HERBERT SMITH FREEHILLS
DISPUTE RESOLUTION

TERMINATING YOUR CONTRACT:

WHEN CAN YOU CALL IT QUITS?

CONTRACT DISPUTES PRACTICAL GUIDES
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This is the eighth in our series of contract disputes practical guides, designed to provide clients with practical guidance on some key issues that feature in disputes relating to commercial contracts under English law.

Parties to commercial contracts may wish to exit their contractual arrangements for all sorts of reasons. In many cases, they will have included in their contract a right to terminate in particular circumstances, and a process for doing so. Even where there is no express right to terminate, parties may be entitled to terminate under the general law for a counterparty's breach.

But termination is a drastic step and should never be taken lightly. If a party gets it wrong, it may itself be in breach of contract, giving the counterparty a right to terminate or claim damages or both.



Tom Leech QC, **James Doe** and **Robert Moore** consider when a contract may be terminated and the implications of termination, and provide some practical tips for commercial parties.

TOP TIPS FOR TERMINATING

- If a term is particularly important, DO consider agreeing it will be a strict condition of the contract so that any breach will allow termination
- DON'T assume that describing a term as a "condition" will be sufficient to make it one; clearer drafting may be required
- DO remember if you agree time is "of the essence", even a short delay will mean the counterparty can terminate and claim damages
- DON'T assume you can terminate for just any breach at common law; only certain types, referred to as "repudiatory" breaches, will allow termination
- If the counterparty is in breach, DO consider expressly reserving your rights while you consider your position
- If considering termination, DON'T do anything that might demonstrate an intention to go on with the contract; you may lose the right to terminate
- DO think carefully and take legal advice before taking steps to terminate; if you get it wrong, you may find you are in breach and the counterparty is entitled to terminate and claim damages
- If including an express termination provision, DO make sure the circumstances in which it can be exercised are clear
- DON'T assume an express contractual right to terminate for "any breach" will be interpreted as broadly as it sounds
- DO make sure it's clear whether any contractual machinery for termination applies also to termination for repudiatory breach
- DON'T assume terminating under an express contractual provision will allow you to claim "loss of bargain" damages; it normally won't
- DO remember that you may not be able to exercise a right to terminate a supply contract if your customer has entered into an insolvency process

"To adapt a well-known saying: 'Terminate in haste, repent at leisure.'"

1. Introduction

One of the most common disputes that arises between contracting parties is the question of whether one party was entitled to terminate the contract and (if so) whether it has gone about it correctly.

Where a party terminates, the contract is brought to an end from the date on which the termination is effective (which may vary depending on whether the party exercised a right of termination at common law or under a contractual provision). The effect is that neither party has to perform its primary obligations under the contract going forward. One or both parties may, however, have an obligation to pay damages to the other if there has been a breach of contract causing loss. The nature and extent of that obligation will depend on the terms of the contract and the circumstances in which it has been terminated.

The contract may provide for circumstances in which it can be terminated, for example on notice, or if one party has committed a "material breach". The contract may also lay down a particular process that must be followed by the party seeking to exercise the right to terminate. These matters are considered at sections 7-8 below.

Regardless of any express right to terminate, a party may be entitled to terminate under the general law (or common law) as a result of a counterparty's breach. But not just any breach will give rise to a right to terminate. In summary, it must be a breach of a particular type of term (known as a "condition"), or it must be a sufficiently serious breach of some other term, or the counterparty must have made it clear that it is unwilling or unable to perform the contract in some essential respect. In addition, there will be a right of termination if the counterparty's conduct has made performance impossible. Termination at common law is considered at sections 2-5 below.

A party that has a right to terminate is not generally obliged to exercise it – and may lose the right to do so in some circumstances. This is considered at section 6 below.

Whether a contract has been terminated under an express provision or at common law may have serious implications, including the basis on which the innocent party may be entitled to claim damages. The interplay between contractual rights to terminate and termination at common law is considered at section 9 below.

"A right to terminate is a right to bring the contract to an end from the point of termination onwards. It does not affect the rights and obligations that have accrued up to that point."

