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LAWYERS



Construction life-cycle's completion phase - How to ensure proper termination, suspension and completion of a construction contract

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18 November 2009



Today's Seminar

- **Termination**
- **Suspension**
- **Completion**



Part 1 – Bases of termination

- There are 2 types of termination
 - Common law termination
 - Contractual termination



Part 1 – Bases of termination

- Not every breach can give rise to the right to terminate a contract. Most breaches only give rise to a right to claim damages.
- Only 3 Bases of termination at common law
 - Breach of a condition
 - Fundamental breach – breach of an intermediate term
 - Repudiation – a party evinces an intention to no longer be bound by contract



Part 2 – Distinction of terms

- Tripartite distinction of terms
 - Conditions (essential component of the contract)
 - Intermediate terms (vary in significance)
 - Warranties (collateral to the main purpose)



Part 3 – Breach of a condition

- When is a term a condition?
 - Reluctance of courts
 - Time is of the essence
 - Stating a term is a condition
 - Express right of termination
 - Repeat performance -v- a single act



Part 4 – Breach of an intermediate term

- When can you terminate for a breach of an intermediate term?
 - Fundamental breach
- When is a breach of an intermediate term fundamental
 - 6 factors
- Fundamental breach vs Repudiation



Part 5 - Repudiation

- Anticipatory repudiation
 - Terminology
 - Repudiation defined (a party evinces an intention to no longer be bound by the contract)
 - Elements of repudiation
 - Repudiation traps
 - Unjustified purported termination
 - Express right of termination



Part 6 – Anticipatory Breach

- Anticipatory breach
 - 3 elements
 - Repudiation
 - Communication (Termination or Affirmation)
 - Innocent party willing and able to perform its obligations
 - There is no right to suspend performance



Examples

- Non-payment by employer is not a repudiation in some cases
- There is no right to suspend works if payment is wrongly withheld or late
- Although late payment is not a repudiation, continued refusal to pay may amount to repudiation
- Wrongful ejection of contractor from the site is a repudiation
- Failure of employer to give possession of site is a repudiation



Examples

- Delay in giving possession may or may not amount to a repudiation – whether time is of the essence. Need to show that the Employer has evinced an intention no longer to be bound
- Minor interference by the Employer is not a repudiation
- Withholding of certificates / under-certification may or may not amount to a repudiation – depends on the facts, especially whether employer interfered
- If interference from the Employer or if the employer is aware of persistent under-certification but do not take any action, then it may amount to repudiation



Examples (cont.)

- Employer commits an act of prevention or fails to cooperate may amount to repudiation if an intention no longer to be bound is evinced
- Employer engages other contractor to carry out the contracted works may amount to repudiation
- Contractor's refusal to carry out work before substantial completion
- Contractor's refusal to rectify substantial defective works amount to repudiation

