line to calculating time periods for legal and court procedure, which are counted in "clear days". As an example, Clause 2.8 of the Civil Procedure Rules which defines this method as applicable to all civil procedure in England. The Companies Act 2006 also uses clear days.
- A commercial approach should be taken to the words "an act is required" at clause 1.4. Clauses 6.4.1 and 6.4.2 do not strictly specify that upon the issue of a warning notice the Contractor must "act" and rectify the relevant breaches. Failure to carry out this act would of itself constitute a breach of Contract by the Contractor; in its place, the effect of the provision is to give the Employer the right to terminate (following the issue of the warning notice and the expiry of the relevant time period). However, it is commercially sensible to interpret the rectification of the defaults as "an act [which] is required to be done" to which clause 1.4 applies, given that that the Contractor must act in order to avoid the termination of the Contract.
- The alternate method of calculation, by non-clear days, would give effect to a very burdensome provision against the Contractor. The Judge highlighted that breaches of a construction contract can be extensive and/or critical. In such instances, 7 days may already be a very short period to permit for rectification. In his judgment, to provide the Contractor with less than the stated short period would create a requirement which is too onerous as well as incompatible with the key objective of the clause, which is to grant an opportunity for rectification. This would indeed be the case in *Bellis v Sky House*, where the Contractor would have only had a "*fraction over six days*" to comply with the notice had the clear day rule at clause 1.4 not been applied.

Takeaways

An equivalent of clause 1.4 is found in most JCT standard form contracts so the decision in *Bellis v Sky House* is important in clarifying how it should be interpreted and how it applies to other provisions of the JCT contract.

In *Bellis* it was confirmed that a commercial (and so, in this case, a relatively wide) approach should be taken to the application of the provision. As a result, it is likely that the "clear day" principle will apply to most timescales specified within the JCT standard form. The Court's comments around the "clear day" approach constituting the "standard approach" may also indicate that the Courts will be inclined to adopt this approach to timescales stated within other contracts.

Nonetheless, given the limited scope of this judgement to the JCT termination provisions, an abundance of caution should be taken by all parties when complying with timescales within a construction contract.

From a Contractor's perspective, it is prudent to take a conservative approach to timescales and complete any act required under a provision well within the relevant period.

Conversely, in circumstances where a Contractor is allowed a particular period of notice before the Employer can take further action (as in *Bellis),* the Employer will want to take a more lenient approach and at the very least ensure that the relevant number of clear days has elapsed before taking any subsequent action, in order to ensure that its subsequent action is in compliance with the Contract.

Finally, in addition to their own responsibilities, parties will also want to ensure that they are familiar with the notice provisions that their counterparties are required to comply with, not only in respect of timescales, but also in respect of method of service (e.g., by hand or recorded delivery). This will help to ensure that any defence or argument around notification can be immediately recognised and raised.

Dalton Group Limited v City of Edinburgh Council **[2023] CSOH 4**[57]

This is a Scottish termination for convenience case and one regarding the potential limitations of loss of profit claims when a termination for convenience clause is in place in the contract.

Dalton had a contract to sell scrap metal collected at Edinburgh's recycling centres. A dispute arose in 2018 over contamination of the scrap with old gas canisters and Edinburgh began processing this through another company.

Dalton argued that Edinburgh wrongfully repudiated the contract and sought to recover as damages the profit it would have gained over the balance of the contract term. But Edinburgh said these should cover only three months of payments since it could have given notice at any point to terminate at will.

A dispute arose regarding the degree of contamination of the scrap being purchased – with Dalton alleging numerous incidents of hazardous gas pressurised canisters being present in the scrap.

In the Scottish Outer House (first instance), the substantial question was addressed regarding the potential limitations of loss of profit claims when a termination for convenience clause is in place. The case raised an important issue of whether a loss of profit claim could be capped by the notice period specified in a termination for convenience clause, even if the innocent party chose to affirm the contract rather than terminate it.

The backdrop to this issue is the important one that a termination for convenience clause is often included in contracts to provide a means for one party to exit the contract without cause, typically by providing advance notice. When a party terminates a contract due to the other party's default or repudiatory conduct, they usually have the right to seek compensation for the loss of the expected benefits of the contract, which often includes a loss of profits claim for the remaining term of the contract. However, complexities arise when the defaulting party has a contractual right to terminate the contract for convenience. In such cases, the question arises: Can the innocent party still claim loss of profits for the full duration of the contract, assuming the right to terminate for convenience would not have been exercised?
Previous decisions on this issue are not entirely consistent. One previous case, *Comau v Lotus Lightweigh*t, [2014] EWHC 2122 (Comm) took a strict approach, concluding that a termination for convenience clause eliminates the right to claim loss of profit. The court's rationale in Comau was that

[57] https://www.bailii.org/scot/cases/ScotCS/2023/2023_CSOH_4.html

the innocent party's "expectation interest" in the contract was limited to the profit it could have gained before any termination for convenience.

However, the TCC *in Willmott Dixon v London Borough of Hammersmith and Fulham* [2014] EWHC 3191 (TCC) took a somewhat different approach. In that case, it was decided that a factual inquiry was needed to determine whether, given the circumstances, the defaulting party would have exercised its right to terminate for convenience.

Given the Council raised a preliminary issue concerning the effect of a termination for convenience clause in the contract, arguing that damages should be limited to three months' worth of loss of profit due to its right to terminate with three months' notice, in response Dalton relied on the doctrine of election, which allows a party facing repudiatory conduct to choose between accepting the repudiation and treating the contract as terminated or affirming the contract and demanding performance.
Dalton's position was that the contract had never been terminated (whether lawfully or not), because it had not accepted the Council's wrongful repudiation.

Dalton claimed that it had affirmed the contract and remained ready to accept scrap metal. Therefore, it argued that the termination for convenience clause was irrelevant since the contract had not been terminated.

