

December 2013

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## Reconsidering Repudiations of Contracts: Recent Developments

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A repudiation of a contract is a breach of contract by one party that is sufficiently serious to entitle the other party to treat the contract as terminated with immediate effect and to sue for damages. An innocent party, faced with a repudiation, is entitled to choose whether to: (i) treat the contract as continuing, which is known as affirmation of the contract; or (ii) accept the repudiation and bring the contract to an end, thereby discharging all future obligations under the contract. It is said that there is no third choice in addition to these two options. Nevertheless, there is, as described by Rix L.J. in *Stocznia Gdanska SA v Latvian Shipping Company (No.2)* [2002] 2 All ER (Comm), a middle ground between acceptance of repudiation and affirmation of the contract when the innocent party is deciding what to do. This article examines this grey area.

The test for repudiation derives from the case of *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26. The test can be summarised as the following questions: does the breach deprive the innocent party of substantially the whole benefit of the contract; or does the breach of the contract go to the root of the contract, such that the breach makes further performance of the contract impossible? If the answer to either of these questions is yes, then the innocent party may argue that the contract has been repudiated and can either affirm the contract or discharge the contract accordingly, as the party sees fit.

### Why it matters: recent developments

The issue of repudiation is important because, in addition to damages — which is the innocent party's remedy in any event — repudiation allows the innocent party to get out of the contract and extinguish any future obligations under the contract. Alternatively, if the commercial relationship allowed, or economic conditions meant that it was advantageous to do so, the innocent party may decide to continue with the contract, but reserve its right to claim damages. This flexibility is obviously very useful.

There are a number of difficulties with understanding how repudiation works, including whether a repudiation can be cured; the distinction between actual and anticipated breaches; and the date on which an assessment of the repudiation is made. The case of *Ampurius Nu Homes Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577 (the Ampurius case), described below, deals with these issues and makes the position clearer.

## The Ampurius case

Telford Homes (Creekside) Ltd (Telford), a property development and construction firm, entered into an agreement with Ampurius Nu Homes Ltd (Ampurius), a property developer, for the 999 year lease of property comprising commercial units within four blocks (Blocks A, B, C and D). The target date for completion of Blocks A and B was 28 February 2011 and for Blocks C and D was 21 July 2010. Telford's obligations under the contract required it to carry out the build with "due diligence" and to use "reasonable endeavours" to complete the development by the target date. However, due to the economic downturn, Telford ceased work on Blocks A and B to ease cash flow and to assist it with financing the project. Ampurius alleged that Telford's delay was a repudiation of the agreement and reserved its position regarding acceptance of that repudiation. Negotiations were continuing between the two parties when, eight months later on 22 October 2010, Ampurius purported to terminate the contract as a result of the alleged repudiation. However, unbeknownst to Ampurius, Telford had recommenced work on Blocks A and B earlier in the month. Telford accordingly denied the alleged repudiation and continued with the project which was completed roughly nine months late, for Blocks C and D, and approximately one year late, for Blocks A and B.

On whether a repudiation had occurred, the Court of Appeal first looked at whether the effect of the breach (in this case a one year delay) deprived Ampurius of the substantial benefit of the whole contract. The answer to which the Court of Appeal came, in the context of a 999 year lease, was that the breach surely had not. Ampurius further underscored this answer, admitting that the delay had not caused any corresponding loss.

On the correct time for assessment of whether there had been a repudiation, Ampurius argued that the correct date was the date of the repudiation itself. However, the Court of Appeal decided that the assessment should take place when the repudiation is purportedly accepted and the contract terminated.

The Court of Appeal ultimately found that the repudiation had been cured. Thus, Ampurius had no right to terminate the agreement. As a result, Ampurius' injury was restricted to the delay caused by the suspension of work. The delay caused by Telford was not a breach of the necessary severity to constitute a repudiation of the contract.

## What we learn from the Ampurius case

The confirmation that an innocent party can have time to decide whether to accept a repudiation must be considered in light of the risk of an event occurring after the repudiation which cures the situation, such as happened in the Ampurius case. As long as the contract stays alive, the innocent party runs the risk that the repudiation becomes a mere anticipatory breach that can be overtaken by another event.

The Ampurius case simplifies some of the potentially confusing issues surrounding repudiation, which can be summarised as follows:

1. the analysis of whether a breach is serious enough to amount to a repudiation of the contract must take place at the time of the innocent party's purported acceptance of the repudiation; and
2. both anticipatory breaches and breaches which constitute a repudiation of the contract in question have the potential to be cured before an election is made.