

When will a wrongful suspension amount to a repudiatory breach of contract?

In the recent case of *Mayhaven v DAB*¹, the English High Court had to consider whether a contractor's wrongful suspension of its works would, as a matter of principle, amount to a repudiatory breach of contract entitling the employer to terminate the contract and sue for damages. The High Court held that a wrongful suspension would not automatically constitute a repudiatory breach. In this newsletter we look at the law on repudiation generally and then consider the circumstances in which a wrongful suspension may or may not amount to repudiation.

Repudiation – general principles

Absent express words in the contract, any breach of contract will entitle the other party to damages as compensation for the loss suffered as a result of the breach. Only if the breach is 'repudiatory', however, will it entitle the other party to choose whether to accept the repudiation and terminate the contract, thereby putting an end to all primary obligations under the contract, or to treat the contract as continuing (often called 'affirming' the contract).

'Repudiation' can best be described as being where *"one party so acts or so expresses himself as to show that he does not mean to accept the obligations of a contract any further"*². Short of an express refusal to continue with the contract, the courts will ascertain whether the actions of the defaulting party in the circumstances were such as to lead a reasonable person to conclude that it no longer intended to be bound by the contract.

A breach of contract will be considered repudiatory where:

1. the parties have agreed, expressly or impliedly, that any breach of a particular contractual provision will entitle the other party to end the contract; i.e., where there is a breach of a condition of the contract; or
2. the consequences of the breach would deprive the innocent party of substantially the whole of the benefit that the parties intended it should obtain from the contract; in other words, where there has been a fundamental breach of contract.

The courts have made it clear that not every suggestion of an intention not to perform, or of an inability to perform, some part of the contract will amount to repudiation. 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"*³. Nonetheless, the refusal to perform must be *"made quite plain"*⁴. Therefore, where there has been a genuine dispute as to the interpretation of a contract, the courts may be unwilling to hold that a party's express intention to only carry on the contract in accordance with its mistaken interpretation would amount to repudiation. The same may be true where the defaulting party has genuinely been mistaken as to the facts⁵ or the law⁶ when breaching the contract.

Suspension for non payment

There is no general right at common law for a contractor to suspend its works for non payment⁷. Accordingly, if a contractor suspends its works for a single instance of non

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Contacts



Peter Godwin

Partner

Registered Foreign Lawyer

Tel: +81 3 5412 5412

E: peter.godwin@herbertsmith.com



Dominic Roughton

Partner

Registered Foreign Lawyer

Tel: +81 3 5412 5412

E: dominic.roughton@herbertsmith.com



David Gilmore

Partner

Registered Foreign Lawyer

Tel: +81 3 5412 5412

E: david.gilmore@herbertsmith.com



Emma Kratochvilova

Senior Solicitor

Tel: +81 3 5412 5412

E: emma.kratochvilova@herbertsmith.com

¹ *Mayhaven Healthcare Ltd v Bothma & Anor (t/a DAB Builders)* [2009] 2634 EWHC

² *Heyman v Darwin* [1942] AC 356, HL

³ *Woodar v Wimpey* [1980] 1 WLR 277, HL

⁴ *Spettabile Consorzio Veneziana di Armamento di Navigazione v Northumberland Shipbuilding Co Ltd* (1919) 121 LT 628, 634, 635

⁵ *Kent v Godts* (1855) 26 L.T. (o.s.) 88

⁶ *Freeth v Burr* (1874) L.R. C.P. 208, 214

⁷ *Channel Tunnel v Balfour Beatty* [1992] 2 Lloyd's Rep. 7

payment it faces the risk that either the employer will exercise an express contractual right to terminate for the contractor's failure to proceed regularly and diligently with the works or, if there is no such express right to terminate and the criteria in Heyman v Darwin and Woodar v Wimpey (quoted above) are satisfied, the contractor itself will be in repudiatory breach of contract.

On the other hand, persistent late or non payment of a cynical kind by an employer may amount to a repudiatory breach entitling the contractor to terminate the contract⁸. Similarly, persistent late or non payment can be looked at cumulatively such that the court may consider that the employer's unacceptable past performance is an indicator of future unacceptable performance entitling the contractor to treat itself as discharged⁹. In such event, the contractor would be entitled to accept the repudiatory breach and bring the contract to an end without suspending the works. However, in most cases the contractor will face the dilemma of choosing whether to suspend the works, and risk being in repudiatory breach of contract, or to carry on working despite the continuing non-payment until it is able to establish a repudiatory breach by the employer. The latter may be the safest option but it also carries the risk that, by the time sufficient payments have been missed to constitute a repudiatory breach of contract, the employer has become insolvent.

