

Late completion tempts premature termination

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1. **General danger** - Terminating a contract for the sale of land has always been a dangerous step justifying extreme caution. The danger to be avoided is that one party may treat a breach by the other as a repudiation of the contract and accept that repudiation only for it to be held that the breach was not a repudiation and so the acceptance is itself a repudiation which may be accepted by the party in breach. The party not in breach is converted from innocent party to transgressor with heavy financial penalties.

2. **Financial context** – this area has become a legal battle ground again due to the recession. Developers have run out of funding and so have suspended developments whilst hunting round for fresh sources of finance (the Telford case) Once that delay has been overcome purchasers have then found themselves committed to purchases but unable any longer to obtain mortgages for a substantial percentage of the purchase price (the Urban 1 case)

3. **Build and sell** – this danger is particularly acute when the contract is not to sell an existing property but to build and then transfer or lease the new property. This has been highlighted by two recent Court of Appeal decisions – Telford Homes (Creekside) Limited v Ampurius Nu Homes Holdings Limited [2013] EWCA 577 and Urban 1 (Blonk Street) Limited v Ayres [2013] EWCA Civ 816. Both are concerned with new developments and with contracts which did not have a specific fixed completion date for the transaction but linked completion to the date of practical completion of the construction. In each there was a delay in completion of the construction which was the justification for the purchaser terminating the contract and in each case the Court of Appeal held that the delay did not constitute a repudiation of the contract. In consequence by wrongly ending the contract the innocent party had repudiated the contract thereby risking the loss of the deposit and a damages claim.

4. Telford Homes (Creekside) v Ampurius Nu Holdings –

4.1 **Delay** - this case did not concern the purchase of a flat or flats as is often the case but rather the grant of four leases of commercial units for terms of 999 years in return for a premium of just under £8,500,000 subject to the possibility of variation. Under the contract Telford contracted to build four blocks with commercial units on the lower floors and around 370 flats on the upper floors. There were standard obligations to use due diligence in the construction and to use reasonable endeavours to procure completion of the works by the target dates which were 21st July 2010 for blocks C and D and 28th February 2011 for blocks A and B. Completion was to take place 25 working days after the certification of practical completion of each set of two blocks. It was held on the construction of the contract that for these purposes practical completion did not require completion of the flats above which meant that works could be continuing to the block even after completion of the relevant lease.

With the onset of the credit crunch sales of flats slowed causing Telford to slow down the pace of work on blocks C and D and to suspend work on blocks A and B. However, Telford did seek to obtain alternative funding which it succeeded in

securing from a bank. Blocks C and D were completed on 19th January 2011 and 4th April 2011 respectively which was about nine months later than the target date. Work resumed on blocks A and B on 4th October 2010 and was completed by 1st May 2012 and 20th February 2012 respectively which was just over one year later than the target date. The anticipated gap of seven months between the construction of the two sets of blocks was actually just over a year.

4.2 **Termination** – in October 2010 Ampurius wrote terminating the contract on the basis that the delay was a fundamental breach. Although unaware of it this was shortly after work had resumed on blocks A and B although Ampurius had been earlier informed that work was going to resume. The problem facing Ampurius was that there was no fixed completion date, time was not of the essence and the contract contained no express right to terminate if construction had not been completed by a specified date. Added to this no notice to complete had been given. In consequence it had to be established under general contract law that the delay on the part of Telford constituted a repudiation of the contract.

4.3 **Characterisation of term** – the first stage in the analysis of the facts is to ascertain the character of the terms breached. In doing so the courts apply the threefold categorisation of condition, warranty and innominate term. This was discussed in the judgments in the Urban 1 case. Breach of a condition allows the innocent party to elect to terminate. Breach of a warranty results in a damages claim only. Breach of an innominate term requires the Court to determine whether or not the particular breach in the circumstances of the case constituted a repudiation. In the Telford case there was no condition and the contract was silent as to discharge so the judgments of the Court moved straight to the test for repudiation.