The court adhered to the principle that when calculating damages for breach of contract, the claiming party is entitled to recover damages that would put it in the position it would have been in if the defending party had fulfilled its contractual obligations. If the breach consists of wrongful termination, damages are assessed based on the assumption that the defending party would have lawfully terminated the contract. In this case, Dalton maintained that the contract had never been terminated because it had not accepted the Council's wrongful repudiation. Therefore, the court concluded that, "*in a case where the contract has not been terminated, damages do not fall to be assessed by reference to the least burdensome method of terminating the contract*."

Consequently, the Council faced a full claim for loss of profit, rather than being limited to the three-month notice period specified by the termination for convenience clause.

In conclusion, this judgment does not definitively resolve the tension between the *Comau* and *Willmott Dixon* cases. However, it offers a strategy for parties facing repudiatory conduct when the defaulting party benefits from a termination for convenience clause. By affirming the contract rather than accepting the repudiation and terminating it, the innocent party may preserve the right to make a full loss of profit claim, as seen in the Dalton Group case.

This case underscores the importance of carefully considering contractual options when dealing with contractual disputes. Parties should be aware of the potential consequences of their actions or inactions and the impact they may have on the termination of the contract and subsequent legal liabilities. It highlights the need for clear communication and adherence to contract provisions when attempting to terminate a contract early, while also avoiding actions that inadvertently affirm the contract through conduct.

In addition, the decision also provides a good example of the importance of carefully considering contractual options whenever breaking with a counterparty. It is evident from the judgment that the Council will seek to defend the balance of the proceedings on the basis that Dalton had itself repudiated the contract by wrongly refusing to accept deliveries of scrap from the Council. If that were the case,

there may have been a different outcome if the Council had notified Dalton that, in the event it was incorrect as to Dalton's repudiation, it was also terminating the contract for convenience. That would potentially have limited any claim by Dalton to the 3-month notice period provided by the termination for convenience clause.

***Providence Building Services Limited v Hexagon Housing Association Limited* (so far unreported)**

On the 7 November 2023 in an ex tempore judgment Mr Adrian Williamson KC, sitting as judge of the High Court gave an important TCC termination judgment in *Providence Building Services Limited v Hexagon Housing Association Limited* (so far unreported). It provides decisive clarification on termination provisions in the commonly used JCT Design and Build Contract 2016. The decision is significant as it sheds light on the interpretation of specific termination clauses within the contract when a contractor seeks to terminate for employer default.

The dispute involved Providence Building Services Limited ("Providence") and Hexagon ("Hexagon") over a development in Croydon for 37 flats. 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 deals with Default by Employer and the contractor's entitlement to terminate the contract for such default. The dispute revolved around the interpretation of this clause, specifically addressing the circumstances under which the contractor could terminate the contract pursuant to clause 8.9.4 where the Employer repeats a specified default.

The material facts of the case included Hexagon committing a specified default by making a late payment, subsequently remedying aka "curing" 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.

The key 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.

After hearing arguments from both parties, the judge declared that, based on the true and proper construction of the contract, a right to terminate under clause 8.9.3 must have fully accrued before the contractor could exercise the right to terminate under clause 8.9.4. In this case, the judge decided 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. Consequently, Providence's notice of termination was invalid under clause 8.9.4.

It is significant that the judge refused permission to appeal to the Court of Appeal. This decision provides clarity on an unresolved point of construction related to termination provisions in the JCT DB 2016, impacting how contractors may terminate contracts for employer default.

***C&S Associates UK Ltd v Enterprise Insurance Company plc* [2015] EWHC 3757 (Comm)**

The High Court here considered a number of issues in the case of *C&S Associates UK Ltd v Enterprise Insurance Company plc*, including the scope of the *Heisler* exception (see below, page 68) to the general rule that a party can justify termination by a new reason given later.

The general rule at common law is that a party can justify ending an agreement by relying on a new failure or breach that was not mentioned at the time of termination. However, this is subject to an exception which was laid down in the 1954 case of *Heisler v Anglo Dal Ltd*[58] which held that if the new failure being relied on was not pointed out at the time of termination and could, in fact, have been remedied, it cannot be cited as a new ground for ending the agreement.

In *C&S Associates Ltd* the High Court confirmed that a party can justify termination of an agreement by reference to a failure which it was not aware of at the time of termination. The Court also provided useful guidance on the circumstances in which a contractual right to terminate may preclude a party's common law right to terminate for repudiatory breach.

The facts

C&S Associates UK Ltd was a motor insurance claims handler for Enterprise Insurance Company plc. Enterprise desired to conduct an audit on the claims which C&S handled on its behalf, but C&S refused to deliver the files to Enterprise's external auditor. As a result, Enterprise terminated the agreement for repudiatory breach and subsequently cited C&S's poor performance as further grounds for termination.

C&S then claimed against Enterprise pursuing damages for wrongful termination arguing that:

1 Enterprise should not be able to rely on C&S's poor performance to terminate as C&S would have been able to rectify the failure had it been notified of it. This exception to the general rule was established in *Heisler v Anglo Dal Ltd* [1954] 1 WLR 1273; and

2 Enterprise should not be able to terminate for repudiatory breach because the agreement contained a clause permitting either party to terminate for material breach on 30 days' notice.

The decision

The High Court refused to accept C&S's arguments and verified that a party can justify termination of an agreement by reference to a failure of which it was not aware at the time of termination. The High Court explained that the exception to the rule established in *Heisler* only applies to anticipatory breaches or to situations where steps could have been taken by the defaulting party to avoid the breach altogether. In this case, C&S would not have been able to remedy the breach even if it had been notified of it as the date for performance had already passed.

On the second point, the High Court agreed that it is open to parties to agree that certain breaches will not amount to a repudiatory breach. However, the parties had not done so here. The agreement between Enterprise and C&S contained a clause permitting either party to terminate for *"material breach*" provided that, if the breach could be remedied, that party must give the defaulting party 30 days' notice.

C&S argued that this amounted to an agreement that *any* material breach capable of remedy could not be treated as repudiatory. The High Court rejected this argument on the basis that the clause did not

[58] [1954] 1 WLR 1273

expressly prevent a sufficiently serious breach from amounting to repudiation of the contract. Therefore, it did not extinguish Enterprise's common law right to terminate immediately for repudiatory breach.

