

CASE IN BRIEF - DOUBLE EDITION

DCT Projects Pty Ltd v Champion Homes Sales Pty Ltd [2016] & Vinergy International (PVT) Ltd v Richmond Mercantile Ltd FZC [2016]

by Sarah Redding

In two recent decisions of the Australian and UK Courts, the respective jurisdictions each took a different approach to the relationship between parties' contractual termination obligations and the common law right to terminate for repudiatory breach. Regardless of the jurisdiction, parties are encouraged to use clear and unequivocal language in drafting termination provisions to ensure their intentions as to the common law right to termination based on repudiatory breach are clear. Failure to do so, could enable parties to circumvent any contractual notice or remedy requirements, as was the case in *Vinergy*.

DCT Projects Pty Ltd v Champion Homes Sales Pty Ltd [2016] NSWCA 117

Background

In May 2006, DCT Projects Pty Limited (DCT) and Champion Homes Sales Pty Limited (Champion) entered a construction contract for the construction of several townhouses, as principal and contractor respectively.

Work commenced in August 2006, but construction was delayed following a number of disputed variations claimed by Champion. The Parties signed a modification agreement following suspension of works by Champion due to the unpaid variation claims. However, the modification agreement had little effect, as further disputes arose and Champion suspended work on three further occasions during early 2008.

The parties' deteriorating relationship culminated in DCT purporting to terminate the contract on 2 July 2008. DCT asserted Champion's conduct amounted to repudiation of the contract. Notably, DCT did not terminate for breach of contract. Had DCT done so, they would have been required by the contract to serve a notice of default, and allow Champion a 10 working day remedial period. On 7 July 2008, following DCT's action, Champion considered DCT's purported termination as repudiation of the contract, and sought to terminate the contract itself.



Despite a barrage of cross-claims from DCT against Champion, the trial judge ruled in favour of Champion, holding that DCT had wrongfully terminated the contract, which conduct amounted to repudiation. Champion was therefore entitled to terminate the contract in the circumstances. DCT appealed the decision.

Decision

The Court of Appeal upheld the trial judge's finding of wrongful termination by DCT. In making its decision, the Court of Appeal discussed the concept and application of repudiation, stating it "is a serious matter and is not to be lightly found or inferred". The Court of Appeal considered that while renunciation can be by words or conduct, the threshold for conduct to amount to renunciation is high and must communicate renunciation of either the contract as a whole or a fundamental obligation under it. Gleeson J held that a "party must demonstrate its intention to no longer be bound by the contract or state that it intends to fulfil the contract in a substantially inconsistent manner with its obligations, for that party's conduct to constitute a renunciation of its contractual obligations".

Vinergy International (PVT) Ltd v Richmond Mercantile Ltd FZC [2016]

Background

In 2008, Richmond Mercantile Limited FZC (Richmond) and Vinergy International (PVT) Limited (Vinergy) entered into a long-term supply agreement for the supply of bitumen by Richmond to Vinergy. 39 shipments took place, however in 2012 Richmond terminated the contract following a number of disputes over allegations that Vinergy had committed three breaches amounting to repudiation of the contract. The repudiatory breaches alleged by Richmond were breach of the exclusivity clause by secretly contracting with another supplier for bitumen, failure to pay an invoice for an extended period, and failure to pay demurrage for certain shipments.

The termination clause of the contract permitted either party to terminate on "failure of the other party to observe any of the terms herein", provided that a remedy period of 20 days minimum was given by the aggrieved party for any breaches capable of being remedied. Richmond did not give notice in accordance with the contract, asserting that the common law right to terminate for repudiatory breach was not limited by any clause of the contract, and also that the termination clause only applied to breaches capable of remedy. In response, Vinergy claimed Richmond's termination was unlawful and repudiatory itself, given the termination was not conducted in accordance with the contract.

When the matter came before the Arbitration Tribunal, the Tribunal found Richmond had lawfully terminated the contract. Vinergy appealed to the High Court.

Decision

The High Court upheld the Arbitration Tribunal's decision that Richmond's termination was lawful and was not hindered by the termination clause in the contract. In reaching their decision, the High Court considered whether Richmond could "rely on an unhindered common law right to terminate [the contract] by reason of a repudiatory breach so as to completely bypass the notice and remedy requirements in the termination clause". In finding the termination clause did not limit Richmond's common law right to accept a



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repudiatory breach to terminate the contract, the High Court expressed the significance of the specific wording in the contract. Teare J held that the termination contract clause in this case only related to breaches capable of being remedied, and that the breach of exclusivity was incapable of being remedied.

Teare J contextualised the application of the termination clause as being limited by its wording. The clause depended on "failure to observe any of the terms herein" and was the only one of six contractual rights to terminate which required notice to remedy. Teare J found that it could be inferred the procedure in the clause was intended to apply only to the specific right to terminate found in the clause, "...not to any of the other express rights to terminate...or the right at common law to accept a repudiatory breach as terminating the contract". The High Court upheld the Arbitration Tribunal's decision that Richmond's termination was lawful, and they were not required to give Vinergy notice or a remedy period.

Comment

These cases demonstrate the different approaches taken to the issue of repudiation by Courts in different jurisdictions. The New South Wales Court of Appeal in Australia demonstrated a reluctance to infer repudiation, preferring to uphold contractual termination obligations, unless there had been an unambiguous communication of renunciation of either the contract as a whole or a fundamental obligation under it. Meanwhile, the United Kingdom High Court showed a more liberal approach to the common law right of termination for repudiation, confirming that in the absence of a clear and unequivocal contractual provision, the Court will be reluctant to restrict the common law right to terminate. The judicial uptake and effect of these decisions in subsequent cases remains to be seen. However, it will be interesting to see whether either case has an impact on the New Zealand Courts' approach to similar issues.



BUILDING DISPUTES TRIBUNAL TO LAUNCH NEW RULES IN 2017

The Building Disputes Tribunal is about to launch a revised suite of rules to govern the dispute resolution services it provides including Arbitration, Mediation, Arb/Med, Expert Determination and early Neutral Evaluation.

The new rules contain a number of visionary innovations intended to address the needs of the modern building and construction community for efficient and effective dispute resolution and to further assert BDT's position as the leading independent specialist dispute resolution service provider to the building and construction industry in New Zealand.

Watch this space for further announcements about the rules launch in 2017.

