

Termination for breach of contract: Don't jump the gun

If party A contracts with party B for the provision of goods or services to it over a period of years in return for payment, what circumstances would allow party A to terminate the contract?

It is well established that minor breaches of contract allow a party to bring a claim for damages. The courts have, however, been anxious to ensure that termination is only permitted where the breach of contract is such as to go to the very root of the contract so that failure to perform it would mean that performance of the remainder would result in something substantially different from what was initially contemplated.

That in itself sounds fine but what is the situation where the parties expressly agree in a written contract that the breach of any obligation will allow one party to terminate the contract?

In the 2000 case of **Rice (t/a Garden Guardian) -v- Great Yarmouth Borough Council**, that was precisely the point the Court of Appeal was required to address.

In that case the Council contracted with Rice to provide it with leisure management and grounds maintenance for a period of four years. It used a standard form of contract drafted by the Association of Metropolitan Authorities and the clause dealing with termination stated "If the contractor commits a breach of any of its obligations under the contract the Council may, without prejudice to any accrued rights or remedies under the contract, terminate the contractor's employment by notice in writing having immediate effect."

Almost immediately after Rice first commenced work the Council served the

first of numerous default notices regarding the state of its sports pitches. A few months later, the Council terminated the contract in accordance with the above clause.

Despite the clear wording of the contract allowing the Council to terminate "if the contractor commits a breach of **any** of its obligations" the Court of Appeal held that a literal interpretation of that clause flew in the face of commercial common sense and that a common sense, commercial interpretation had to be applied.

In deciding whether the cumulative effect of the various breaches which had taken place was sufficiently serious as to justify the Council bringing the contract to an end the Court should consider, looking at the contractor's performance over a period, whether those cumulative breaches were such as to justify an inference that the contractor would continue to deliver a sub-standard performance in the future such that the Council would thereby be deprived of a substantial part of that for which it had contracted.

This case illustrates the far more commercial, rather than literal, approach taken by the courts in the interpretation of commercial contracts and termination clauses in particular. Under the circumstances, even if you are able to extract very harsh termination provisions from a contractor, enforcing them may not be at all simple.

In the case of **Alan Auld Associates Ltd – v – Rick Pollard Associates Ltd [2008]** the Court of Appeal again considered this question.

Dr Pollard had worked as Consultant for Alan Auld Associates and throughout this

Head Office

3 Lonsdale Gardens
Tunbridge Wells
Kent TN1 1NX
T 01892 510000
F 01892 549884

Thames Gateway

The Old Rectory
St. Mary's Road
Greenhithe
Kent DA9 9AS
T 01322 623700
F 01322 623701

Termination for breach of contract: Don't jump the gun (continued)

time, having issued 19 invoices between 31 December 2004 and 30 April 2006, not one of his invoices had been paid on, or indeed anywhere near on time, leading to the total amount outstanding growing to £721,000.

Dr Pollard withdrew his services and continued to work on the project through another consultant. Alan Auld Associates sought to bring a claim for their lost profit alleging that Dr Pollard had withdrawn his services in breach of the (implied) terms of the contract. Dr Pollard said that he had accepted Alan Auld Associates' repudiatory breach of contract arising from persistent late payment "with every prospect of continuing to do so in the future".

The Court of Appeal re-visited their decision in the Rice case, confirming that the cumulative effect of breaches and likelihood of future breaches may legitimately be considered in assessing whether a breach was repudiatory and could be accepted to lawfully terminate the contract. In this case, by analogy to a contract of employment, the Court said that the time for payment "lay at the heart of the agreement" and, on the facts, the "substantial, persistent and cynical" breaches were sufficient to amount to a repudiatory breach, which Dr Pollard had been entitled to accept and thereby terminate the agreement.

This information sheet has been prepared to highlight some key issues relating to termination for breach of contract. It is intended to be for general guidance only and is not a substitute for specific advice. It is based upon our understanding of the legal position as at January 2009 and may be affected by subsequent changes in the law.

Should you require any specific legal advice on the issues covered, please contact Kamal K Aggarwal by email at kamal.aggarwal@ts-p.co.uk or call Kamal on 01322 623700.