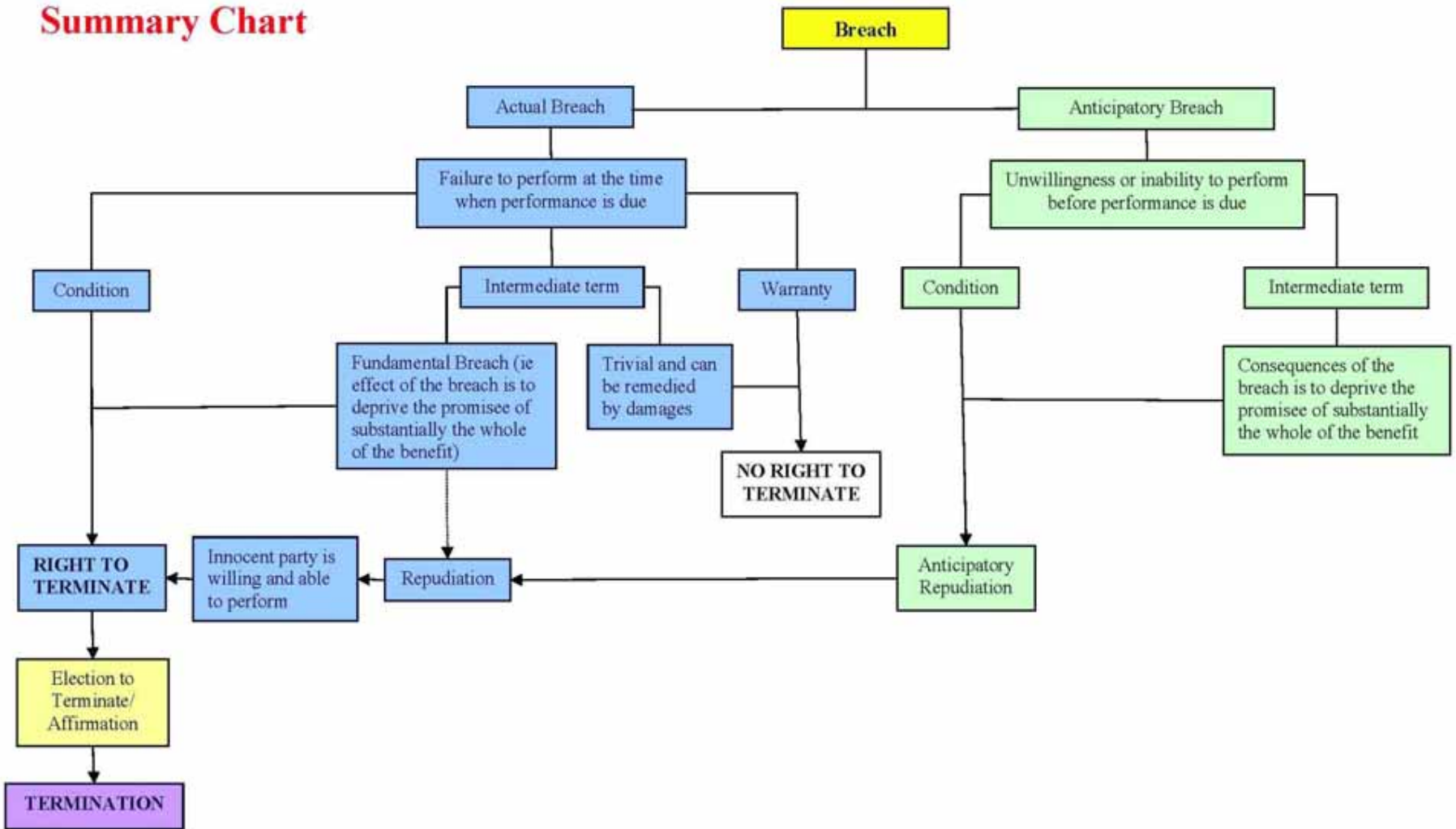


Examples (cont.)

- It is obvious that the contractor has no ability to comply with the completion date requirement may amount to repudiation
- Delay by contractor may amount to repudiation only if time is of the essence
- Reduction of workforce so that it is not proceeding with works regularly and diligently may not amount to repudiation
- If time is of the essence or after serving a notice to the contractor making time of the essence, and the contractor still fails to complete the works by the stipulated time, it amounts to repudiation



Summary Chart



Part 7 - Affirmation following serious breach

- The innocent party has a right to elect:
 - Affirm the contract
 - Terminate the contract
- 3 ways in which a right can be waived
 - By contractual variation
 - By operation of the doctrine of election
 - By operation of the doctrine of estoppel



Part 7 – Affirmation (cont.)

- Alternative inconsistent legal rights
- 3 requirements for election
 - Electing party clearly chooses one of the rights
 - Electing party has full knowledge of facts
 - Electing party knows the alternative legal rights generated by those facts



Part 7 – Affirmation (cont.)

- Waiver by estoppel requirements
 - Clear statement that innocent party will forgo termination rights
 - Defaulting party must be induced to act in reliance of that statement
 - Defaulting party suffers a detriment as a result of acting upon that statement
- Insistence that a serious breach be remedied



Part 8 – Contractual Termination

- Must strictly follow specific procedures set out in the termination clause eg serve notice
- Termination clause eg Standard Form of Building Contract clause 25 – Determination by the Employer and clause 26 – Determination by the Contractor
- Grounds of determination are set out
- Procedures are set out
- Consequences are set out



Part 8 – Standard Form of Building Contract clause 25

- Grounds of determination:
 - Wholly suspends the Works without reasonable cause
 - Fails to proceed regularly and diligently with the Works
 - Refuses or persistently neglects to comply with a written notice from the Architect requiring him to remove defective work or improper materials or goods and by such refusal or neglect the Works are materially affected



Part 8 – Standard Form of Building Contract clause 25

- Procedure:
 - Architect give a written notice by registered post or recorded delivery specifying the default
 - If the Main Contractor continues such default for 14 days after receipt of such notice
 - The Employer may within 10 days after such continuance give a written notice by registered post or recorded delivery forthwith determine the employment of the Main Contractor



Part 8 – Standard Form of Building Contract clause 25

- Consequence:
 - Employer may employ other persons to carry out the Works
 - May enter upon the Works
 - May use all temporary buildings, plant, tools, equipment, materials and goods
 - The Contractor shall assign to the Employer the benefit of agreement for the supply of materials or goods and/or for the execution of any work



Part 8 – Standard Form of Building Contract clause 25

- Consequence:
 - The Contractor shall clear the site as and when required by the Architect
 - The Contractor shall pay direct loss and damage
 - The Employer shall not be bound by any provision of the contract to make any further payment before completion of the Works