2. Termination at common law

Regardless of whether the contract contains express termination provisions, a party may be entitled to terminate under the common law as a result of a counterparty's breach. Whether or not a particular breach will give rise to a right of termination depends on the type of term that has been breached. The three categories of contract term are set out in the boxes below.

CATEGORIES OF CONTRACT TERMS

CONDITION
Any breach will entitle the innocent party to terminate the contract, however minor or trivial the breach may be

INTERMEDIATE/INNOMINATE TERM
A breach will entitle the innocent party to terminate only if it is sufficiently serious, ie it "goes to the root of the contract"

WARRANTY
Unless agreed otherwise, a breach will never entitle the innocent party to terminate (though there will be a right to claim damages for any loss)

In summary, the innocent party will have a right to terminate if the counterparty has:

(i) breached a condition (see section 3 below);

(ii) committed a sufficiently serious breach of an intermediate term (see section 4 below); or

(iii) clearly demonstrated an intention not to perform the contract in some essential respect, ie not to perform it at all, or to breach a condition or to commit a repudiatory breach (sometimes called an "anticipatory breach" or a "renunciation" – see section 5 below).

The terminology in this area is not entirely consistent. "Repudiatory breach" is sometimes used to refer to a breach of an intermediate term which is sufficiently serious to allow the counterparty to terminate (as per (ii) above). Perhaps equally commonly, however, it is used to refer more broadly to any act or omission which gives rise to a right of termination at common law (as per any of (i) to (iii) above). We will use the term in this broader sense.

Finally, there will be a right to terminate where the counterparty's conduct has made performance impossible. In many cases this will also amount to a renunciation, but (unlike for renunciation) the innocent party must prove that performance was in fact impossible. Termination for impossibility is not considered further in this guide.

3. Breach of a condition

A term will be a condition (sometimes called a "strict condition") of the contract if:

- the parties have agreed in the contract that it will be a condition, eg by stipulating expressly that "time is of the essence" of the particular obligation;
- the term is so important that any breach of it will deprive the innocent party of substantially the whole benefit of the contract; or
- it is designated as such by statute, eg the implied term as to title under section 12(1) of the Sale of Goods Act 1979.

In general, unless the contract has made it clear that a particular stipulation is a condition (or, conversely, merely a warranty) it will be treated as an intermediate term, so that whether or not it entitles the innocent party to terminate at common law depends on the severity of the breach.

Merely including an express right to terminate for breach of the relevant term will not necessarily make it a strict condition. Similarly, referring to a term as a "condition" will not necessarily make it so, particularly as the term "condition" has a number of different meanings. Whether or not particular wording will have that effect will be a matter of interpretation in each case. Two contrasting decisions are considered below.

"If you want to be able to terminate at common law for any breach of a particular term, however minor, it is best to agree expressly that it is a strict condition of the contract such that any breach will allow the innocent party to terminate at common law."

In *Personal Touch Financial Services Ltd v Simplysure Ltd* [2016] EWCA Civ 461, the Court of Appeal found that a term of a contract appointing the defendant as the claimant's representative to sell private medical insurance was a strict condition of the contract. The relevant clause (clause 7) stated:

> "It is a condition of the Agreement that the [defendant] be aware of and abides by the rules of the regulator and ... regularly acquaint himself/herself with any new Rules or Regulations issued by the regulator ...."

The court noted that describing a contractual provision as a condition is not conclusive; agreements often refer to all their terms as conditions, as in "conditions of sale". However, this was not such a case. The word "condition" appeared only once in the agreement, in clause 7, and its use was emphasised by the introductory words "It is a condition of the agreement". Although that was not conclusive, it had to be given due weight.

Construing clause 7 as a condition did not lead to an unreasonable result. Its breach was liable to have serious consequences for the claimant, including potential criminal and civil liability as well as regulatory sanction. It was therefore commercially sensible to have included clause 7 as a true condition. The fact that there was no evidence of any loss caused by the breach was irrelevant.

In *Spar Shipping AS v Grand China Logistics* [2016] EWCA Civ 982 (see this post on our Litigation Notes blog) the Court of Appeal held that an obligation to make punctual payment of hire was not a strict condition of a time charterparty (though on the facts there was a repudiatory breach in any event).

