



Law of Contract II

JDOC1002

Termination – Pt 2

Repudiation and anticipatory breaches

- ▶ Prospective breaches:
- ▶ Repudiation of prospective obligations:
 - ▶ Repudiation occurs where a party expressly or impliedly indicates that they are unwilling or unable to perform all of the party's obligations or where the proposed breach, when it occurs, would give rise to a right to terminate
- ▶ Terminology – “repudiation”:
 - ▶ Wider sense: covers both actual breaches and prospective breaches where innocent party entitled to terminate for the repudiation
 - ▶ Narrower sense: concerned with repudiation of prospective obligations only

Repudiation and anticipatory breaches

- ▶ Innocent party entitled to accept repudiation and terminate contract immediately (without waiting for time for performance to arrive for actual breach)
 - ▶ Choice for innocent party whether to terminate immediately or keep contract on foot
- ▶ Anticipatory breach arises where innocent party elects to terminate (accepts repudiation)

Repudiation and anticipatory breaches

- *Hochster v De La Tour* (1853) 118 ER 922
- Contract: def employing pl as courier
- Before commencement of employment, def told pl his services no longer required
- Held: repudiation by def; and pl can immediately terminate and sue for damages

Conduct constituting repudiation

- ▶ *Creatiles Building Materials Ltd v To's Universe Construction Co Ltd* [2003] 2 HKLRD 309
- ▶ Facts:
 - ▶ Nov 1997: Pl (building contractor) contracted with def (builder) to apply granite spray coating to external walls of building
 - ▶ Contract price to be paid by deposit/initial amounts (40%) and remainder by interim instalments
 - ▶ May 1998: debit note for 1st interim payment of 20% of contract price issued
 - ▶ Def refused to pay
 - ▶ Pl left building site next day
- ▶ Issue: did def repudiate contract entitling pl to terminate?

Conduct constituting repudiation

- ▶ HKCA held:
 - ▶ Yes
 - ▶ Actual breach in failure to pay instalment
 - ▶ Depending on facts, failure to pay can amount to repudiation (of future obligations)
- ▶ Analysis:
 - ▶ Was actual breach (non-payment) a breach of condition or serious breach of intermediate term?
 - ▶ Even if not, do circumstances of breach show an intention not to be bound (to future obligations)?

Repudiation and acceptance of repudiation

- ▶ *Chao Keh Lung v Don Xia* [2004] 2 HKLRD 11
- ▶ Facts:
 - ▶ Oct 1998: contract for sale of 30,000 shares in Teleway from def to pl
 - ▶ 4th instalment payment due: 6 July 1999
 - ▶ 5th instalment payment due: 13 December 1999
 - ▶ Shares to be transferred after final payment
 - ▶ 3 June 1999: def contracted to sell all his Teleway shares to another (shares transferred 16 June 1999)
 - ▶ 6 July 1999: pl did not pay instalment
- ▶ Issue: was there repudiation by def and acceptance by pl on 6 July 1999?

Repudiation and acceptance of repudiation

- ▶ HKCA held:
 - ▶ No repudiation by def
- ▶ Principles:
 - ▶ Repudiation: words or conduct evincing an intention not to perform, or express declaration that party is or will be unable to perform their obligations under the contract in some essential respect
 - ▶ Short of an express refusal or declaration, the test is to ascertain whether the actions of the party are such as to lead a reasonable person to conclude that they no longer intend to be bound by the contract
 - ▶ Where one party has, by their own act or default, disabled themselves from performing their contractual obligations in some essential respect, the other party will be entitled to accept the repudiation and terminate

Repudiation and acceptance of repudiation

➤ HKCA:

- Sale of shares to another not repudiation because def still had time to acquire shares from other shareholders to transfer to pl
- Even if there was repudiation, there was no acceptance by pl
- Non-payment of 4th instalment was not an unequivocal acceptance of the repudiation in the circumstances

Where repudiation not accepted

- Contract remains on foot
- Repudiating party may change their mind and retract repudiation; and may perform when time for performance arrives
- Election to terminate is required to complete cause of action for anticipatory breach
 - Eg if contract not terminated but is frustrated in interim, there is no breach by repudiating party: *Avery v Bowden* (1855) 5 E & B 714

Where repudiation not accepted

- General rule: innocent party may elect to continue with performance of contract
- *White and Carter (Councils) Ltd v McGregor* [1962] AC 413
- Facts:
 - 1954: appellant (advertising contractor) agreed with respondent (garage proprietor) to display ads of respondent on council litter bins – 3 year contract
 - 1957: agreement to renew contract – 3 year renewal
 - But respondent then cancelled renewal: repudiation
 - Appellant did not accept repudiation; displayed ads and sued for full sum due under contract (clause 8)
- Issue: was the appellant entitled to the full contract price?

Where repudiation not accepted

- House of Lords held:
 - Yes
 - Appellant can elect to affirm contract and continue performance
 - Appellant entitled to sue in debt for contract price under cl 8
- Note different causes of action: action in debt and action for damages for breach of contract
 - Duty of pl to mitigate losses in latter but not former

Where repudiation not accepted

- ▶ Exceptions to general principle – situations where innocent party not entitled to continue performance to claim full contract price:
- ▶ 1st exception: where performance by innocent party is dependent on cooperation of party in breach:
 - ▶ *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233, 253-4
- ▶ Eg:
 - ▶ A contracts with B for B to restore painting owned by A
 - ▶ A repudiates and agrees to sell painting in original form to C
 - ▶ Is B entitled to perform under first contract and sue for price?

Where repudiation not accepted

- ▶ 2nd exception: where innocent party has no legitimate interest in completing the contract
- ▶ No legitimate interest where damages adequate and keeping contract alive is wholly/extremely unreasonable or perverse
 - ▶ *Isabella Shipowner Ltd v Shagang Shipping Co Ltd* [2012] 2 Lloyd's Rep 61, [44]

Where repudiation not accepted

- ▶ *Gator Shipping Corp v Trans-Asiatic Oil SA (The Odenfeld)* [1978] 2 Lloyd's Rep 357
- ▶ 10 year charterparty of ship; charterer repudiated with over 7 years of charter left to run
- ▶ Shipowner kept contract on foot for further 9 months (and claimed agreed hire for that period), terminated thereafter
- ▶ Held: shipowner entitled to do so, but would have no legitimate interest in keeping contract open for remaining charter period

Wrongful termination

- Wrongful termination itself amounts to repudiation
- *Kensland Realty Ltd v Whale View Investment Ltd* (2001) 4 HKCFAR 381
- Facts:
 - Sale of shop in Mongkok for \$55M
 - Settlement at 1pm on specified date – time of the essence
 - “Split payment” direction by V to P – information provided 72 mins before time for settlement
 - 8 cheques and 2 cashier’s orders paid by 1:06pm

Wrongful termination

- Issue:

- V refused to complete but sought to keep deposit
- Can V treat late payment as breach by P giving rise to V's right to terminate (enabling V to keep deposit because of P's breach)?

Wrongful termination

- Held:
- V in breach of implied term for split payment information to be given within reasonable period before settlement
- Even if V's breach gives P a right to terminate, P is entitled to affirm contract
- But P is then in breach of condition (late payment)
- Is V entitled to terminate?
 - No
 - V caused P's late payment: V cannot obtain benefit from own breach
- V's termination wrongful and amounted to repudiation
- V not entitled to retain deposit