4.4 **Test for repudiation** – There are two ways in which repudiation can be established. The first is where it is shown that the party in breach had evidenced an intention not to complete the contract or at least only to do so in a manner substantially inconsistent with that party's contractual obligations. That was not the case here as Roth J. had found that Telford had a strong commitment not just to performing the contract but to the completion of the development as a whole. The second way is to prove that the breach deprives the innocent party of substantially the whole of the benefit of the contract. What this involves has been described in a number of formulations such as it amounting to frustration of the contract or going to the root of the contract. The tension between such formulations and the alternative formulation of being deprived of a substantial part of the benefit under the contract was acknowledged but left unresolved. What was emphasised was that the bar is set high.

4.5 **Date apply test** – repudiation has to be established at the date of the purported termination and not at the date of breach. The application of the test at that date means that the Court will take account of remedial steps taken by the party in breach and also likely future events based on the objective facts known then (Lewison LJ at para. 44).

4.6 **Application of test** – Lewison LJ recognised that it was difficult to be sure what such formulations of the test mean. However, whichever formulation is used it is

necessary to first ascertain the benefit intended to be gained by the innocent party from performance of the contract and then the effect of the breach on that party.

The trial judge held that the delay was repudiatory because work had been deliberately stopped on two of the blocks despite requests that the work resume and a date could not be given for the resumption of those works. The contract envisaged a single project comprising four blocks of which three framed a piazza. Ampurius wanted delivery of the four blocks as close in time as possible to assist with their marketing and to avoid disruption by outstanding building works.

The Court of Appeal did not accept that Telford had repudiated the contract and allowed the appeal. The period of delay in the context of a lease of 999 years was considered not to be substantial and a loss of six months with such a term was described as trivial. By the time of the letter terminating the contract no actual loss had been suffered by Ampurius and future financial loss was estimated to be in the region of £100,000. Again this figure was not considered to be substantial when the premium was in excess of £8 million and the developments costs around £100 million. It had already been held by Roth J. that there was no decline in market values. The Court was also influenced by the findings that Telford had made strenuous efforts to obtain funding; Telford had a strong commitment to the development; the works on blocks A and B had resumed prior to the termination letter; and Telford had offered to postpone completion of the leases of blocks C and D. Further there was no evidence that the delay had made it more difficult for Ampurius to obtain funding although it is not obvious that this would have affected the outcome.

The contract provided for staged completion of the four leases. There was always going to be a gap between the practical completion of the two sets of blocks. In consequence the marketing problems which swayed the trial judge did not arise exclusively because of the delay in performance as seven month's interference due to ongoing building works was part of the contract. The further interference was not sufficient to frustrate the contract.

4.6 **Uncertainty** - What was not considered by the judge at first instance was whether Ampurius reasonably believed that the works could not be completed within such time as would not frustrate the contract. Delay resulting in such a belief reasonably held could be a repudiatory breach (para. 74 Longmore LJ) but such uncertainty was not considered by the trial judge who relied solely on the likely gap between the practical completion of the two sets of blocks. However, in that case such an argument would not have resulted in a different outcome because the uncertainty had gone by 22nd October 2010 when the termination letter was sent so there could be no repudiatory breach to be accepted (para. 76)

4.7 **Warning to innocent parties** – this case illustrates the need to carefully analyse the contract and its history before seeking to terminate on the grounds of delay in carrying our works. It also emphasises how difficult it will be for the innocent party to establish the necessary repudiatory breach. Lewison LJ cited dicta of May LJ in *Shawton Engineering v DGP International* [2005] EWCA Civ 1359 which serves as a warning on this point. May LJ stated that where “time is not of the essence and where the party said to be in breach by delay is nevertheless making an effort to

perform the contract, it is intrinsically difficult for the other party to establish a fundamental breach in this sense". In such circumstances sending a letter of termination will be very high risk. If not justified the deposit will be forfeit and a possible damages claim arises.

