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Termination: the latest legal and contractual developments

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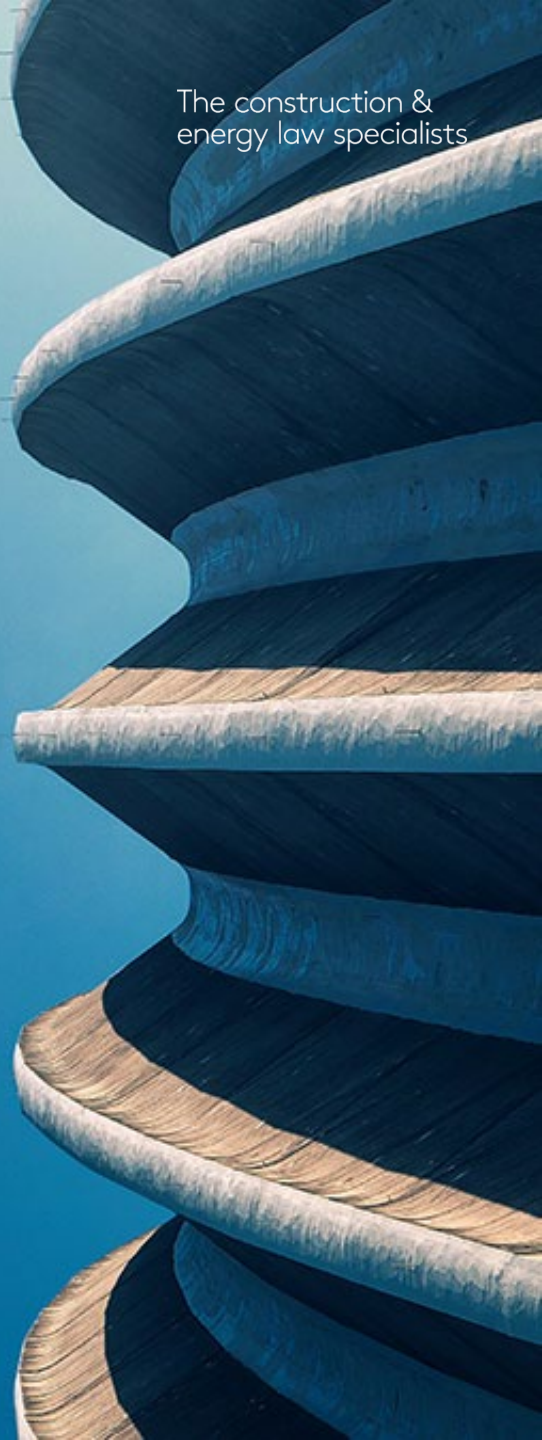
Simon Tolson, Senior Partner, Fenwick Elliott LLP
Karen Gidwani, Partner, Fenwick Elliott LLP
Sanjay Patel, Barrister, 4 Pump Court



Structure of the webinar

- The right to termination: a practical look at *Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd & Anr*

- Getting the termination right: termination notices
  - Valid and invalid notices and repudiation
  - Termination triggers
  - Recent TCC cases