The fact that there was an express option to terminate on breach of the term did not make it a strict condition, nor was that a strong indication that the term was a condition. While the innocent party could undoubtedly terminate under the express clause, it would not be able to claim loss of bargain damages unless there was a right to terminate at common law (see section 9 below).

The Court of Appeal noted that the courts should not be too ready to interpret contractual terms as conditions. The contract did not expressly make time of the essence. Although punctual payment of hire was a very important term, it could not be said that any breach would derail performance; the consequences of breach could vary from the trivial to the grave.

The court was not persuaded that any general presumption as to time being of the essence in mercantile contracts was of assistance here. In the specialist context of payment of hire under time charterparties, there could only be limited scope for general presumptions. In any event, any such presumption did not generally apply to time of payment.

4. Breach of an intermediate term

Where the term that has been breached is an intermediate term – ie neither a strict condition nor a warranty – whether the innocent party is entitled to terminate will depend on the consequences of the breach.

A number of formulations of the test have been used, including whether the breach deprives the innocent party of "substantially the whole benefit" or a "substantial part of the benefit" of the contract. These are not, however, seen as differing standards, but rather different ways of seeking to capture the basic principle that to amount to a repudiation the breach must "go to the root of the contract".

The question of whether the particular breach is repudiatory must be judged taking into account all the relevant circumstances, including the benefit the injured party was intended to obtain from performance of the contract. The bar is generally seen as a high one and it may be difficult to predict with any certainty whether the bar is met in a given situation. Some contrasting decisions are considered below.

Where the innocent party terminates for what it believes is a repudiatory breach, but a court finds that it was not so, the "innocent" party is likely to be in a difficult position. Its purported termination will likely amount to a renunciation (see section 5 below). The counterparty may therefore be entitled to terminate and claim damages.

"Parties should think carefully before taking steps to terminate for repudiatory breach. Getting it wrong may prove disastrous."

In *Telford Homes (Creekside) Ltd v Ampurius NU Homes Holdings Ltd* [2013] EWCA Civ 577 (see post) the Court of Appeal held that a developer's delay in carrying out works did not amount to a repudiatory breach of an agreement for lease. The developer had entered into an agreement for lease with an investor with a view to granting 999 year leases of certain commercial units.

The developer was required to carry out the works with due diligence and use reasonable endeavours to procure completion by specified target dates. The developer fell behind schedule and suspended part of the work due to funding difficulties. The investor purported to terminate for repudiatory breach about two weeks after the developer resumed work.

The Court of Appeal held that the breach was not so serious as to be repudiatory. The starting point was to consider what benefit the injured party was intended to obtain from performance of the contract. The court then had to consider the likely effect of the breach on the injured party, judged as at the date of purported termination – not the date of the breach.

Here the injured party was intended to obtain a leasehold interest of 999 years in the blocks. If, as things turned out, completion was a year late, the investor would have acquired interests in all the blocks that it contracted for. On the face of it, depriving someone of one year out of 999 years would not deprive him of a substantial part of the benefit he was intended to receive, let alone substantially the whole benefit.

In *Spar Shipping AS v Grand China Logistics* (referred to above) (see post) the Court of Appeal held that repeated failures to make punctual payment of hire under a time charterparty amounted to a repudiatory breach in the form of a renunciation.

The charterer had repeatedly failed to pay hire when due. By the time the shipowner terminated, the charterer was emphasising its cash flow difficulties, providing no concrete payment proposal and suggesting it would merely pass on sub-hires when received, which was bound to amount to a significant shortfall on the hire due.

The judge held that an objective observer would conclude that the charterer was "unwilling, because it was unable" to pay hire punctually, and this showed an intention not to perform the charterparties in a way that deprived the claimant of substantially their whole benefit.

The Court of Appeal agreed. On the judge's findings, a reasonable owner in the claimant's position could have no realistic expectation that the charterer would pay hire punctually in advance. The anticipated non-performance would deprive the claimant of substantially the whole benefit of the charterparties. This was, principally, because it converted a contract for advance payments into one for payment in arrears.