This dilemma under common law is avoided in many international construction contracts as they commonly contain an express right for the contractor to suspend for non payment¹⁰. Note, however, that even when an express right to suspend for non payment exists, the contractor may still be at risk if the employer is able to rely upon an equitable or contractual right of set-off or abatement such that the sums claimed by the contractor are not in fact payable. In such event, the contractor's suspension will be wrongful and may, again subject to satisfying the criteria in Heyman v Darwin and Woodar v Wimpey, amount to a repudiatory breach of contract. It will generally be no defence for a party who is alleged to have repudiated the contract to show that he acted in good faith when breaching the terms of the contract¹¹.

Genuine Mistake and the High Court decision in Mayhaven v DAB

Mayhaven v DAB concerned a situation where the contractor (DAB) suspended its works for non-payment under an express term of the contract in the genuine belief that it had not been paid sums by the employer (Mayhaven) pursuant to an adjudicator's award. DAB had not realised that Mayhaven had in fact made payment by including the sums awarded in a later valuation. Indeed, DAB had been misled into making this mistake by relying on a letter written by Mayhaven's solicitors advising that Mayhaven had no intention of making any payment to DAB pursuant to the adjudicator's decision. DAB suspended its works for non-payment, however wrote to Mayhaven advising that it remained "*willing and able to return to site*" to complete the final two weeks' worth of work.

Mayhaven, rather than informing DAB of its mistake and thereby avoiding the suspension, immediately wrote to DAB claiming that DAB was in repudiatory breach of contract and brought the contract to an end. DAB referred the matter to arbitration. The arbitrator concluded that DAB's actions did not amount to a repudiatory breach of contract and Mayhaven appealed.

The Court upheld the arbitrator's award, finding that a party who, in good faith, relies on an express provision of the contract, i.e. to suspend performance, is not by that fact alone to be treated as having repudiated his contractual obligations if he turns out to be mistaken as to his rights. The Court did not accept Mayhaven's submission that a wrongful suspension which gives rise to a failure to proceed regularly and diligently under an express term of the contract, would necessarily amount to a breach of a

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⁸ Alan Auld Associates Ltd v Rick Pollard Associates [2008] BLR 419

⁹ Rice v Great Yarmouth Borough Council (2003) TCLR 1

¹⁰ For example: FIDIC Conditions of Contract for Construction 1999 (Red Book) sub-clause 16.1; and ENAA Model Form International Contract for Power Plant Construction Vol. 1 GC 41.2. Note that contractors that are party to construction contracts that fall within the scope of the *Housing Grants, Construction and Regeneration Act 1996* (the "Act") will also have a statutory right to suspend for non payment under section 112 of the Act. This will not apply, however, to international construction contracts.

¹¹ Federal Commerce & Navigation Co Ltd v Molena Alpha Inc. [1979] A.C. 757

condition or fundamental term so that every such breach would amount to a repudiatory breach of contract. It would be a matter of considering the seriousness of the breach and the facts and circumstances of the case.

The Court held that the arbitrator was correct to take account all of the circumstances surrounding the wrongful suspension; DAB's mistake as to its legal entitlement to suspend the contract was merely one of the factors to consider when determining whether the suspension amounted to repudiation. The Court considered that the arbitrator was right to conclude from DAB's suspension letter that its suspension did not indicate an absolute refusal to carry out the works or an intention to no longer be bound by the contract.

Conclusion

Without an express right to suspend for non-payment, contractors should be wary of suspending their works in the event of a single non-payment. The cautious approach would be to continue the works until the employer's failure to pay becomes so persistent as to amount to repudiation by the employer entitling the contractor to terminate.

Even where the contract contains an express right to suspend for non payment, contractors should take care before exercising such right. If the employer has a valid right of set-off, or if it is otherwise found that the sums claimed are not due to the contractor, the suspension may be found to be wrongful. The employer may then be able to exercise an express power to terminate for the contractor's failure to proceed regularly and diligently or, applying the principles in Heyman v Darwin and Woodar v Wimpey, claim that the contractor's wrongful suspension is a repudiatory breach of contract.

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Herbert Smith LLP, 41st Floor, Midtown Tower, 9-7-1 Akasaka, Minato-ku, Tokyo 107-6241.

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