- Q&A

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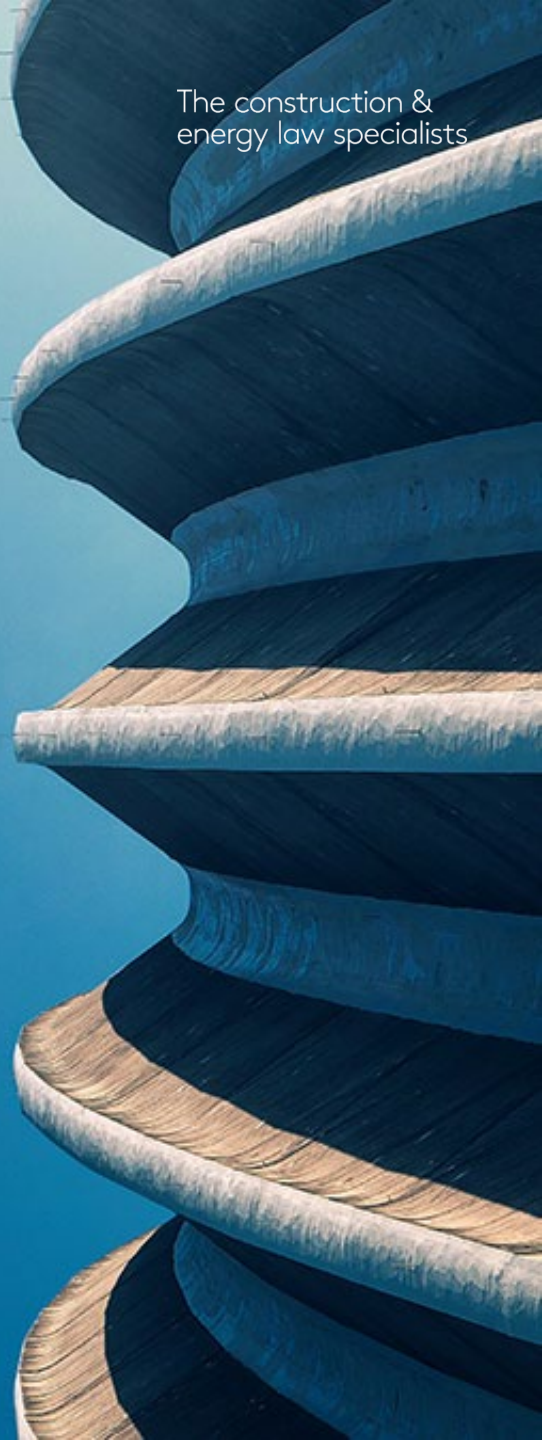
The right to termination: a practical look at *Energy Works (Hull)*



EWH v MW High Tech [2022] EWHC 3275

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Overview of project

- Energy from waste plant in Hull: runs on "RDF"
- Key players: EWH employer, MW main contractor, Outotec gasification subcontractor
- Contract commencement on 20 Nov 2015
- MW required to achieve Take Over by 9 April 2018
- EWH entitled to terminate contract once LDs reach Delay Damages Cap of 15% of contract price – 7 January 2019 (if no EoTs…)
- EWH's responsibility to source processed waste for commissioning

The 2018 RDF standoff (1)

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The start of the battle over fuel

- The works become more and more delayed…
- 9 April 2018 (the date for Take Over); installation work ongoing.
- Late 2017, early 2018 – start of aggressive MW correspondence re sourcing of RDF
- 1 June 2018 – 14 August 2018; MW suspends commissioning over RDF compliance standoff
- Key question: was MW entitled to refuse to commission plant if it did not know RDF was in spec?

The 2018 RDF standoff (2)

The return of the battle over fuel

- By November 2018 the plant certified as being able to fire RDF for commissioning.
- Two problems, one for MW and Outotec and another for EWH:
  - For MW: serious commissioning problems both at Hull and sister plant at Levenseat in Scotland. Gasifier cannot fire on Fuel without tripping.
  - For EWH: Delivered fuel not perfectly in spec. Calorific value beginning to creep above upper limit.
- On 14 January 2019 MW suspends commissioning again – remains that way until termination on 4 March 2019.

Weighing up decision to terminate – behind the scenes!

- Weighing up the risks:

  (1) Delay Damages Cap hit on 7 January 2019 – how long to leave it before termination?

  (2) The fuel saga: smoke and mirrors or genuine impediment to progress?

  (3) The suspensions: justified or commercial strong-arming?

  (4) Grounds for termination: termination, common law or both?

  (5) …what is the cost to the client of letting the delay run on…?

The trial: fuel and delay

- MW needed to establish an EoT of 56 days to defeat contractual termination right.
- By trial, all MW's EoT claims based on alleged breaches of fuel related obligations.
- If MW was entitled to EoTs for the periods where it suspended because of fuel complaints, the termination would be invalid.
- The decisive question: could MW refuse to accept RDF/progress commissioning activities if it did not know RDF was within specification? What if the RDF could be shown to be out of specification?