Takeaway

This decision is a helpful reminder that a party can justify a decision to terminate by reference to a failure of which it was previously unaware. The *Heisler* exception will only apply if the other party could have taken steps to prevent the contractual breach from occurring had it received notice of the failure.

Contracting parties should consider whether they wish to exclude the right to terminate for certain repudiatory breaches or to specify a time period in which such breaches must be rectified. If so, the parties should take care to ensure that their intentions in this regard are clearly set out in the contract.

16. Other consequences of Termination

The first important point to note is that on termination (whether under a contract or at common law) the obligation to perform the main contractual duties ceases. Therefore the parties are no longer bound to provide services or make payment.

However, it is always the case that some clauses of the contract will "survive" termination. Typically, these are clauses such as jurisdiction and dispute resolution. Where a contract sets out a scheme in relation to termination then often there will be a list of clauses set out which are said to survive termination.

In addition to clauses that survive, unless the contract expressly states otherwise, the parties will retain what are known as accrued rights. This is where a breach has occurred prior to termination and a right to damages has arisen. The wronged party retains its right to claim those damages regardless of the termination.

A question has recently arisen over the ability to view the right to be paid liquidated damages as an accrued right following termination of a contract. In the recent case of *Triple Point Technology Inc v PTT Public Company Limited,*[59] the Court of Appeal held that the employer was not entitled to the liquidated damages that had accrued to the point of termination but instead was entitled to general damages for delay. This decision is currently being appealed to the Supreme Court.

In a repudiatory breach situation, the wronged party will be entitled to damages for breach of contract. In the case of a contractor this will include loss of profit due to the lost contract, and in the case of an employer this will include the "extra over" costs to complete the works (that is, the amount it costs the employer to complete the works less the amount left in the contract price which would otherwise have been paid to the original contractor).

If a party terminates wrongfully then the other party may treat the contract as repudiated at common law. Alternatively, some contracts will specify the consequences that will arise as a result of wrongful termination. For example, the IChemE Red Book (5th edition) states that where an employer wrongfully terminates for contractor default then this is not to be treated as a repudiation and instead shall be considered to be the same as if the employer had terminated for convenience.

Whilst termination may be seen as a last resort, it is an important remedy to have. Those entering into contracts should ensure that their termination provisions provide sufficient grounds for termination, spell out who has to do what in the event of termination and are clearly drafted.

Those seeking to terminate must be sure that they can prove the grounds they rely upon have arisen; understand and prepare themselves to implement the practical steps needed to secure the site, obtain documents and arrange for subcontracts to be assigned; and ensure their notices are valid and correct in content, form and delivery.

[59] [2019] EWCA Civ 230

As referred already above 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 liquated 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, where the plaintiffs were not entitled to recover the costs of restoring a road to its former level where the surface had been lowered through mining subsidence when a perfectly satisfactory road could be constructed at the new level at a much lower cost.

It was so held unreasonable to insist on precise restoration where some other solution is equally effective and serviceable.

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…where at para 76, Coulson J rejected the suggestion that the defendant's liability to pay liquidated damages came to an end when his employment under the contract was terminated. Coulson J said:

"*Any such term would reward the defendant for his own default. Take the example of a contractor who has wholly failed to comply with the contract, is in considerable delay, and is facing a notice of termination. The defendant's case would mean that such a contractor was only liable to pay liquidated damages for delay before the decision was taken to terminate, thereby penalising the employer for trying to get the works completed by another contractor, and rewarding the contractor for sitting on his hands and failing to carry out the works in accordance with the programme."*

One criticism that has been made is that the reasoning reveals a misapprehension that, in the absence of a claim under the liquidated damages clause, the claimant would have had had no claim for damages for delay:

See McKendrick E, "Liquidated Damages, Delay and the Termination of Contracts", (2019) 8 JBL 577 at 587. However, the SC in *Triple Point* did not think that Coulson J made such an elementary error. It was sure that what he had in mind was the difficulty of proving and quantifying loss caused by delay and the fact that a right to damages at the agreed rate of £700 per week in Hall was - as is often the position - patently far more advantageous to the employer than a claim for damages at common law (under which the only damages recoverable in Hall would have been a much smaller sum in storage costs). The point that Coulson J was making was that cutting off liquidated damages at the date of termination rewards the contractor for the fact that its default has led to the contract being terminated before the work has been completed by relieving it of further liability to pay damages at the agreed rate.

17. Weighing up decision to terminate – behind the scenes; when to stick or twist?

Deciding whether to terminate a construction contract in the UK is a significant and complex decision that should not be taken lightly. Termination can have legal, financial, and operational implications. Here are key factors to consider when making this decision:

Contractual Provisions: Review the contract thoroughly. Look for termination clauses, conditions, and procedures outlined in the contract. Make sure you follow the termination process specified in the contract to avoid potential legal disputes.

Breach of Contract: Determine whether the other party (usually the contractor) has breached the contract. Common breaches may include delays, quality issues, failure to meet specifications, or non-performance. Collect evidence of these breaches.

Notice and Cure Period: Check the contract for any required notice or cure periods. Typically, the contract will specify a period during which the breaching party can rectify the breach before termination. Failure to adhere to these periods can affect the legality of the termination.

Legal Advice: Consult with legal counsel who specialise in construction contracts. They can help you understand the legal implications of termination and guide you through the process to ensure you follow the law.

Cost Analysis: Calculate the financial impact of termination. This includes the cost of completing the project with a new contractor, any legal costs, and potential damages or penalties you might incur due to termination.

Documentation: Maintain thorough records of all project-related activities, including correspondence, progress reports, change orders, and issues that led to the decision to terminate. This documentation will be crucial in legal proceedings.

Performance Assessment: Assess whether the issues leading to the potential termination can be reasonably resolved through negotiation, mediation, or arbitration. Terminating the contract should be a last resort when other remedies are exhausted.