5. Urban 1 (Blonk Street) Limited v Ayres

5.1 This is another recent Court of Appeal case in which the attempted termination of the contract for delay has been held on appeal to cause the innocent party to become the person repudiating the contract.

5.2 **Contract** – Urban proposed to build a block of mixed apartments and commercial units and contracted on 25th January 2007 to build the block and to grant to the Ayres a lease for a term of 125 years of a two-bedroomed apartment in the block. No fixed completion date was specified. Completion was to be ten days after receipt of a notice of the practical completion of the property. As there were no express time limits this meant that Urban had a reasonable period in which to build and then completion was to be ten days after the expiry of that period. Time was not of the essence.

5.3 **Delay** – it was expected that work would start in February 2007 and the target date for completion was December 2008. There was a slight delay in starting and then various problems which delayed matters but were resolved by September 2007. This put back the anticipated completion date to February 2009 but this was not communicated to the purchasers until October 2008. By then they had obtained an offer of a 90% mortgage which had to be taken up by the end of December 2008. There was little work between October 2008 and January 2009 due to the building contractor having financial difficulties. In November 2008 the purchasers were told that there would be no more 90% mortgages after 2008. Around this period the efforts of the purchaser's valuer to gain access to the property to value the apartment were blocked by Urban 1. At the end of January 2009 it was stated that completion would be May 2009 but there were further delays in February. On 20th March 2009 the purchaser's solicitors wrote terminating the contract due to unreasonable delay stating that the reasonable period for the completion of the works was the end of December 2008 or alternatively a reasonable time from 9th February 2009. The property was completed by 31st July 2009 and notice of practical completion given on 13th August 2009 with a notice to complete under the standard conditions given on 1st September 2009.

5.4 **Repudiation** – no provision in the contract entitled the purchaser to terminate for unreasonable delay. The standard condition relating to notices to complete only operated when the property had been constructed and so no notice to complete could be served under the standard condition making time of the essence. In consequence as with the Telford case reliance had to be placed on establishing a repudiatory breach.

The trial judge had the difficult task of dealing with both sides representing themselves. He held that there had been unreasonable delay constituting repudiation. Amongst the factors he took into account was completion being six months late and

the loss of the mortgage offer combined with the purchaser's inability to obtain a replacement mortgage.

The Court of Appeal did not agree and allowed the appeal. Again the length of the term of the lease to be granted was set against the delay and considered not to be substantial. The gap between the earliest possible date for completion and the letter of termination was at most a month. Further the loss of the mortgage offer and the change in the mortgage market both occurred before the contractual completion date. The purchasers would have suffered these consequences even without the delay and, therefore, they carried no weight. It was considered to be important that Urban 1 was seeking to perform the contract and such prejudice as had been suffered could be compensated by damages. Again the innocent party had become the guilty party exposed to forfeiture of the deposit and a damages claim.

6. Lessons

6.1 From the purchaser's perspective with such contracts a fixed date for completion of construction and an express right to terminate avoids the uncertainty of repudiation.

6.2 Without such provisions the purchaser has to rely on the uncertain concepts of "unreasonable delay" and "repudiatory breach".

6.3 In such cases the Court has to analyse the benefit to be obtained from the contract by the purchaser and then determine the effect that the breach has on that benefit. Termination will only be justified if the breach deprives the purchaser of the substantially the whole of the benefit.

6.4 Hard as it will seem to the other party delay does not automatically confer a right to terminate.

6.5 The bar is set high when it comes to proving the delay constitutes a repudiatory breach.

6.6 Terminating without time having been effectively made of the essence is a high risk course of action as is shown by these two cases. There may be no choice but if not justified it will itself be a repudiation which the party in delay can accept and then forfeit the deposit and, if appropriate, claim damages.

6.7 Warnings need to be given before a purchaser enters a contract to buy under a build and purchase contract. The vulnerability of purchasers who need mortgages in order to complete has been repeatedly shown following the onset of the credit crunch.

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