The trial: fuel and delay

- Pepperall J: MW not entitled to suspend commissioning activities or refuse to accept RDF simply because RDF out of specification.
- **Contract analysis**: (1) Contract set out when MW could suspend works; no basis to suspend because RDF out of specification, (2) Contract stated MW required to proceed regardless of existence of dispute, (3) “Unacceptable” RDF was a narrow category of RDF; did not include RDF that was simply out of spec.
- **Common law analysis**: At common law, a party is not entitled to suspend performance simply because other side is in breach. In fact, unwarranted suspensions amounted to repudiation: see para 302.
- **See paras 68-70 and 73-83**

The trial: the seriousness of suspending

- The judge went further than simply saying that MW was not entitled to an EoT for periods of suspension…
- **Repudiation**: The suspension of works, in combination with scale of delay, entitled EWH to terminate at common law as well as under the contract: see para 302.
- **Wilful default:** The suspensions also amounted to a wilful default as their intention was to "create" concurrent delay and exert concurrent delay: see paras 343 – 347.
- Transferable lesson: suspending is a dangerous business; particularly if the purpose is to put commercial pressure on employer!

Other points of interest on liability

- Programming: failure to report existence of defects promptly and provide a timeline for rectification of defects amounted to a wilful default on the facts: see paras 333 – 347. It was left open whether the breach was repudiatory: see para 303. Compare and contrast approach of Ramsey J on a similar issue in *Vivergo v Redhall Fuels* [2013] EWHC 4030 at 504-512. Growing body of law that (deliberate) inaccurate programming is a serious business…

- Scale of delay as repudiatory breach: Analysis of Pepperall J at paragraphs 300-301 was that delay past Delay Damages Cap amounted to a repudiatory breach. Again, contrast Ramsey J in *Vivergo v Redhall Fuels* at 504-512. When does serious delay "go to the root of the contract" or "evince an intention no longer to be bound by the contract"?

Termination losses

- Largest head of loss: financing losses due to delayed completion of project – claim for £53.1m.
- Pepperall J allows the claim in principle: see paragraphs 390 – 409.
- However, note battle that did not happen re whether MW liable for additional financing costs for full post-termination delay to completion of the project. Was any delay due to defects for which MW not responsible? (or slow working of replacement contractor…?)
- Open question – what is the proper analysis for post-termination delay-related claims for general damages? Does it require critical path analysis? See Lodge Holes Colliery Co Ltd v Wednesbury Corporation [1908] AC 323, Lord Loreburn LC at 325 and Hall v Van der Heiden (No.2) [2010] EWHC 586 at 65-66. Possibly not - fight for another day…

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Getting the termination right: termination notices

We will be looking at these points

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

Termination under the contract…

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

- To start with, the law requires that any valid termination **notice must comply strictly with any termination conditions** set out in the contract. To borrow the analogy of Lord Hoffman in the aforementioned leading case of *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] UKHL 19 *concerning notice validity, **"[i]f the clause [in a contract] had said that the [termination] notice had to be on blue paper, it would have been no good serving a notice on a pink paper".*** Identifying and satisfying termination conditions is often more complex than just using the right coloured paper!

- Secondly, even where a termination notice is correctly drafted and validly served, a right of termination can be inadvertently **lost where a party acts in a manner which is inconsistent with the termination of the contract**. A common example is where a party demands payment of arrears which have accrued under a contract, causing them to 'waive' the right to terminate for those arrears.

- The stakes are high when it comes to correctly terminating a contract: if a party incorrectly terminates then they will, in general, be liable to the other party for the losses resulting from that incorrect termination on a repudiatory basis. In high value commercial contracts, the losses could be substantial…

Termination at common law…

Back to basics… conduct is repudiatory if it "*deprives the innocent party of substantially the whole of the benefit*", intended to be received for performance of the obligations under a contract.

OKA as the "***substantially the whole benefit***" test from ***Hong Kong Fir v Kawasaki***

Repudiatory breach is often expressed as a breach that goes *"to the root of the contract".*

Is the breach serious enough?

1. it needs to be a serious breach – not a breach of warranty - that is:
   - a breach of a condition or
   - breach of an innominate (aka "intermediate") term which deprives the innocent party of substantially the whole benefit of the contract, are repudiatory breaches of contract and therefore sufficiently serious to terminate a contract.

2. A contract may set out a different standard of breach, such as a:
   - "material breach"
   - "fundamental breach"
   - "substantial breach", or
   - "serious breach".

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Termination trigger – be careful how you use it!

Termination trigger: powerful tool Be careful how you use it!

- As termination is a serious step, not to be taken lightly, 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!

- Terminating a contract is risky – ensure you know what is required **before** you exercise your right to terminate. It is also important to understand what you can do if someone wrongfully terminates your contract.