The court also rejected the submission that the breach was not repudiatory because the arrears constituted a small proportion of the total sums payable under the charterparties

This simply did not grapple with the importance of the bargain for payment of hire in advance.

5. Renunciation

Where a party has clearly demonstrated an intention not to perform the contract, the innocent party does not need to wait until the time for performance to see whether the counterparty will in fact be in breach. The right to terminate arises immediately. This is referred to as a "renunciation" or "anticipatory breach".

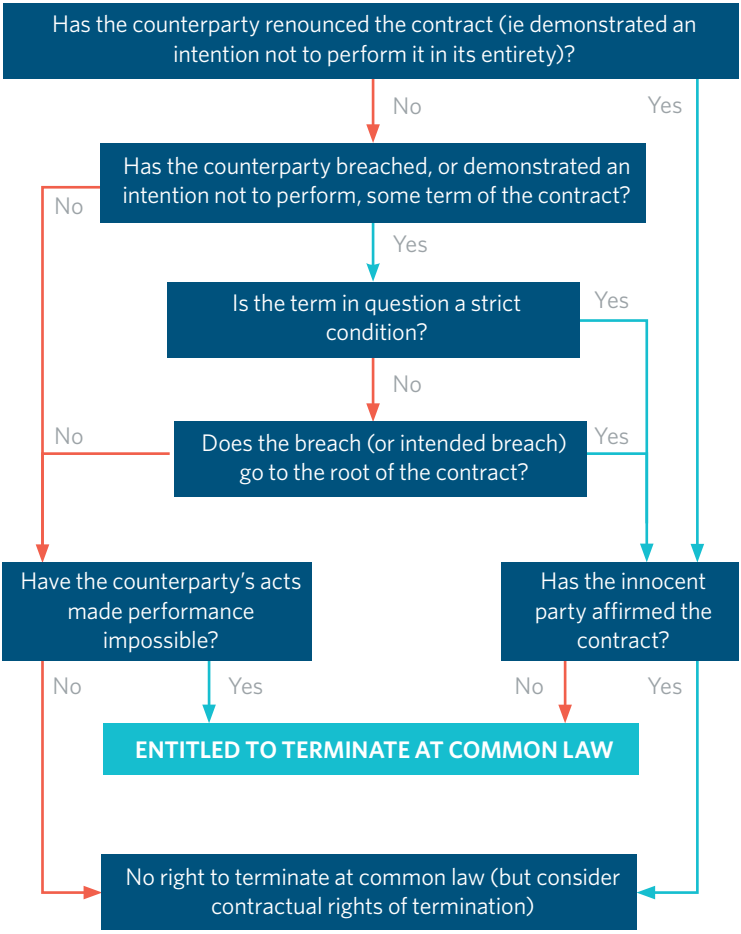
A renunciation may be made by words or by conduct. The party may expressly declare that it no longer intends to perform, or the party's conduct may be such as to lead a reasonable person to conclude that the party is unwilling or unable to perform the contract in accordance with its terms.

Not just any threatened breach will amount to a renunciation. Where a party intends to perform some, but not all, of its obligations, the question is whether the anticipated non-performance will amount to a breach of a strict condition or a sufficiently serious breach of an intermediate term. If it is a mere breach of warranty, or a minor breach of an intermediate term, there will be no renunciation.

As noted above, where a party purports to terminate the contract for what it (mistakenly) believes is a repudiatory breach, that may well amount to a renunciation so that the counterparty is entitled to terminate and claim damages.

"If it's clear the counterparty doesn't intend to perform the contract in some essential respect, there's no need to wait for an actual breach before terminating. But again that step should never be taken lightly."

Is there a right to terminate at common law?



6. Affirmation

When faced with a repudiatory breach, the innocent party normally has a choice:

- **Terminate**: It can treat the contract as discharged and claim damages, including damages for loss of bargain (see section 9 below). This is sometimes referred to as "acceptance of the repudiation".
- **Affirm**: It can treat the contract as continuing and hold the counterparty to its obligations, eg by claiming the contract price. There may also be a right to claim damages for any losses suffered as a result of the breach.

