

TERMINATING CONTRACTS

Clients have been let down by another party with whom they have a contract. They want your advice about whether they can or should terminate the contract, and if so how. You are not entirely sure whether the breaches will be viewed by the courts as serious enough to constitute a repudiation, entitling your client to terminate at common law, but an express termination clause (ETC) in the contract seems to cover the circumstances. Is that the way to go? The interaction and relative advantages of rights to terminate via these two routes are an area of some legal difficulty, and merit careful consideration before advising clients. A number of legal questions in the area have recently been addressed by the Court of Appeal in *Stocznia v Gearbulk* [2010] QB 27, but others remain difficult.

The theoretical bases on which a contract may be terminated by the injured party 'accepting' the other's repudiation are well enough known, and include principally breach of a term constituting a strict Condition, a sufficiently serious breach of an intermediate term, and a so-called 'anticipatory breach', generally founded on a stated unwillingness or incapacity to perform when the due date arrives. However the frequently encountered question of whether a breach of an intermediate term is sufficiently serious to constitute a repudiation "gives rise to very great difficulty", as *Treitel* puts it.

So why bother, when there is also an ETC available? The principal advantage of such clauses is often put as providing certainty for an injured party as to whether he has indeed become entitled to terminate the contract. Furthermore, *Stocznia v Gearbulk* has now confirmed that a termination is indeed a termination in the usual sense, whether effected at common law or under an ETC (see at [34]). However this certainty may come at a price to the injured party, and may also prove to be short term, if subsequently it turns out that the clients will only be able to obtain a full remedy on the basis of a termination at common law.

Some noteworthy features of termination under an ETC are as follows:

- if the grounds for termination specified in the ETC are or include apparently minor or trivial grounds, the court will try to construe them so as to be limited to serious breaches – see e.g. *Dominion Corporate Trustees v Debenhams* [2010] EWHC 1193 (Ch)
- the exact wording of the contractually specified grounds must be satisfied – see e.g. *MMP v Antal* [2011] EWHC 1120 (Comm)
- how strictly a termination notice must comply with the terms of the ETC is currently unclear. *Chitty on Contracts* somewhat tentatively suggests that strict compliance may no longer be required, applying the approach to construing notices in the well known landlord and tenant case of *Mannai Investment v Eagle Star* [1997] AC 749, and cites *Ellis Tylin v*

Co-operative Retail Services [1999] BLR 205 in support. However other texts, such as *Treitel*, take a more conservative view

- that said, it is clear that time provisions in an ETC must be strictly adhered to, and even slight prematurity will be fatal: *Afovos Shipping v Pagnan* [1983] 1 WLR 195 (HL)
- similarly, if (as is often the case) the ETC provides that the contract breaker must first be given an opportunity to remedy the default, the prescribed procedure must be strictly followed, and that opportunity must be clearly stated when the first notice is given: *Western Bulk Carriers v Li Hai Maritime* [2005] 2 Lloyd's Rep 389 at 406-7.

It should be remembered that at common law a party can ordinarily justify a termination of a contract on any ground which in fact existed at the time, whether or not he initially invokes that ground in his termination notice. Recent authorities confirming this long established principle include *Stocznia v Latco (No 2)* [2002] 2 Lloyd's Rep 436 at [22] per Rix LJ, and *Stocznia v Gearbulk* at [44] per Moore-Bick LJ. On this basis, a party who initially terminates in reliance on an ETC may later (generally in order to obtain loss of bargain damages – discussed below) rely on the same notice as acceptance of a common law repudiation, if he can establish that one had occurred and was available for acceptance at the time of his original notice.

However an important exception to this principle is where the specified consequences of a termination under an ETC are inconsistent with, and not simply less than, those of a termination at common law upon acceptance of a repudiation. As Christopher Clarke J put it in *Dalkia Utilities v Celtech* [2006] 1 Lloyd's Rep 599 at [143]-[144] “*In the present case markedly different consequences would arise according to whether or not there was a termination under [the ETC] or an acceptance of a repudiation... The same notice cannot operate to produce two ... diametrically opposing consequences. In those circumstances it should take effect in, and only in accordance with its express terms, namely as a determination under [the ETC].*” In such a case, a termination notice served in reliance on an ETC operates as an election to terminate on that ground, and later reliance on acceptance of a common law repudiation is not open to the notice giver.

There are a number of possible consequences of the presence of an ETC in a contract, and/or of its being invoked by an injured party, which may need to be considered on the facts of any given case. They include:

- Whether common law rights of and/or following termination are excluded or limited, either expressly or by necessary implication. The starting assumption is that they will not be (*Dalkia Utilities v Celtech* at [21]), but there are cases where such exclusion has been found, such as *Lockland Builders v Rickwood* (1996) 77 BLR 38 (CA)

- Whether termination on the expiry of notice or on a specified future date (which may well be very desirable commercially) is legally possible. Provision for this is quite common in ETCs (an example is afforded by the ETC in *Walkinshaw v Diniz* [2001] 1 Lloyd's Rep 635), but (as the authorities stand) this is not possible at common law. A common law acceptance of a repudiatory breach must be with immediate effect (*Harrison v Norwest Holst* [1985] ICR 668 (CA) at 683 per Sir Denys Buckley)
- Whether termination may be achieved in advance of the time when the relevant performance becomes due. With an ETC this depends on the wording of the grounds for termination, but they will generally be the commission of one or more actual breaches, in which case a valid termination has to await their commission. By contrast, the common law allows for termination following an 'anticipatory breach'
- Whether the injured party can recover full loss of bargain damages. In Australia, and probably in England, the answer is only where there has (also) been a repudiation at common law; the bare fact of a valid termination under an ETC is not enough (*Shevill v Builders Licensing Board* (1992) 149 CLR 620; *Financings v Baldock* [1963] QB 104 (CA)). In Canada, however, a valid termination under an ETC suffices (*Keneric Tractor Sales v Langille* (1987) 43 DLR (4th) 171)
- Where there is a forfeiture provision, and the contract has been terminated under a linked ETC, it may be somewhat easier for the other party to obtain relief from forfeiture of a proprietary interest, or in some cases a possessory interest, than it would have been on a termination for repudiation
- Where there is an exclusion or limitation of liability clause, on which the other party seeks to rely, it may be more difficult for him to succeed in doing so on a termination for repudiation (and in particular a deliberate repudiation – see *Internet Broadcasting v Mar LLC* [2009] 2 Lloyd's Rep 295) than it would be where the termination is founded simply on an ETC
- If for some reason a termination turns out to be ineffective, and the other party has leaped at the opportunity to treat the termination notice itself as a repudiation and purported to 'accept' the same, then if an ETC has been invoked in good faith, but mistakenly, it will be easier for the injured party who originally attempted to terminate to persuade the court that his termination notice, albeit ineffective, did not amount to a repudiation, as was achieved in cases such as *Woodar v Wimpey* [1980] 1 WLR 277 (HL) and *Eminence Property Developments v Heaney* [2010] 3 EGLR 165 (CA).