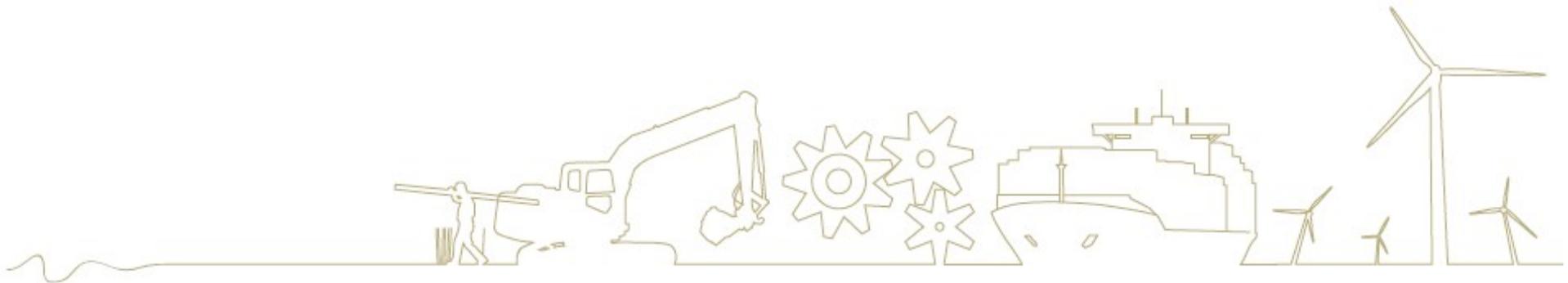


Atkin Chambers Barristers

What – right now – amounts to a repudiatory breach following Optimus Build?

Steven Walker QC



Agenda

- A brief history
- The “modern” definition
- The modern definition redefined
- Recent application of the principles in cases of suspension and failure to pay

Heyman v Darwins

Heyman v Darwins [1942] AC 356 at 378

Lord Porter:

The word "repudiation" has also led to difficulties because it is an ambiguous word constantly used without precise definition in contract law. I do not attempt an exhaustive list of the senses in which the word has been used, but I may give some instances...."

Another case to which the word repudiation is applied is when the party, though not disputing the contract, declares unequivocally that he will not perform it and, admitting the breach, leaves the other party to claim damages."

Heyman v Darwins

Lord Wright:

“Indeed, the word “repudiation,” accepted or unaccepted, is an ambiguous expression. As Scott L.J. pointed out in Toller v. Law Accident Insurance Society, Ltd. 128 : “It may mean: repudiate the original existence of the contract. It may mean: disclose an intention to disregard it in toto and refuse to be bound by its terms altogether. Or it may mean: a mere contention that under the terms of the contract the defendant is completely free from liability by reason of some fact.” Except in the first case the contract is not repudiated. Even in the second all that is repudiated is the defendant's future liability under it.”

Renunciation

Repudiation may be distinguished from a “renunciation” of a contract which occurs when, before the time for performance of an obligation has arrived, a party states that it will not perform its obligation.

Unhelpfully both repudiation and renunciation are sometimes referred to as anticipatory breach but the expression is best suited to describe a repudiation of a contractual obligation that occurs before the obligation is required to be performed.

Definition

Lord Simon at 361:

“If one party so acts or so expresses himself, as to show that he does not mean to accept and discharge the obligations of a contract any further, the other party has an option as to the attitude he may take up. He may, notwithstanding the so-called repudiation, insist on holding his co-contractor to the bargain.... Alternatively, the other party may rescind the contract, or (as it is sometimes expressed) "accept the repudiation," by so acting as to make plain that in view of the wrongful action of the party who has repudiated, he claims to treat the contract as at an end, in which case he can sue at once for damages.”

The Nanfri [1979] AC 757

Lord Wilberforce at 778-779:

“I shall not set out at any length the numerous authorities on anticipatory breach: this is one of the more perspicuous branches of the law of contract and the modern position is clear. The form of the critical question may differ slightly as it is put in relation to varying situations...”

The Nanfri

Four formulations:

... an intimation of an intention to abandon and altogether to refuse performance of the contract ...' or 'evince an intention no longer to be bound by the contract ...

[fulfil the contract] *“only in a manner substantially inconsistent with his obligations, and not in any other way”*

..such as to deprive the other party of substantially the whole benefit intended to be obtained from the further performance of their own contractual undertakings

“such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract”

The Nanfri

“The difference in expression between these two last formulations does not, in my opinion, reflect a divergence of principle, but arises from and is related to the particular contract under consideration: they represent, in other words, applications to different contracts, of the common principle that, to amount to repudiation a breach must go to the root of the contract.”

Criticism of The Nanfri

Telford Homes (Creekside) Ltd v Ampurius Nu Home Holdings [2013] EWCA Civ 577, Lewison LJ, at para. 50:

"The trouble with expressing important propositions of English law in metaphorical terms is that it is difficult to be sure what they mean. As the High Court of Australia majority judgment pointed out...to describe a breach as "going to the root of the contract" is "... a conclusory description that takes account of the nature of the contract and the relationship it creates, the nature of the term, the kind and degree of the breach, and the consequences of the breach for the other party."

