Repudiatory Breach in the Case of Ampurius Homes Holdings vs Telford Homes (Creekside)

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The recent case of Ampurius NU Homes Holdings Limited v Telford Homes (Creekside) Limited considered the question of repudiatory breach – something that may occur more frequently in times of economic hardship, as the case illustrates.

The case involved a contract for the development by the defendant of a property comprising units for commercial and residential use and the grant of long leases in the property to the claimant, who planned to sublet the various units. As a result of the credit crunch, the defendant had funding problems and in March 2009 stopped work on part of the development. The defendant intended to resume the work when it could. The delay lasted for about 18 months.

A repudiatory breach is a breach of contract that is sufficiently serious, particularly in the light of its consequences, to allow the other party to bring the contract to an end. The other party may do this by ‘accepting’ the repudiation; or it may treat the contract as continuing by ‘affirming’ the contract.

The claimant alleged in November 2009 that the defendant was in repudiatory breach of contract, but took part in discussions and negotiations with the defendant with a view to the works being resumed. Eventually, though, the claimant purported to terminate the contract by accepting the defendant’s repudiation on 2 October 2010, just after the defendant had resumed work.

The first question that had to be decided, perhaps surprisingly, is whether the defendant had been in breach of contract at all. The defendant had an obligation to proceed with due diligence and to use reasonable endeavours to complete the works by a certain date. However, the defendant argued that the due diligence obligation should be interpreted as meaning due care, not due expedition (as such words are normally thought to mean), because there was already a separate time obligation. As for the time obligation, the defendant argued that it had used all reasonable endeavours to obtain funding, and so had discharged this obligation.

The court rejected both these arguments. On the first point, the court held that to perform work with ‘due diligence’ meant more than doing it carefully. The expression normally connotes both due care and due expedition. The court also observed that it is not infrequent for contracts to contain overlapping obligations and the presumption against surplusage is of little weight in the interpretation of commercial contracts. On the second point, the court held that the obligation to use reasonable endeavours covers matters that relate directly to the physical conduct of the works (such as inclement weather or a shortage of materials for which the defendant is not responsible) and not to anterior or extraneous matters such as having sufficient financial resources to do the work at all.

Therefore, in stopping work for as long as it did, the defendant was in breach of both these obligations. The question then was whether these breaches were repudiatory. It was accepted that time was not of the essence of the contract and had not been made so. However, the court held that the delay was sufficiently serious for the breach to be repudiatory. An ongoing breach might not constitute a repudiatory breach from the outset, but it could become a repudiatory breach after a time and the court decided it had become sufficiently substantial by the end of 2009.

The next question was whether the claimant had left it too late to accept the repudiation and thereby terminate the contract; in other words, whether the claimant had in the meantime affirmed the contract, in particular by taking part in negotiations with a view to enabling the contract to continue.
The court held that the claimant had not affirmed the contract: it was entitled to take time to decide whether to accept the repudiation and it was clear that it took part in negotiations without prejudice to their rights arising from the breach.

As to the damages recoverable, the claimant was entitled to the recovery of the deposits it had paid to the defendant, plus interest thereon. As to the other expenses that it had incurred in anticipation of the contract being performed and its project for the letting of the property going ahead, the issue here was whether the claimant would have made a sufficient profit to recover these expenses. The court held that the burden was on the defendant to prove that they would not have done so. On the evidence of the rental values, the court held that this burden was discharged and that the claimant would not have recovered these expenses anyway.

Care has to be taken in treating a breach of contract as repudiatory, in case it is later decided by the court that the breach was not repudiatory: the party that had wrongly treated the breach as repudiatory is then likely to be thereby in repudiatory breach itself. Many building contracts expressly set out the circumstances in which a contract may be terminated. In such cases, this sort of analysis may not then be necessary.

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