Subcontractors and Suppliers: Consider the impact on subcontractors and suppliers. If you terminate the contract, you may need to work with them directly or include them in negotiations for project completion.

Project Completion Plan: Develop a plan for completing the project if you decide to terminate the contract. This includes finding a new contractor, ensuring a smooth transition, and setting clear expectations for the project's completion.

Insurance and Bonds: Check if there are any performance bonds or insurance policies in place that can help cover costs associated with contract termination.

Stakeholder Communication: Communicate your decision with all relevant stakeholders, including project owners, lenders, investors, and regulatory authorities.

Dispute Resolution: Be prepared for potential disputes or legal challenges. Understand the dispute resolution mechanisms outlined in the contract and be ready to engage in negotiations or legal action if necessary.

Regulatory Compliance: Ensure that the termination process complies with all relevant regulations, such as planning permissions and environmental requirements.

Long-Term Relationship: Consider the potential impact of termination on your long-term relationship with the contractor. If the relationship can be salvaged, it may be worthwhile to explore options beyond termination.

18. Why reaching for trigger can backfire and must not be done unreasonably or vexatiously

The potential issues and challenges related to terminating a construction contract in the UK are largely consistent with the factors to considered above when deciding whether to terminate.

A concise summary of the key points to address are these:

1 Legal Disputes: Terminating without proper justification or procedure can lead to costly legal disputes.

2 Breach of Contract Claims: The contractor may counterclaim for breach if the termination is not justified or if notice and cure periods are not followed. Where a party terminates wrongfully then the other party may treat the contract as repudiated at common law. Alternatively, some contracts will specify the consequences that will arise as a result of wrongful termination.

3 Cost Overruns: Completion costs with a new contractor may exceed the budget.

4 Delays: Transitioning to a new contractor can cause project delays.

5 Reputation Damage: Termination can harm your reputation in the industry.

6 Impact on Subcontractors and Suppliers: Subcontractors and suppliers may face financial losses and delays.

7 Regulatory Issues: Non-compliance with regulations can lead to legal problems.

8 Unresolved Issues: Termination may not resolve all project-related problems.

9 Incomplete Work: The terminated contractor may leave behind unfinished work.

10 Financing Impact: Termination can affect loan agreements and financing.

11 Difficulty Finding a Replacement Contractor: Finding a new contractor may be challenging.

12 Damage to Relationships: Termination can strain relationships with various stakeholders.

13 Insurance and Bond Implications:

14 Termination can trigger claims on bonds and insurance.

These are the critical issues to be aware of when contemplating the termination of a construction contract in the UK. It is important to understand the potential risks and take appropriate measures to mitigate them.

If you terminate for the wrong reasons, you can find yourself having to pay a contractor's lost profits or an employer's additional completion costs and a contractor's *wrongful suspension* can lead to an employer terminating the contract altogether.

But a question often asked is should the mistake be genuine one, will attempts to suspend or terminate always give the other party the upper hand?

In *Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ 1168, the court addressed this issue in the context of a property purchase transaction. The vendor gave a notice to complete the purchase making the time for completion of the essence of the sale contract, and then, mistakenly, treated the contract as at an end prior to the expiry of that notice itself in repudiatory breach thereby entitling the other party to terminate the contract.

The purchaser was reluctant to complete as the market had fallen and he thought he saw a golden opportunity to get out of the transaction. He said that the incorrect notice was repudiatory and asked for his deposit back.

The Court of Appeal in Eminence decided that it was not. By holding that an innocent mistake made by a party in its grounds for declaring the sale contracts to be at an end was not a repudiatory breach of contract because it did not demonstrate a clear intention by that party to abandon the contracts and/or refuse altogether to perform them. By this decision the Court of Appeal has brought some comfort to those of us who find the whole area of repudiatory breach of contract a potential minefield.

The Court of Appeal went back to the 1980 case of *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* 1 WLR 277, HL (which indicates that all the circumstances of the "repudiation" need to be looked at, it was said in that case that "a party who takes action relying simply on the terms of the contract, and not manifesting by his conduct an ulterior intention to abandon it, is not to be taken as repudiating it".) and concluded that, in this case, the vendor was simply trying to enforce his rights rather than act inconsistently with his obligations under the agreement. He remained willing to complete. Therefore, he did not commit a repudiatory breach of contract.

How might this operate in the construction field?

A clear example is when a notice to terminate or notice to suspend is given too early. If, when the mistake is pointed out, the giver of the notice, accepts that it was wrong, and agrees to continue to perform its obligations under the contract, then *Eminence v Heaney* signifies that it may be able to avoid the dangers of repudiation. Indeed, in *Mayhaven v Bothma*[60], the TCC came to a similar conclusion in the case of an incorrectly given suspension notice.

However, where some act inconsistent with the continuing performance of contractual obligations has taken place, the position may be different. For example, the employer may have refused to pay the contractor or even acted to shut out the contractor from the site. Alternatively, the contractor may have walked off site.

In such a situation, these are more likely to be regarded as defining acts of repudiation and if they rest upon a notice incorrectly given or a stance incorrectly taken, the court is more likely to find that repudiation has occurred. Obviously, it would be better if a correct notice had been given in the first place but *Eminence v Heaney* and *Mayhaven v Bothma* both indicate that all is not lost and the position can sometimes be retrieved.

Then there is the issue of being unreasonable or vexatious in pursuing a termination.

[60] *Bothma and another (t/a DAB Builders) v Mayhaven Healthcare Ltd* [2010] BLR 154

As is well known under JCT contracts both the 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.

The most significant point taken by Reinwood in relation to the validity of a notice of determination was that the notice was given "unreasonably or vexatiously" within the meaning of clause JCT 98 PXQ 28.2.5. Having considered the authorities, HHJ Gilliland QC then went on to give the following six propositions[61] derived from those authorities.

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."

Consequently, in giving a notice of determination under clause 28.2.4 (JCT 98 in that case), the contractor in the Judge's view is fully entitled to have regard to his own commercial interest. On the facts here, there were grounds for the contractor, Brown, to believe that Reinwood was seeking unduly to influence the conduct of the quantity surveyors and of the architect in its favour and against Brown.