Rice v Great Yarmouth

Hale LJ (as she then was)

"The question for the court ... in any case like this is whether the cumulative effect of the breaches of contract complained of is so serious as to justify the innocent party in bringing the contract to an end. The technical label is 'repudiatory' but that is just a label to describe the consequence which may flow.

The essential question is whether the breach or breaches are such as to justify the summary termination of the contract by the other party, having regard to all the circumstances" (para. 35)

[2000] All ER 902 (D)

Eminence Property v Heaney

Etherton LJ at [63-64]

“So far as concerns repudiatory conduct, the legal test is simply stated, or, as Lord Wilberforce put it, “perspicuous”. It is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.”

Eminence Developments v Heaney

“Secondly, whether or not there has been a repudiatory breach is highly fact sensitive. That is why comparison with other cases is of limited value. The innocent and obvious mistake of Mr Jones in the present case has no comparison whatever with, for example, the cynical and manipulative conduct of the ship owners in The Nanfri.

[...]

Fourthly, although the test is simply stated, its application to the facts of a particular case may not always be easy to apply, as is well illustrated by the division of view among the members of the Appellate Committee in Woodar itself.”

Motive may be relevant

Etherton LJ:

“Thirdly, all the circumstances must be taken into account insofar as they bear on an objective assessment of the intention of the contract breaker. This means that motive, while irrelevant if relied upon solely to show the subjective intention of the contract breaker, may be relevant if it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been, aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person. So, Lord Wilberforce in Woodar (at p. 281D) expressed himself in qualified terms on motive, not by saying it will always be irrelevant, but that it is not, of itself, decisive.”

Suspension of work

Lawful or unlawful?

Statutory right?

Contractual right?

Mayhaven Healthcare v Bothma [2010] BLR 154

“I do not accept that every wrongful suspension which leads to a breach of Clause 2.1 will automatically be a repudiatory breach. Rather, whether such a suspension and a consequent breach does amount to a repudiation depends on the breach and the facts and circumstances of the case.” Ramsey J. at para. 23.

De Beers v Atos

At para 229 the Judge said:

“It is quite clear to my mind from the terms of the correspondence that I have already set out that at no stage was Atos purporting to exercise its right under clause 12.5 to suspend work until payment of the invoice. The message that came across loud and clear in the communications from Atos between 21 May and 6 June 2008 was that the work would be suspended unless DB agreed to enter into an appropriate commercial agreement with Atos by 5 pm on 31 May, subsequently extended to 6 June 2008.”

[2010] EWHC 3276 (TCC)

Optimus Build v Southall

HHJ Stephen Davies at para.61:

“the key point is that the claimant was not saying that unless and until they were agreed and satisfied it would not carry out any further work. It was asking, entirely reasonably in the circumstances, for an early meeting to seek to resolve these issues. It was not saying that it was not prepared to negotiate away from these three stipulations.... The claimant was not in repudiatory conduct when it was making it plain its willingness to meet and seek to resolve the issues which divided the parties with a view to completing the project.”

[2020] EWHC 3389 (TCC)

Thank you

Steven Walker QC



Silk 2012

sjwalker@atkinchambers.com

Steven specialises in advising and representing parties to complex commercial contracts relating to a wide range of subject matter including the design and delivery of buildings, oil and gas installations, power generation plant, process and engineering plant, ships, IT systems, telecommunications systems, PFI/PPP, facilities management and professional services.

He has extensive experience in the energy sector having been heavily involved in a number of projects concerning the design and construction of offshore wind farms, energy from waste plants and other forms of renewable energy.

Transport-related projects have formed an important part of Steven's practice over the past 25 years. His first case in the sector concerned the Eurostar high-speed train sets and since then he has been involved in numerous projects in the road, rail and air sectors including the construction of the HS1 high-speed rail link, airport runways and other airport infrastructure, overground and underground rail and tram systems, road construction/extension, and communication systems.

He has appeared as advocate in the Technology and Construction Court (TCC), the Court of Appeal, numerous arbitrations (including ICC, DIAC, UNCITRAL, HKIAC, LCIA and LMAA) and adjudications, and in expert determination and mediation. His arbitration experience includes substantial international experience.



Atkin Chambers

1 Atkin Building
Gray's Inn
London
WC1R 5AT
United Kingdom

Office hours

8.00am - 7.00pm GMT
Monday to Friday

Telephone

+ 44 (0)20 7404 0102

Fax

+ 44 (0)20 7405 7456

E-mail

clerks@atkinchambers.com

If you need to contact us out of hours or in an emergency situation, please use the following number:

+44 (0)7843 561737

© Copyright 2018 Atkin Chambers All Rights Reserved

The information provided in this presentation is intended to give general information about legal topics. The information is not intended to be relied upon or to be a substitute for legal advice. Accordingly, we do not accept any liability for any loss which may arise from reliance upon this information. The content of this presentation is correct as at the date of this presentation.

The content of this presentation is the copyright of Atkin Chambers. Atkin Chambers authorises the intended recipient to hold this presentation on any intranet database but it should not be amended or provided to anyone outside your organisation without the prior permission of Atkin Chambers.

Please address all enquiries of this nature to: clerks@atkinchambers.com.