A party will be taken to have affirmed the contract if it has acted in a way that demonstrates an intention to go on with the contract regardless of the counterparty's breach, for example by continuing to perform its side of the contract (eg delivering goods or making payment).

Where the innocent party has affirmed the contract, with knowledge of the breach, it will no longer be able to terminate for that breach (though it might be entitled to terminate at a later date if the breach is ongoing or a further breach is committed). The innocent party will be given a reasonable opportunity to decide, so mere inaction for a short period following the repudiation will not necessarily mean a loss of the right to terminate – though how long is reasonable will depend on the facts. If the innocent party waits too long, it may be taken to have affirmed.

Where the innocent party has affirmed the contract, it remains in existence for the benefit of both parties. If therefore the "innocent" party finds itself unable to perform its own obligations at the relevant time, the (previous) defaulting party may be entitled to terminate and claim damages. That, however, assumes that the innocent party has not been prevented from performance by the other's breach, or led by the contract breaker to believe that it was no longer required to perform a particular obligation under the contract – if that is the case, the defaulting party will generally not be permitted to take advantage of the situation to the detriment of the innocent party.

In addition, there are a number of limitations on the normal principle that the innocent party can elect to affirm the contract following a counterparty's repudiatory breach. In *White & Carter (Councils) Ltd v McGregor* [1962] AC 413, the House of Lords referred to two such limitations:

- If the innocent party is unable to perform its obligations under the contract without the other's cooperation (unless it can get an order for specific performance to compel such cooperation). So, for example, an employer cannot affirm a contract of employment following the employee's repudiatory breach.
- If the innocent party has no legitimate interest in performing the contract and claiming damages. This may be the case, for example, if damages would be an adequate remedy and maintaining the contract would be wholly unreasonable.

The decision of the Court of Appeal in *MSC Cottonex*, considered below, appears to have added a further limitation, namely where further performance (by either party) is impossible because the commercial purpose of the venture has been frustrated.

"When deciding whether or not to terminate, be careful not to take steps which suggest you intend to continue with the contract. An express reservation of rights is also advisable."

In *MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt* [2016] EWCA Civ 789 (see post) the Court of Appeal found that a party was not entitled to affirm and claim ongoing liquidated damages for delayed performance following a repudiatory breach.

The claimant had contracted to supply and ship containers of the defendant's raw cotton to a customer in Bangladesh. The containers had to be returned to the claimant within 14 days of discharge from the vessel, failing which a daily tariff (demurrage) applied. The customer never collected the cotton and the containers remained in Bangladesh where the customs authorities would not allow them to be unpacked without a court order. After the 14 day period elapsed, the claimant sought to claim demurrage for each day that it was without use of the containers.

The Court of Appeal held that the contract had been repudiated when it became apparent to a reasonable observer that the containers could not be redelivered within the foreseeable future. The commercial purpose of the venture was frustrated at that point.

It further held that it was not open to the claimant to affirm the contract because the defendant was unable to perform its obligations, as the commercial purpose of the venture had become frustrated, rather than simply refusing to do so. Even if it was possible for the claimant to affirm the contract, it would have had no legitimate interest in so doing on the basis that: (a) by the time of the repudiatory breach the accrued demurrage greatly exceeded the value of the containers; and (b) replacement containers were readily available.

7. Contractual termination rights

Regardless of whether there is a right to terminate at common law, a party may have a right to terminate under an express contractual provision. The key difference is that, with termination at common law, the innocent party will be entitled to claim damages for its "loss of bargain" arising from future non-performance whereas, if termination is under the contract, there is generally no entitlement to loss of bargain damages (see section 9 below).

Commercial contracts often provide a right to terminate for a counterparty's breach in circumstances that would not give rise to a right of termination at common law. For example, there may be a right to terminate for "material breach". What amounts to material breach will be a matter of interpretation in each case but, as a general rule, courts are willing to find that a material breach does not have to be repudiatory; something less will suffice.

In *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200, the Court of Appeal held that the defendant had not been entitled to terminate its contract with the claimant under a clause allowing termination for "material breach".

