

Terminating terrors

Julian Acratopulo considers when repudiatory breaches of a contract can lead to termination in light of *Valilas v Januzaj*



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If a contract says that it can be terminated for breach of certain obligations, all well and good. But if the contract is silent, when in law can it be terminated for breach?

Given that the consequences of wrongful termination can be severe, this is a fundamental question to which there should be a clear answer. Clients want to know at least what the legal test is, even if the facts are difficult, in order to try to take lawful decisions. However, practitioners will struggle to give them clarity.

Absent express contractual provision, currently most terms are construed as intermediate terms which do not give rise to an automatic right of termination. As a result, it is necessary to look at the nature of the breach of the relevant clause to decide whether or not it gives a right to terminate the contract. This creates uncertainty, which is then magnified, because the courts consistently fail to take the opportunity to set out clearly what is the nature of a breach

that makes it repudiatory. Doing so would tie the judge's hands.

Most recently, in *Valilas v Januzaj* [2014] EWCA Civ 436, Arden LJ even expressed the view that no satisfactory fixed rule could be formulated. She then applied the test that a repudiatory breach is one that deprives the victim of substantially the whole of the benefit of the contract.

But that is not the same as being deprived of a substantial part of the benefit to which the victim is entitled under the contract, another test regularly propounded and applied by the courts. A substantial part of the benefit of a contract is potentially significantly less than substantially the whole of the benefit.



Declarations of ultimate compliance were not relevant

Dissenting judgment

Looking at the position in the round – making “a multi-factorial assessment involving the nature of the contract and the relationship it creates, the nature of the term and consequences of breach for the innocent party”, according to Floyd LJ – the Court of Appeal (Underhill LJ

dissenting) concluded that a failure to make interim payments in accordance with the contractual schedule was not a repudiatory breach.

The claimant had indicated that he would pay once the extent of his liability was clear. The consequences of breach for the defendant were not significant, he had other sources of income, and he should have appreciated that he would be paid in the end. Does this mean that the breach would have been repudiatory if interest rates were higher, or if the defendant might not have been able to pay, or if the claimant had no other income?

Underhill LJ, dissenting, was more severe. The claimant made a deliberate decision to depart from the primary obligations under the contract. The claimant intended to fulfil the contract “but in a manner substantially inconsistent with his obligations and not in any other way”, to cite another test for repudiatory breach.

In reaching his conclusion, Underhill LJ looked more at the substantial part of the benefit – payment upfront – of which the defendant was deprived rather than considering whether the benefit lost was substantially the whole benefit. Declarations of ultimate compliance were not relevant, Underhill LJ thought.

So *Valilas* leaves the law uncertain. Best, therefore, set out in the contract when it can be terminated and the consequences of that termination. **SJ**

ACTION POINTS

As the Court of Appeal acknowledged in *Telford Homes (Creekside) Limited v Ampurius NU Homes Holdings Limited* [2013] EWCA Civ 577, **there is a tension in the authorities as to the test for repudiatory breach of contract. Some authorities suggest the breach must deprive the injured party of “substantially the whole benefit” of the contract. Others suggest it is merely a deprivation of “a substantial part of the benefit”.**

Ultimately, this tension gives the courts flexibility in assessing breaches of contract and by definition creates additional uncertainty for the end user beyond the application of the underlying facts. In practice, therefore, careful thought should be given, with clients, at the time of drawing up the contract to determine and expressly provide the circumstances in which it can be terminated and the consequences of that termination.