The Judge accepted that the effect of determination on the employer may be a relevant consideration. These effects include that, the employer loses any right it has to require the contractor to carry out remedial works. However, on the other hand, the contractor is only entitled to payment for work properly carried out. Further what is in substance a final account is accelerated and this could have cash flow consequences for an employer. Here, there was no evidence to indicate that Reinwood would suffer

[61] Gilliland's decision was overturned by the Court of Appeal in June 2007 - [2007] EWCA CIV 601. However, in their judgment, the Court of Appeal made no reference to the six propositions described above.

any financial difficulties as a result of the determination of the contract by Brown or that Brown was aware that it might cause financial difficulties for Reinwood.

The current equivalent in JCT 16 is clause 8.2.1. As always Contractors can more easily dispute the validity of the first default notice and/or argue it was issued unreasonably or even vexatiously if the initial notice is a bare allegation.

In the case of *Lubenham Fidelities & Investments Company Ltd v South Pembrokeshire District Council* (1986) 33 BLR 39 Judge Newey QC stated that the fact that parties are negotiating at the time of service of the notice "might well make the service of it unreasonable".

It has been held that the test of reasonableness was that of a reasonable contractor, circumstanced in all respects as was the contractor at the time when he gave the notice to determine.

"Vexatiously" connotes an ulterior motive to oppress, harass or annoy[62]. Where a contract entitled the employer to terminate the contractor's employment for "breach of any of its obligations under the Contract", it was held that such a clause could only be relied upon where the breach was repudiatory in character or there was an accumulation of breaches that could properly be described as repudiatory[63].

19. What of a defect in the termination process and The *Heisler* exception

Getting termination wrong can be a very costly business. A wrongful termination will be regarded in most common law jurisdictions as a repudiation, leading to liability to the terminated party in damages. If the Employer gets it wrong, it will be liable for the Contractor's loss of profit and other damages; if the Contractor gets it wrong, it will be liable at least for the Employer's extra over completion cost.

What does getting it wrong mean? Of course, if the termination purports to be in accordance with the terms of a construction contract termination provision, such as FIDIC's Clauses 15 and 16, the most serious error is to rely on grounds that are held by the dispute adjudication board (DAB) or arbitrator not to exist. For example, the arbitrator may find that there were reasonable excuses for the delay, under Clause 15.2(c).

Errors in the substance or form of the termination notice are common. The question is whether such errors are fatal to the termination, leading to repudiation or whether a valid termination can still be achieved.

- 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.

[62] *John Jarvis v Rockdale Housing Association* (1986) 36 B.L.R. 48 at 68, CA.
[63] *Rice v Great Yarmouth Borough Council* [2003] T.C.L.R. 1, CA.

- 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.

Form

Referring to form first, most contracts detail how a notice is to be given. JCT and FIDIC contracts normally require notices to be written and to identify an address, a means of communication and to whom copies should be sent. Sometimes, the notice needs to call itself a notice or identify the clause under which notice is being given.[64]

It has been said that as termination is an extreme step, particularly where the contractual grounds are ones that would not amount to repudiation under the general common law, then precise compliance with the contract must be heeded.[65]

Repudiation is a severe or 'fundamental' breach of contract, equated to ripping up the contract or showing an intention no longer to be bound by it.[66] Under English law, for example, a single non-payment by the Employer is not regarded as a repudiation. Some tribunals have held that if a party wants to avail themselves of such a right of termination that would not exist in the general law, then strict compliance with form is required.

However, in the Gibraltar airport case of Akenhead J,[67] Akenhead held that the delivery of the notice of termination to the site office rather than the specified head office of the contractor was not an indispensable requirement of either FIDIC Yellow Book Clause 15.2 or Clause 1.3:

- the project manager was based at the site office;
- the site office had been used for receipt and sending of communications in practice; and
- the notice was received by Obrascón Huarte Lain (OHL) on the day it was sent and its contents were immediately passed on to the senior directorate.

It therefore appears that there is under some contracts a little leeway in that courts and arbitrators may take a common-sense approach to non-compliance where the breach is *de minimis* or where it has had no prejudicial effect on the other party.

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[64] FIDIC 2017 contracts define a Notice as: '"Notice" means a written communication identified as a Notice and issued in accordance with Sub-Clause 1.3 [Notices and Other Communications]'.

[65] Akenhead J in *Obrascon Huarte Lain SA v Attorney General for Gibraltar* [2014] EWHC 1028 (TCC): 'Termination of the parties' relationship under the terms of such contracts is serious step. There needs to be substantive compliance with the contractual provisions to achieve an effective contractual termination… Generally, where notice has to be given to effect termination, it needs to be in sufficiently clear terms to communicate to the recipient clearly the decision to exercise the contractual right to terminate.'

[66] Language reflected in FIDIC 1999 Clause 15.2 in the ground 'abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract'.

[67] *Obrascon Huarte Lain v A-G for Gibraltar* (2015) BLR 521.

Substance

If the aim of the notice is to give the defaulting party a final opportunity to rectify the default on pain of termination, then reason suggests that the default has to be stated. Similarly, if the notice is a 'show-cause' type notice inviting the defaulting party to explain why the contract should not be terminated, the ground for termination would have to be set out.

Fascinating questions arise where a party learns of a ground for termination only after having terminated on a different basis. This may be due to the finding of facts or the taking of legal advice. The question is most keen where the ground notified is wrongful but the discovered ground would have warranted termination.

At common law, a terminating party is not liable for ending the contract when the other party was in repudiatory breach, whether or not the terminating party knew it at the time – again in *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339 (employer successfully defended a claim for wrongful dismissal on the grounds of breaches by the employee not known to the employer at the time of termination).