Jackson LJ stated: "In my view this phrase connotes a breach of contract which is more than trivial, but need not be repudiatory.... Having regard to the context of this provision, I think that 'material breach' means a breach which is substantial. The breach must be a serious matter, rather than a matter of little consequence."

Another alternative is a right to terminate for "any breach", which on its face appears very broad. But the courts have tended to interpret such terms restrictively, eg to mean a breach that is repudiatory at common law, on the basis that a broader interpretation would flout business common sense.

Contracts may also provide a right to terminate for convenience, or in particular circumstances which do not amount to a breach of contract. Common examples include a right to terminate on a counterparty's insolvency or change of ownership or control. There may also be a right to terminate if a "force majeure" event continues for a specified period, or where there is a "material adverse change" (MAC) after the contract is entered into but before the relevant obligations are performed – see issue 7 of this series When events intervene: Force majeure, frustration and material adverse change.

Note that the circumstances in which suppliers of goods and services to insolvent companies can terminate their contracts have been dramatically curtailed as a result of changes introduced by the Corporate Insolvency and Governance Act 2020. Under these provisions, where a company enters an insolvency process, its suppliers are not permitted to enforce a termination right which would have arisen due to the insolvency, nor to rely on any pre-existing termination right.

8. Contractual machinery

Where a contract contains express termination provisions, it will often lay down a particular process to be followed by a party seeking to exercise the right to terminate.

This will commonly include a requirement to serve notice of termination; it is unusual for the trigger event to discharge the contract automatically. Matters that will often be covered in the termination provisions include when the notice of termination is to be served, what it should contain, and how it is to be served.

Contractual notice provisions should be strictly observed. Whether or not a particular provision is mandatory will be a question of interpretation; if the court finds that a mandatory requirement has not been complied with, the notice will be invalid.

In *Friends Life Ltd v Siemens Hearing Instruments Ltd* [2014] EWCA Civ 382, the Court of Appeal held that a tenant's break clause had not been properly exercised because the tenant failed to comply with a provision that the notice "must be expressed to be given under section 24(2) of the Landlord and Tenant Act 1954".

The High Court had found that the use of those words was not mandatory; the Court of Appeal overturned that conclusion. Lewison LJ noted that the word "must" was an emphatic and imperative word, and that it was "impossible to interpret the clause as if it said the notice 'must' be expressed in a certain way, but it does not matter if it is not".

Where there is an express right to terminate for breach, the contract may require the termination notice to give a particular period for the defaulting party to remedy the breach (if remediable), so that the innocent party is then able to terminate only if the breach has not been remedied by the end of the period.

In *Bains v Arunvill Capital Ltd & Anor* [2020] EWCA Civ 545 (see post), the Court of Appeal held that a consultant's statement that he intended to perform his contractual obligations under a consultancy agreement did not remedy his material breach of refusing to provide services under that agreement. The court unanimously agreed with the High Court's conclusion that, to remedy the breach, the consultant would have had to start providing the required services within the relevant period for remedying the breach.

The termination clause may also specify the consequences of termination. For example, it may provide for the return (or retention) of any advance payments and the return of any confidential information. It may also include a contractual mechanism for calculating the compensation due to the innocent party following termination – though such a provision may in some circumstances fall foul of the rule against penalties (see issue 6 of this series: Defining your liability in advance: Liquidated damages, limitation and exclusion clauses).

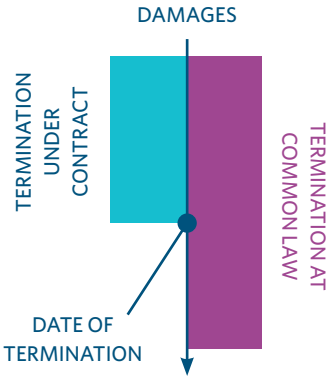
Where a contracting party has a contractual right of termination, the court will not ordinarily enquire into the party's motives for exercising that right. So, for example, the courts have resisted attempts to imply obligations of good faith in relation to the exercise of a contractual right of termination, and have interpreted express obligations of good faith narrowly so that they don't apply to a right of termination. In general, therefore, so long as any contractual requirements for the exercise of a termination right have been met, the terminating party does not have to justify its actions. For more information, see issue 4 of this series How far can you act in your own self-interest? The role of good faith in commercial contracts.