Part 9 - Limits on the right to terminate

- Fault of the innocent party
- An exclusion clause in the contract
- An earlier election to affirm
- Estoppel based on the conduct of the innocent party



Part 10 - Consequences of termination

- Termination operates prospectively
- General consequences of termination:
 - Parties are released from the duty to perform further obligations
 - Accrued rights of both parties survive
 - Terminating party may sue for damages for loss of the bargain
 - The terms of the contract remain relevant for the following purposes:
 - Determining liability
 - Assessing damages
 - Resolving disputes (eg arbitration clause)



Part 10 - Consequences of termination (cont.)

- Check the contract:
 - Re-enter by employer
 - Forfeit construction plants and material on site
 - Costs of re-tendering and getting replacement contractor
 - Other remedies
- LD
- Payments due to contractor prior to termination
- Contractual payments for incomplete work



Conclusion

- Common law termination
 - Breach of a condition
 - Fundamental breach
 - Repudiation
 - Right to elect
- Contractual termination
 - Limited grounds
 - Strictly comply with the procedures
- Consequence of termination
 - Future obligations released
 - Accrued rights remain



Suspension

- No general common law right to suspend work
- Contractual rights



Owner's right to suspend works

- HKIA form
 - 23.3(c): *'the Architect may issue instructions regarding:.....the postponement or suspension of the whole or a part of the Works'*



Owner's right to suspend works

- Government Form
 - Sections 54 - 55
 - obligations on contractor to secure and protect works
 - additional expenditure
 - suspension over 90 days



Owner's right to suspend works

- Other additional clauses
 - obligation to immediately suspend Work as directed
 - use its best endeavours to minimise all costs and expenses caused by suspension
 - provide a report on anticipated additional costs and expenses caused by suspension
 - owner make sure if suspension is as a result of contractor's faulty design, workmanship or materials, contractor not entitled to extension of time or cost
 - Upon resumption of work – joint examination of the Works



Contractor's right to suspend works

- No general common law right to suspend work or terminate contract due to non-payment of work
- HKIA and Government form:
 - No right to suspend work
 - Right to terminate for non-payment



Contractor's right to suspend works

- FIDIC
 - Contractor's right to suspend work for non-payment
 - By giving 21 days' notice
 - Resume work as soon as reasonably practicable upon receipt of payment
 - Contractor also has right to terminate contract for non-payment



Contractor's right to suspend works

- No general right at common law to suspend work if payment was wrongfully withheld
- Whether non-payment would amount to repudiation will depend on the circumstances
 - if owner shows an intention not to perform the contract
 - a continual and deliberate refusal to pay may amount to repudiation – *Creatiles Building Materials v. To's Universe Construction* [2003] 2 HKLRD 309
- Contractor who stops work may have wrongfully repudiated the contract



Completion

- Mariner International Hotels Limited & Anor v Atlas Limited & Anor (unreported, Court of Final Appeal, 5 February 2007)
 - Under the terms of the Agreement, completion of the purchase was conditional upon Atlas:
 - procuring practical completion of the Hotel by 30 June 1998
 - proving good title to the property



Completion (cont.)

- Mariner declined to complete the purchase
- Both parties accused the other of having repudiated the Agreement
- Both Court of First Instance and Court of Appeal held that Mariner had repudiated the Agreement
- Mariner appealed to the Court of Final Appeal



Meaning of practical completion?

- Mariner: 'a state of affairs in which the Hotel *has* been completed free from any patent defects other than ones to be ignored as trifling'
- Atlas: 'a state of affairs in which the Hotel is capable of being opened for business even though works are still being continued'
- CFA preferred Mariner's definition



Can possession amount to practical completion?

- *Murphy Corporation v Acumen Design & Development (Queensland) P/L & Anor (1995) 11 BCL 274*
- Taking possession of and using works under a building contract for their intended use could amount to an understanding that practical completion has been achieved



Standard Form of Building Contract (2005 edition)

Substantial completion:

'The state of completion where the Works or a Section may not be absolutely completed or entirely free from defects but have reached the state where they can be taken over and used by the Employer for their intended purpose and where the unfinished items of work and the remaining defects then patent are only of a minor nature and extent and their completion or rectification will not unreasonably interfere with or interrupt the taking over of the Works or Section.'



Take home points on completion

- Works can be practically complete notwithstanding that there are latent defects
- Certificate of Practical Completion may not be issued if there are patent defects
- Practical Completion means the completion of all the construction work that has to be done
- Architect is usually given a discretion to certify Practical Completion where there are very minor items of work left incomplete, on *de minimis principle*



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L A W Y E R S