Facts known but not cited at the time may also be relied on later – see *Reinwood Ltd v L Brown & Sons Ltd* [2008] EWCA Civ 1090[68]. A party who is alleged to have repudiated a contract can thus subsequently rely on any defence notwithstanding that at the time of the alleged repudiation he gave other or no reasons by way of excuse,[69] unless either had the reason been put forward at the time the party in breach could have rectified matters- the so called *Heisler exception*[70]. From *Heisler v Anglo-Dal Ltd* [1954][71] which is the legal authority that a party should not be able to rely on the breaching party's poor performance to terminate where party in breach would have been able to rectify the failure had it been notified of it. This exception to the general rule was established in Heisler.

Or the innocent party to the breach is estopped by his conduct or otherwise and the other party's reliance thereon from relying upon a reason different from that which he gave at the time of the alleged repudiation[72]

However, each case must be considered on its facts. A party cannot raise new reasons to justify a termination if:

- the breach could have been put right, if it had been brought to the other party's attention in time and *Heisler*; and
- the party wishing to terminate has waived its right to rely on the breach or is estopped from doing so (usually when a party knows of a breach but does not act on it) as in

[68] In respect of the content of the notice, it is advisable to refer specifically to the clauses of the contract as well as their content when drafting notices, as although a purposive interpretation will be given to notices, a reasonable recipient of the notice must be left in no doubt as to its meaning (see *Reinwood Ltd v L Brown & Sons Ltd* [2008] UKHL 12).

[69] *Taylor v Oakes Roncoroni* (1922) L.T. 267; *British and Benington*s *v North Western Cachar Tea* [1923] A.C. 48 at 71, HL*; Scammell v Ouston* [1941] A.C. 251 at 268, HL; *The Mihalis Angelos* [1971] 1 Q.B. 164 at 195, CA; *Scandinavian Trading v Zodiac Petroleum* [1981] 1 Lloyd's Rep. 81 .

[70] The *Heisler* qualification or exception concerned *'anticipatory breaches or, to the extent that this is different, to situations where if the point had been taken, steps could have been taken to avoid the party being in breach altogether, either by giving it an opportunity to perform its obligation in time or by enabling it to perform in some other valid way'*.

[71] 1 W.L.R. 1273 at 1278, CA

[72] *Glencore Grain Rotterdam BV v Lebanese Organisation for International* Commerce [1997] 4 All E.R. 514, CA considering and explaining *Panchaud Freres SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep. 53 , CA. For determination under the Standard Form of Building Contract, see Clauses 8.4 and 8.9.

– Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce ('Lorico') [1997] EWCA Civ 1958.

Termination is a hazardous business. My advice to clients is always: to take great concern with both form and substance.

20. The attitude of Judges / Technology and Construction Court

Lord Sumption once said[73] "*Judges are fond of speculating about the motives and practices of businessmen in drafting contracts. It is a luxurious occupation. The rules of admissibility protect them from the uncomfortable experience of being confronted by actual fact*".

But as litigants we often bring difficult cases and the area of termination is one of them.

Termination for breach of contract releases the parties from their contractual obligations to perform. It is as I have been at pains to spell out in this paper a powerful and definitive device that discharges all unperformed primary obligations under the contract yet to accrue and ends the contractual relationship, often instantaneously. Significant commercial and financial consequences for the parties may ensue. This can be acute for the defaulting promisor. Not only is he deprived of the benefit of the contract; in many cases, he must also compensate the injured promisee in damages for losses caused by breach, possibly including the loss of the bargain. With the aim of avoiding at least some of these consequences, the defaulting party often wishes to resist the other exercising his right to terminate.

Recourse to the court may be necessary for a determination as to whether the contract was terminated effectively. The court might also be required to decide the consequences of termination and, in particular, resolve competing claims to compensatory damages.

The practical effect of the high threshold facing the injured party wishing to terminate is that the interests of the defaulting party are largely protected at this stage rather than when the right to terminate has arisen.

We must all bear in mind that under English law there is no general entitlement to a grace period The court does not have a general power to grant a period of grace to a defaulting promisor in repudiatory breach. Where time is of the essence and the defaulter does not perform by the due date, the injured party's right to terminate arises immediately. The promisor cannot apply to the court for or require from the promisee an extension in time.

One judicial justification for the strict enforcement of time stipulations is the desire for commercial certainty. Lord Hoffman once justified the decision on the ground of commercial certainty and said[74],

'…*in many forms of transaction, it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced'*

In the same vein, where the performance rendered by the promisee does not comply with the contract and the breach is repudiatory, the promisor cannot require the promisee to grant him an opportunity to cure the breach before exercising the right to terminate.

There is no entitlement to a 'second chance' to perform. Instead, the promisee can terminate the contract and reject any further tenders that the promisor might make. As is explained in Chitty[75], 'English law

[73] Harris Society Annual Lecture, Keble College, Oxford Lord Sumption 8 May 2017
[74] In *Union Eagle Ltd v Golden Achievement Ltd* [1997] UKPC 5
[75] Chitty (n 5) at [24-002]

does not permit a contracting party unilaterally to cure a repudiatory breach once it has been committed … the choice whether to affirm or not is the choice of the injured party. It cannot be taken from him by the party in breach making an offer of amends'.

The defaulting party is also unable to challenge the decision of the injured promisee to exercise a common law right to terminate as not having been made in good faith. The right is not subject to any general requirement of good faith or fairness.

Where the promisee has a contractual right to terminate, it is similarly unfettered. Outside the sphere of consumer contracts, for which there is specific legislation, termination clauses do not have to pass a threshold test of fairness or reasonableness in order to be valid. As long as they are clearly drafted, there is little inclination on the part of the courts to impede their operation.

The motives in exercising the right are irrelevant and he can put an end to the contract without giving reasons. He can therefore terminate to escape what has turned out to be an unprofitable bargain, for instance due to market fluctuations. This has been justified by a desire for commercial certainty and speedy resolution of disputes. Both are facilitated by the courts not investigating the promisee's motives for terminating. It is also consistent with the absence in English law of a general duty to act in good faith or concept of abuse of rights.