- 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) 46 BLR 91 at 100. Where the contract requires service of a Default Notice prior to a Termination Notice, there must be a "sensible connection" between the two Notices both in content and time.

- 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.

Clear words are needed to remove a party's common law right to accept a repudiation. But watch out if you invoke CL right ineffectually

The importance of considering termination rights carefully !

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:

James Kemball Ltd v "K" Line (Europe) Ltd, paragraphs 18 and 23.

Getting the trigger wrong

- Another good example of fluffing a termination, but from 28 years ago, is *Lockland Builders v Rickwood* (1995) 77 BLR 42 on termination for repudiatory breach and the consequences in getting it wrong.

- In *Lockland Builders v Rickwood* there was a contract to build 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 cl.2, relied upon a common law right of repudiation.

- The Court of Appeal held that an express determination clause even of this type, and the common law right to repudiate can exist side by side, but the common law right only arises in circumstances where the contractor displays a clear intention not to be bound by the contract. **Mere delay in this case did not amount to grounds for repudiation at common law**, and the owner had only himself to blame for not following the contractual procedure.

Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168

A generous view of the terminator was taken in CA case of *Eminence v Heaney.* …Whether either party was in repudiatory breach always requires a dive into the facts. *Eminence* = vendor, *Heaney* = purchaser. SCS 4th.

- The vendor of property served a contractual notice giving the purchaser 10 working days to complete, but by mistake miscalculated the date on which the notice expired, so purported to terminate the contract and forfeit the deposit after only 8 working days.
- The purchaser argued that this was itself a repudiation by the vendor, but CA (perhaps surprisingly) disagreed
- Acting in good faith but OBVIOUS that he's got it wrong.
- What the claimant had done had obviously been a mistaken application of the contract, which would have been viewed as such by any reasonable person.
- Thus it had not demonstrated an unequivocal intention to abandon the contract, required for repudiation.
- The question of whether either party was in repudiatory breach of contract is "*highly fact sensitive*": The Court cannot and should not reach a decision "in principle" in relation to repudiation without hearing the evidence relating to the conduct of both parties leading up to the service of the Termination Notice.

Three TCC termination cases in last year

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

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

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

In each case the Employer was found to failed to comply with the contractual requirements.

First lets consider each part of the JCT Termination procedure below with reference to these recent cases

I shall consider key part of the JCT Termination procedure below with reference to these recent cases.

Clause 8.4.1 of both the JCT SBC and the JCT DB form sets out the Employer's right to terminate for certain specified defaults.

Under clause 8.4.1, the Architect/CA or the Employer (depending on the form) may serve an *initial notice* on the Contractor setting out the defaults relied on. Under clause 8.4.2, the Contractor then has 14 days from this initial notice to cease the specified default(s). If it fails to do so, the Employer may on, or within 21 days from, the expiry of the 14-day period serve a *further notice* on the Contractor terminating its employment.

Where and how should the notices be served?

- Clause 1.7 of the JCT Forms sets out requirements for service of notices. In particular, this clause specifies that 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 states that, when sent by post, a notice should be sent by Recorded Signed For or Special Delivery.

- The cases make clear that "nothing less or different" than strict compliance with the requirements of clause 1.7 would suffice for the purposes of the Employer's notice under clause 8.4.2.

- Any "non-trivial" departure from the service provisions must invalidate the notice! In the *Thomas Barnes* case delivery of the notice to site where the Contractor was based, was deemed insufficient for service as the Contractor had not expressly notified the Employer that notices could be sent to that address. It was therefore determined that the Employer had failed to terminate the contract in accordance with the contractual provisions.

Who should serve the notice?

- Clause 8.4.1 of the JCT specify who should serve the initial notice of default on the Contractor. In the SBC this person is the Architect or the Contract Administrator. In the Design and Build form the person specified is the Employer (cautious view is EA may not act as agent to do so).

- In TCC in *Struthers v Davies* the court considered the validity of an initial notice of default when served by an incorrect entity.

- 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 a RIBA BC form), 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 subsequent attempt to terminate in reliance on the initial notice were held invalid.

When should the required notices be served?

- When considering the timing of a notice under clause 8.4.2 note that 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 a notice of Termination under clause 8.4.2 **by email and by post** and removed the Contractor from site on the same day the notices were sent.