"If you want to terminate under an express clause, make sure you follow its provisions to the letter."

9. Contractual vs Common law rights

The key difference between termination at common law and termination under the contract is the basis on which the innocent party will be entitled to damages. In both cases, damages are payable for any losses suffered up to the date of termination. But there is a dramatic difference when it comes to "loss of bargain" damages, to put the innocent party in the position it would have been in had the contract been properly performed **in future** – so, typically, a claim for lost profits.

Where a party terminates for repudiatory breach at common law, there is a clear entitlement to loss of bargain damages (subject to any exclusions or limitations of liability under the contract). Where termination is under the contract, however, there is no general entitlement to loss of bargain damages; in most cases, the innocent party will be able to claim for past losses, but not the lost profits it would have earned had the contract continued. This may come as an unwelcome surprise.



But is it possible to have the best of both worlds, by terminating under the contract (which may be a clearer, less risky route to termination) and also for repudiatory breach so as to claim loss of bargain damages? The general rule is yes. There is not ordinarily any bar to the innocent party exercising rights of termination both under the contract and at common law.

There are exceptions, however – eg if, on the proper interpretation of the agreement, the contractual rights to terminate are intended to displace the common law right to terminate for repudiatory breach. Another exception is if the consequences of termination under the contract and at common law are fundamentally inconsistent – so for example if a sum falls due on termination under the contract which is inconsistent with (and not simply less than) the entitlement to damages at common law. In those circumstances, the innocent party will have to choose between the two entitlements.

A party is also unlikely to be able to claim loss of bargain damages where, in serving notice of termination, it has relied exclusively on a contractual right to terminate for a non-breach event.

There is a further question that arises where the contract sets out particular machinery for terminating – namely whether or not the contractual requirements also apply to termination at common law. This is a matter of interpretation of the terms in question.

"In some cases a party will be able to exercise a contractual right to terminate and also terminate for repudiatory breach – and claim loss of bargain damages as a result."

In *Phones 4U Limited (in administration) v EE Ltd* [2018] EWHC 49, the High Court found that a party (EE) had no arguable claim to "loss of bargain" damages at common law where it had terminated the contract in express and sole reliance on a contractual right to terminate in circumstances that did not amount to a breach of contract by the counterparty (Phones 4U).

EE's letter of termination in this case had purported to terminate the agreement on the basis of a contractual right to terminate on various insolvency related events, including the appointment of administrators by Phones 4U. It did not mention any breach by Phones 4U.

The court found that, although EE had a real chance of showing that Phones 4U were in repudiatory breach at the time of termination, the facts clearly showed that EE was only terminating on the basis of a contractual right which did not involve any breach. It therefore could not say that the termination and the consequent loss of bargain resulted from the repudiatory breach.

In *Vinergy International v Richmond Mercantile* [2016] EWHC 525 (Comm) (see post) the High Court found that a notice requirement in a contractual termination clause did not apply where a party terminated at common law for repudiatory breach.

A 10-year contract for the supply of bitumen provided that either party could terminate immediately upon the other party's failure to observe any of the terms of the agreement "and to remedy the same where it is capable of being remedied within the period specified in the notice ... calling for remedy, being a period not less than twenty (20) days".

When the seller terminated for repudiatory breach, the question arose whether it had to give the buyer notice in accordance with the termination clause. The Commercial Court held that it did not. The clause did not expressly apply to termination at common law, and such a provision could not be implied. The clause as a whole provided six contractual rights to terminate, including for example on the counterparty's insolvency. As such, the inference from the clause was that the 20 day notice period only applied to the right to terminate under that specific provision and not to any other express rights to terminate under the clause as a whole, nor to the common law right to terminate for repudiatory breach.

The court went on to say that if, contrary to its view, the 20 day notice period did apply to repudiatory breaches which fell within the scope of the clause – ie breaches which were capable of remedy – this would not make any difference as one breach (breach of an exclusivity provision) was not capable of remedy.

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