AS has been made clear in many cases there is no duty of good faith or standard of reasonableness to impute, whether at common law or in the context of contractual rights to terminate.

That said good faith is creeping in at the fringes and potentially this creep may become real in the years ahead.

It is fair to say that 'English law seems reluctant to give second chances to [defaulting parties] who fail to get it right the first time round'. The interests of the defaulting party are protected mainly in the rules as to when the right to terminate arises. Once the right has arisen, it is relatively unrestricted and there are few defences that he can invoke to resist termination.

A possible progression in the near future is a more significant role for good faith, potentially as an aspect of increasing prominence of good faith principles in English law.

Once can see from the TCC and commercial court a wish to see contracts followed.

21. How to dodge the termination bullet

First, a party does not need to comply with a notice and cure period requirement when terminating for repudiatory breach! Repudiatory breach entitles the innocent party to treat the contract as terminated with immediate effect and sue for damages for breach of contract (*Stocznia Gdynia SA v Gearbulk Holdings Ltd*[76]*).* The cure period only applies where the breach was capable of remedy. So dodging this bullet may be too late already!

By understanding the contract terms, performing compliant work, managing risks, and obtaining legal advice when needed, you can increase the likelihood of successfully completing without termination and so dodging that bullet.

[76] [2009] EWCA Civ 75, repudiatory termination operates in addition to contractual termination rights. As we all know, a party to a contract may end the contract prematurely where the other party is guilty of "repudiatory" conduct.

- Dodging the termination "bullet" involves careful planning, communication, and proactive steps. Fortunately as nearly always a two stage process starting with a default notice for a specified default there is usually a ‘cure period’ gives one a window to pull up socks etc. But the best avoidance is things done before that happens so such a notice is avoided altogether.
- Timely Performance: Adhere to the project programme/schedule and meet deadlines. Delays are often a significant cause of contract termination being instigated. If issues arise that may affect the timeline, communicate them as soon as possible (and meet contract notice requirements) and ideally work on a revised programme/schedule with the other party's agreement. Be ahead of the employer on how to achieve this or mitigate the delivery.
- Maintain thorough records of all project-related documents, including contracts, change orders, communication, and invoices. These records can be invaluable in case of a dispute
- If there are changes or variations to the project, document them properly, timeously and ensure that both parties agree to the revisions. This helps prevent disputes related to scope changes and additional costs probably the second most causative reason for termination.
- Implement a quality control process and conduct regular inspections to identify and address any defects or issues promptly. This proactive approach can prevent disagreements about the quality of the work.
- Maintain appropriate insurance coverage and risk management strategies to protect against unforeseen events that could lead to termination, such as accidents or property damage.
- Legal Advice: If disputes or issues arise, seek legal advice early in the process. An attorney experienced in construction law can help you navigate the situation and protect your interests. In complex cases both parties should carefully consider their options and evaluate potential consequences before making a final decision. Affirmation can happen unintentionally, and there are legal options available to resist termination or challenge it. Engaging in dispute resolution procedures, such as adjudication, can be a way to navigate such challenges while still fulfilling the contract.

In conclusion, the termination of a contract is a multifaceted process that requires thorough understanding, careful consideration, and compliance with contractual and legal requirements. It is crucial to approach termination with caution, follow the appropriate procedures, and seek professional advice when needed to protect your interests and minimize potential legal and financial risks.

22. Perpetual contracts: can they be terminated, how long is forever?

Most contracts specify a term when the contract will expire. However, some contracts are drafted based on an on-going relationship with no specified end date, like one I remember to repair the walls of Hampton Court lime mortar brickwork which I know one contractor won in c 1954 and is still working on in early 2000s, but this is unusual in construction. These contracts are often described as “perpetual” or “indefinite” contracts but like most things can be terminated!

At common law, a term may be implied into a perpetual contract which allows a party to terminate by giving “reasonable notice”. The nature of a business relationship between parties to a contract often

leads the courts to conclude that the parties had intended for the arrangement to be terminable and as a result imply a right to terminate.

Where a contract is silent on term or termination rights, it may still be terminated on 'reasonable notice' on the part of one or both parties (see *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173). Reasonable notice will be deduced according to the ordinary principles that apply to the implication of terms into a contract and with regard to the facts in existence at the time the notice was given, as opposed to at the time the contract was perfected (*Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd* [1955] 2 QB 556.

The court will examine the nature and structure of the contract and decide whether the parties intended that it was perpetual or that it could be terminated. For example, a right to terminate by reasonable notice may be implied where it is obvious or where it is necessary to give the contract business efficacy. The case for an implied term is strong where one can argue that the parties cannot have intended the contract to last forever (and there is no other way to end the contract, short of a repudiation). In such circumstances, the contract is unworkable without a right to termination by reasonable notice.

The common law disfavours perpetual contracts. But having said that disfavoured is not the same as disallowed. What matters to courts is what the parties intend. If they unambiguously want a contract to have a perpetual term, usually courts will enforce it.

A perpetual contract is one where at least one parties obligations are indefinitely ongoing and there is no mechanism in the contract (outside breach or repudiation) for terminating it.

Where the parties to the agreement are entitled to terminate on reasonable notice, the terminating party will require to give formal notice of termination. Absent express notice provisions in the agreement, the common law will apply. Common law does not prescribe specific forms of notice, but established notice should be clearly communicated by the terminating party (*Italmare Shipping Co v Ocean Tanker Co Inc; The Rio Sun* [1982] 1 All ER 517) and unequivocal in its intention (*Gunton v Richmond-upon-Thames London Borough Council* [1981] Ch 448). However, it is much better for parties to have clear termination and term clauses in the contract which the parties can refer to.

23. Tips for drafters

Drafting termination clauses in English law contracts to define the circumstances under which the contract can be brought to an end must always be carefully crafted to ensure they are enforceable and preferably fair to all parties involved. I share here some top tips for drafting termination clauses under English law contracts.

Clarity and Precision: The paramount rule in drafting termination clauses is clarity. Be precise and unambiguous in your language to avoid any potential disputes. Ambiguity often leads to costly adjudication, arbitration or litigation. Use clear and straightforward language that leaves no room for interpretation.