- The court decided that the email notice was ineffective (email not being an effective method of service). The notice sent by post was effective as 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 had in fact removed the Contractor from site!

- Another example of premature Termination came up in the TCC in *Manor Co-Living Limited v RY Construction Limited*. In this case, the Employer sought prematurely (i.e., before the expiry of 14 days of the Contractor's receipt of notice specifying alleged defaults under clause 8.4.1) to serve a final notice under clause 8.4.2 terminating the contract and locked the Contractor out of the site. The Employer's Termination notice was therefore ineffective.

What are the consequences of the Employer getting it wrong?

- As *Keating* states, “a wrongful Termination by the employer or its agent usually amounts to repudiation by the employer”, thus allowing the Contractor to terminate the contract itself and claim damages from the Employer.

- BUT in some circumstances, an invalid termination may not be repudiatory. In *Thomas Barnes*, court found that the Employer’s premature removal of the Contractor from site was not so. The court took into account that the Contractor had ended all meaningful activity on site, that the Contractor was not in a position to carry out 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 salvage 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 flagrant breach of contract at the time the failed contractual notice was served as to be in repudiatory breach and thus, although the contractual termination failed, the notice could still constitute acceptance by the Employer of the Contractor’s repudiation at common law.

Boston Deep Sea Fishing and *Leafelis etc*

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It is clear that a party terminating a contract can rely on grounds other than those that it relies on at the time of termination. In *Leafelis SA v Lonsdale Sports Ltd* [2012] EWHC 485 Leofelis had relied upon one act as a repudiation of a contract, which was an invalid ground for termination, but contended (after the event) that it could have relied upon other grounds to establish a common law right to terminate.

Roth J held that *"it is clear that X can rely on the distinct repudiatory breach by Y albeit that was not the ground on which X acted at the time":* see paragraph 62 of the judgment. This was simply an illustration of the *Boston Deep Sea Fishing* principle (named after *Boston Deep Sea Fishing v Ansell* (1888) 39 Ch D 339) which establishes that *"a party can retrospectively justify termination of a contract by reference to a ground upon which it did not rely at the time of termination":* see paragraph 16 of the judgment in *Leofelis.*

The effect of these authorities is that a parties reliance on a contractual ground of termination in its Termination Notice does not preclude it from relying on a common law right of termination.

The Heisler exception …
Heisler v Anglo Dal Ltd [1954] 1 WLR 1273

Thus, general rule is that a party may rely on a breach that is not raised at the time of termination

But the exception is if the failure had been mentioned, the breach could have been put right.

The general rule is that termination of a contract may be justified if a party was in repudiatory breach at the time of termination, even if the terminating party was unaware of, or did not cite, that breach. The exception to that general rule is that a party may not rely on a breach that is not raised at the time of termination if, had the failure been mentioned, the breach could have been put right. (The exception is known as '***the Heisler exception***')

In *C&S Associates Ltd v Enterprise Insurance Company Plc [*2015] EWHC 3757 (Comm), 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. This decision is a useful 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.

Further, 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.

Phones 4U Ltd (in administration) v EE Ltd [2018] EWHC 49

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However, perhaps, no right to claim damages on a basis other than the one initially relied upon!...

In *Phones 4U Ltd (in administration) v EE Ltd* [2018] the High Court found that a claim for damages for loss of the contract was unsustainable because the termination notice relied solely on an express contractual right to terminate without breach.

Para 132 of jmt.:

I find EE's termination letter as sent entirely clear …It communicated unequivocally that EE was terminating in exercise of, and only of, its right to do so under clause 14.1.2, a right independent of any breach. Phones 4U was not accused of breach. EE made clear it was not to be taken as waiving any breach that might exist, any rights in respect of which were reserved. But a right merely reserved is a right not exercised. EE can still sue upon any breach of contract committed by Phones 4U prior to termination. For any such breach, it may pursue all remedies that may be available to it bearing in mind that the contract was terminated under clause 14.1.2 and not for breach. But what EE cannot do is re-characterise the events after the fact and claim that it terminated for breach when that is simply not what it did. Nor can it say that it treated Phones 4U's renunciation (as now alleged) as bringing the contract to an end when that, again, is just not what actually happened.

