

20 APRIL, 2017

BREACH AND REPUDIATION: THE BASICS

INTRODUCTION

A party to a contract may be unsure of its rights to terminate the contract if the other party has committed a breach of contract. Where there is no express provision in a contract stating the party's right to terminate, the party wishing to terminate the contract should show there has been a *repudiation*.

Parties seeking to terminate a contract based on another party's repudiatory conduct need to be careful as a Court may later find that the party in breach of the contract did not repudiate the contract. In this case, the party seeking to terminate will be held to have repudiated the contract.

WESIAK V D&R CONSTRUCTIONS (AUST) PTY LTD [2016] NSWCA 353

FACTS

In *Wesiak*, a written contract for residential building work existed between a home owner, Wesiak, and a builder, D & R Constructions ('D&R').

The events which ensued in relation to this contract are as follows:

- March 2012 - March 2013: 9 progress claims are made by D&R totalling \$605,000.
- 4 June 2013 onwards: An invoice amounting to \$27,000 was sent by D&R to Wesiak for works done to that date. Wesiak refused to pay the invoice and asked for further details relating to amounts already paid. D&R then sent documentation relating to the amounts already paid, amounts claimed for variations and a further \$75,862. Wesiak responded by saying that they had paid more than what was required at that stage of construction and also stated that significant works remained to be performed.
- 26 July 2013: D&R issue a notice of suspension of works
- 16 September 2013: A letter was sent on behalf of D&R arguing that the \$27,000 was payable. They also stated that they would recommence works provided certain

- conditions (which were inconsistent with the contract) were satisfied.
- 17 September 2013: A letter was sent on behalf of Wesiak in which they disputed having to pay the \$27,000, expressed a willingness to meet some of the conditions proposed by D&R. The letter concluded by stating their intentions to terminate the contract.
- 20 October 2013: D&R terminate the contract based on wrongful repudiation.

ISSUES

On appeal to the NSW Supreme Court the issue before the Court were:

- whether Wesiak' letter dated 17 September 2013 amounted to repudiatory conduct
- whether D&R had repudiated the contract
- whether D&R was entitled to rely on the Wesiaks' 'repudiation' since D&R was also in breach of the Contract

JUDGMENT

The court first outlined the various definitions of 'repudiation' as follows:

- the manifestation of an intention to no longer be bound by a contract
- a breach of contract by one party which justifies the other party's termination

The Court stated that, based on the surrounding circumstances, Wesiak did not repudiate the Contract. The letter dated 17 September 2013 demonstrated a willingness to negotiate and comply with the requirements and variations to the Contract sought by the builder, and invited a continuation of negotiations. Thus, Wesiak did not evince any intention to repudiate the contract.

On the other hand, the builder had demonstrated repudiatory conduct by suspending work on site which was a breach of an essential term of the contract. Furthermore, their communication with the Wesiaks indicated that they were not prepared

to perform the contract and so the Court held that the D&R had repudiated the Contract.

DAMAGES: *GILLIGAN'S BACKPACKERS HOTEL & RESORT PTY LTD V MAD DOGS PTY LTD* [2016] QCA 304

In this case the court laid down the rule that a party accepting a repudiation is entitled to loss of bargain damages if the accepting party is 'ready, willing and able' to perform the contract. Since the party accepting repudiation in this case was insolvent, it was not entitled to loss of bargain damages.

Parties seeking to terminate a Contract on the basis of repudiatory conduct by another party ought to be aware of the risks that this carries and should seek legal assistance to avoid unwanted consequences.

For more information

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