Compliance with the Law: Ensure that your termination clause complies with all relevant laws and regulations. English law contracts are subject to various legal principles and rules, and your clause should not breach any of these.

Termination for Cause: Include a section that outlines the specific grounds on which a party can terminate the contract for cause. These grounds could include breaches of contract, insolvency, or failure to perform. Clearly define what constitutes a breach and the notice period required before termination.

Termination for Convenience: In addition to termination for cause, consider including a termination for convenience clause. This allows a party to terminate the contract without needing a specific reason. Define the notice period, the process for such termination, and any compensation or penalties.

Termination Due to Force Majeure: Address the impact of unforeseen events such as pandemics, natural disasters, or other force majeure events. Specify the conditions under which the contract can be terminated, the notice required, and the consequences, including any compensation or return of prepayments.

Notice Provisions: Clearly state the notice requirements for both parties when invoking a termination clause. Failure to follow proper notice procedures can render the termination invalid.

Rights and Obligations upon Termination: Outline the rights and obligations of each party upon termination. This can include returning property, settlement of outstanding payments, and the handling of confidential information.

Dispute Resolution: Include a provision on how disputes related to the termination clause will be resolved. This can specify whether disputes will be subject to adjudication, mediation, arbitration, or litigation and the applicable jurisdiction.

Compensation and Damages: Define the compensation or damages payable upon termination. This can include any outstanding payments, penalties, or liquidated damages.

Survival Clauses: Specify which provisions of the contract will survive termination. Certain obligations, such as confidentiality or intellectual property rights, may continue even after termination.

Incorporate Material Breach Definitions: Define what constitutes a "material breach" of the contract, as this can be a trigger for termination. Be explicit about the consequences of a material breach.

Termination by Mutual Agreement: Allow for the possibility of both parties mutually agreeing to terminate the contract. Specify the process and any conditions that need to be met for such termination.

Review and Update: Contracts and business circumstances change over time. Include a provision for reviewing and updating the termination clause as needed, ensuring it remains relevant and effective.

Legal Review: Always have a legal professional review your termination clause to ensure it is in compliance with current laws and best practices.

Consider Industry Standards: There may be standard termination clauses or terms commonly used. Consider adopting these as a starting point for your contract, while customizing them to your specific needs

In conclusion, drafting termination clauses in English law contracts requires careful consideration of various factors to ensure enforceability and fairness. Clarity, compliance with the law, and addressing

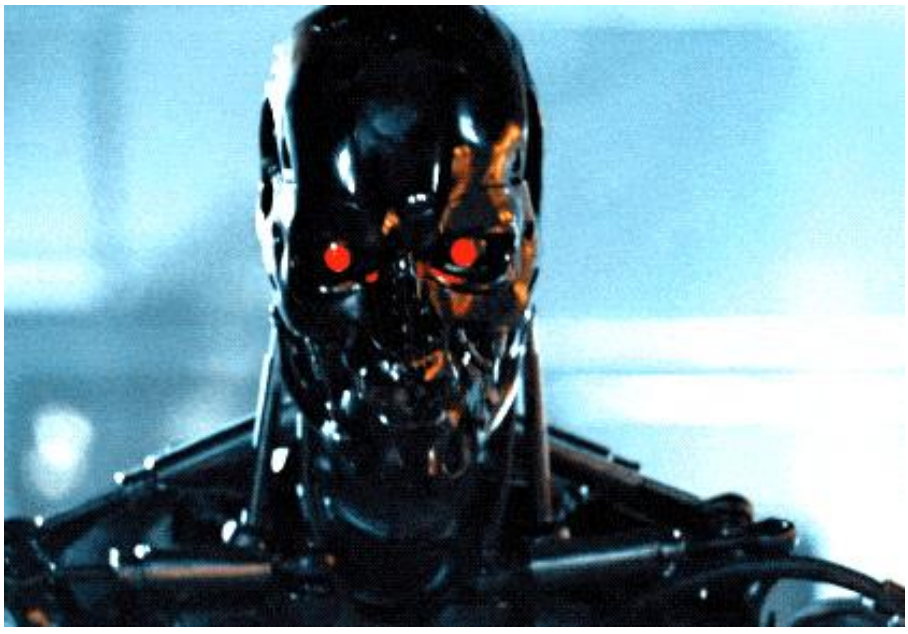
specific scenarios are key elements in crafting a well-rounded termination clause. Always seek legal advice to ensure your termination clauses meet the legal requirements and protect your interests while maintaining fairness for all parties involved.

24. Summary

Termination being the nuclear option is it surprising it can become a game of chicken? There are so many traps and places to slip up that what may start as a bona fide and complaint process can be flipped on its back by a badly time notice, the wrong entity served, the wrong place , an insolvency event not actually crystallising or a cure period actually coming good for the contractor etc. Good lawyers brought on early reduce the risks tremendously but still mistakes occur and often very expensive ones.

It is thus not rare for one or both parties to hold back from actually taking the steps necessary to terminate (where it does not really have to) and instead merely threatening to terminate or alternatively even sometimes applying to court for a declaration as to the existence of a breach of contract justifying termination.

In reality, short of true insolvency, the termination ritual is a dance, often turning into something akin to a game of poker. One party threatens to rely upon the behaviour of the other as entitling it to terminate the contract. Behind the scenes, however, the first party may be nervous about actually taking that step and thereby exposing itself to the risk of a cross termination and claim for damages for loss of bargain by the other party. Equally, however, the other party may also be uncertain of its position. It may be concerned that the first party is already entitled to terminate or, if this is not the case, that any cross termination by it will be wrongful and will give the first party a better basis for terminating and claiming damages. In the situation, neither party dares to take any positive step and instead a bit like dancing with a gorilla they dance around each other, shadowboxing and asserting an intention to terminate but not actually doing so with the gorilla only stopping when it feels the need to. Eventually, though, things come to a head and one of the parties finds that its bluff is called.



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