Thomas Barnes & Sons Plc v Blackburn with Darwen Borough Council [2022]

1. In October the Court handed down its judgment in *Thomas Barnes & Sons plc (in administration) v Blackburn with Darwen Borough Council* [2022] EWHC 2598 (TCC).

2. The case concerned a new bus station in Blackburn. Thomas Barnes had been appointed by Blackburn with Darwen Borough Council ("BDBC") as the main contractor in respect of the construction of the new *transport hub* for some £4.4m under an amended JCT SBC with quantities 2011. The project suffered with significant cost increases and delay.

3. In June 2015 BDBC terminated Barnes' employment and appointed a new contractor to compete the works. Barnes then entered into administration, which it claimed had been caused by the combined effect of BDBC's failure to make interim payments and the wrongful and repudiatory Termination of its employment. The administrators commenced proceedings against BDBC for breach of contract, seeking £1.7m damages.

4. Barnes claimed (a) monies said to be due under the contract on a proper valuation of the works done at Termination (including claims for L&/or E said to have been suffered as a result of the prolongation of the contract period for matters for which the BDBC was said to be responsible); and (b) damages for wrongful termination representing the claimant's loss of profit on the remaining works.

Thomas Barnes v BDBC [2022]…

5. BDBC denied the claim - pleading that Barnes was liable under the final account for £1.8m to cover the cost for another to complete the work, it did not pursue a counterclaim as Barnes by then was in admin. And there were no prospects of recovery for unsecured creditors.

6. BDBC alleged that Barnes had failed to carry out the works in accordance with the terms of the contract (including by failing to meet its design obligations, failing to adequately resource the works, and failing to perform the works and remedy defects in a proper and workmanlike manner), constituting defaults and/or repudiatory breach for which it was entitled to terminate Barnes' employment.

7. HHJ Stephen Davies, sitting as a HC judge, dismissed Barnes' claim.

While Barnes had established an entitlement to prolongation and delay-related damages for 27 additional days beyond the extensions of time already granted to it under the contract, BDBC had been entitled to terminate the contract and/or accept Barnes' repudiatory breach due to Barnes' **serious and significant breaches of contract in failing to proceed regularly and diligently** with the works and substantially suspending the works unless or until BDBC agreed to Barnes' demands for a significant further extension of time. He found that Barnes' demands amounted to a request for BDBC to issue a blank cheque for the acceleration of the works.

Thomas Barnes v BDBC [2022]…

- The Judge held that BDBC **had not validly terminated under the contractual provisions** as it had **failed to properly serve the notice in accordance with clause 1.7.4 of the contract**.
- However, he found that BDBC had properly accepted Barnes' repudiatory breach.
- The Judge further rejected Barnes' contention that the invalid notice of Termination constituted repudiatory breach on the part of BDBC.
- As such, BDBC was entitled to recover and set off the cost of the replacement contractor. Barnes claims were extinguished.
- The Judge found that the Council had properly accepted the Contractor's repudiatory breach for failing to proceed regularly and diligently with the works.

Struthers & Anor v Davies (t/a Alastair Davies Building) & Anor [2022]

Struthers and another v Davies (t/a Alastair Davies Building) and another [2022] EWHC 333 (TCC), considered the validity of a termination notice under the RIBA building contract 2014.

TCC considered the validity of an initial notice of default when served by an incorrect entity. The dispute related to a RIBA Contract, but the wording of the relevant clause was materially the same as clause 8.4.1 of the JCT Standard Building Contract. 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 subsequent attempt to terminate in reliance on the initial notice were invalid.

Struthers & Anor v Davies (t/a Alastair Davies Building) & Anor [2022]

The court, however, held that this attempted contractual termination was invalid for the following reasons:

- The contract required that the contract administrator had to issue the notice of intention to terminate, not the employer.
- No proof was provided to confirm that the contractor received the notice of intention (seemingly in the absence of any deemed service provisions in the contract).
- Even if the notice of intention was validly issued, 14 clear days had not elapsed before the notice of termination was issued, as required by the contract.

Instead, the court construed that the notice of termination, while not valid under contract, operated as an acceptance of the contractor's repudiatory breach. The court was satisfied that the contractor's abandonment of the works and failure to attempt to comply with his obligations sufficiently amounted to repudiatory breach.

Also the court was also satisfied that the contractor's failure to proceed regularly and diligently prior to the abandonment of works also amounted to repudiatory breach. The court highlighted the contractor's "*egregious self-caused failures*" and failure to apply for any EOT (despite being prompted to do so) as relevant factors.

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

- Another example of premature termination!

- The Employer sought precipitately (i.e., before the expiry of 14 days of the Contractor's receipt of notice specifying alleged defaults under clause 8.4.1) to serve a notice under clause 8.4.2 terminating the contract and locked the Contractor out of the site. The Employer's termination notice was therefore ineffective.

- The contractor challenged the validity of the second notice, arguing it had been incorrectly served. As it was locked out of the site after that notice was served, it also argued the employer was in repudiatory breach of contract, a breach that it accepted.

- In the adjudication that followed, the adjudicator agreed with the contractor and rejected the employer's alternative argument (wrongly as it turned out) , namely that it was entitled to terminate at common law for repudiatory breach of contract.

- The employer subsequently issued Part 8 process, seeking a declaration that the adjudicator's decision was invalid because he had breached the rules of natural justice by failing to consider its common law defence. However, the judge held that the adjudicator had considered the substance of that claim and had rejected it on its merits. In so doing, the judge applied the principles from *Global Switch Estates 1 Ltd v Sudlows Ltd* [2020] EWHC 3314 (TCC) and went on to set out several further observations of his own.

- Even though the adjudicator was wrong to conclude that the question of RY's repudiatory conduct was outside his jurisdiction, this ultimately had no bearing on his decision.

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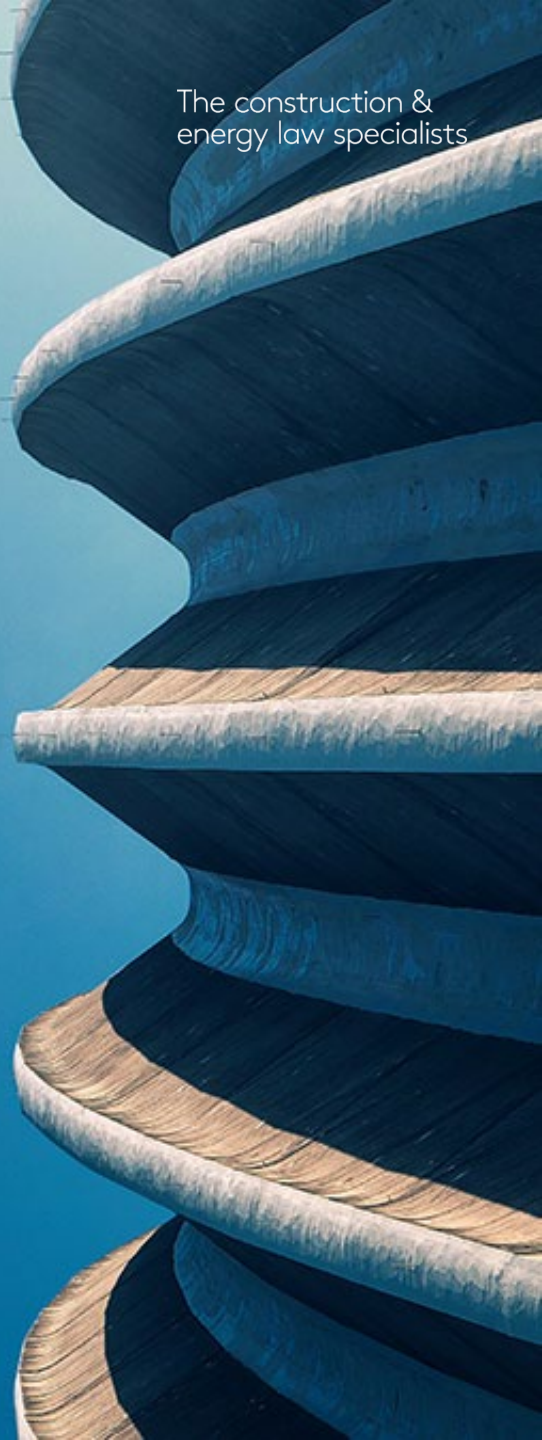

Thank you. Questions?

Simon Tolson, Senior Partner, Fenwick Elliott LLP
Karen Gidwani, Partner, Fenwick Elliott LLP
Sanjay Patel, Barrister, 4 Pump Court