

Terminating Contracts For Breach

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Introduction

1. The general theme of this conference is *remedies*. In many commercial cases the real remedy being sought is not a legal remedy in the form of eg damages or an order compelling another person to do (or not do) something. Rather, the remedy being sought is the ability to exit a contract early and without penalty.
2. This may be for any one of a number of reasons, such as that the contract is no longer profitable for one of the parties or that one of the parties sees better opportunities elsewhere or that there has been a breakdown in relations between the parties.
3. If the parties have been well-advised when negotiating the contract, there may be no scope for challenging the validity or enforceability of the contract on grounds such as uncertainty, lack of formality, mistake or misrepresentation. In such cases, the only option (leaving aside more remote possibilities such as frustration) may be to seek to terminate the contract on the ground of breach.
4. Cases of termination (or attempted or threatened termination) for breach form part of the diet of most commercial litigators. However, the experience over the last 12 months or so suggests that such cases are on the increase, principally as a consequence of changing economic conditions such as the fall in the oil price, exchange rate movements following the Brexit vote, and the ever increasing scale of technological advances.
5. This may therefore be an opportune time to recap on the main principles governing termination for breach, drawing attention to some recent cases and highlighting some important practical issues and potential pitfalls.

The two potential sources of termination rights

6. There are, of course, two potentially relevant sources of termination rights - (i) common law rights and (ii) contractual rights – and it may be helpful to provide a brief overview of the principles governing each.

Common law rights

7. As we all know, a party to a contract may end the contract prematurely where the other party is guilty of what is generally referred to as “repudiatory” conduct.
8. Repudiatory conduct may take any one of three possible forms:
 - renunciation of the contract – i.e. saying or doing something which indicates that the party does not intend to perform the contract in material respect;
 - rendering performance impossible – i.e. acting in such a way as to put it out of the party’s power to perform; and
 - breaching the contract in a sufficiently serious manner to justify termination – i.e. committing a “repudiatory” breach.
9. The cases sometimes refer to “anticipatory” breaches but this is not a further category of repudiatory conduct. It merely means that the conduct in question occurs before the time for performance of the contract and as such it is generally confined to repudiatory conduct of the first and second kinds.
10. These categories are not mutually exclusive. So, for example, the taking of steps which make it impossible for the contract to be performed may also amount to a renunciation of the contract by indicating that the party has no intention of performing. Similarly, acting in such a way as to render performance impossible may also be analysable in terms of breach of an implied condition not to do anything to prevent performance.
11. A key requirement of all three categories is that the conduct in question (whether it be a refusal to perform or creation of a situation of impossibility of performance or a breach of contract) must be sufficiently serious. It will be sufficiently serious if it involves breach of a condition of the contract. As for conduct which does not involve a breach of condition, a variety of expressions have been used to encapsulate what is required, including that the conduct must

“go to the root of the contract”¹ or “frustrate the commercial purpose of the venture”² or “deprive the other party of substantially the whole of the benefit”³ which it was intended that he should obtain under the contract.

12. This requirement gives rise to the first of the difficult practical issues that arise when dealing with termination for breach. Whilst the basic principle is easy to state, it is often far from easy to apply in practice as it requires a careful evaluation of all the relevant circumstances or, as the courts have described it, a “multi-factorial assessment” using “open-textured expressions”.⁴ Often, this process is one on which different people might reasonably come to different conclusions.
13. A great deal can hang on getting the answer right. If the terminating party gets the answer wrong, there is a danger not merely that its termination will be held to be invalid but also that it itself be held to have been guilty of “repudiatory” conduct, opening itself up to the risk that the other party will seek to terminate and to claim potentially substantial damages from it. This danger is examined further below.
14. It is important to remember that “repudiatory” conduct will not automatically bring the contract to an end. Instead, it gives the innocent party a right to elect. The innocent party can *either* disregard the conduct and continue to press for performance of the contract *or* it can terminate the contract. If the innocent party wishes to do the latter, it must communicate its decision to the other party by some overt act which is inconsistent with continuation of the contract. In practice, of course, this is normally done by a written notice from the party or its solicitors. However, a written notice is not essential.
15. The effect of an election to terminate the contract is to bring the contract to an immediate end and to entitle the terminating party to claim:
 - any sums outstanding under the contract at the date of termination;
 - damages for any past breaches of the contract; and
 - damages for loss of bargain – i.e. the profits that would have been made over the remaining life of the contract (in many cases these can be very substantial) or

¹ *Federal Commerce & Navigation Co v Molena Alpha Inc* [1979] AC 757, 779.

² *Trade and Transport Inc v Iino Kaim Kaisha Ltd* [1973] 1 WLR 210, 223.

³ *Hongkong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26,66.

⁴ *Valilas v Januzaj* [2014] EWCA Civ 436.

alternatively compensation for wasted expenditure (i.e. expenditure thrown away as a result of the early termination).

Contractual rights

16. Obviously, whether there are any contractual termination rights and, if so, their precise nature and extent depends on the terms of the contract in question. It may be (although this is relatively rare in commercial contracts of any significant duration) that there are no contractual termination rights.
17. Where the contract contains contractual termination rights, important issues can arise regarding their construction. Whilst the courts are generally content to leave parties to agree whatever terms the parties wish to regulate the arrangements between them, they have felt the need to intervene to prevent overly literal interpretations of termination rights.
18. This has been particularly the case in relation to contracts which purport on their face to allow termination in the event of “any” breach of their terms by a party. The key case is the well-known decision of the House of Lords in *The Antaios*⁵ regarding the importance of interpreting contracts in a way which does not “flout commercial common sense”. In that case the interpretation which was said to flout common sense was an interpretation of a clause which appeared to allow termination in the event of “any” breach. The House of Lords held that “any” breach must mean “any repudiatory” breach because any other conclusion would flout commercial common sense.
19. Of course, each case must turn on its own facts and it may be that there will be cases where the courts can be persuaded that “any” breach means any breach, whether or not repudiatory. However, to date, the courts have almost invariably followed *The Antaios* and held that “any” breach means “any repudiatory” breach.⁶

⁵ [1988] 1 AC 191.

⁶ See, among others, *Rice v Great Yarmouth BC* [2003] TCLR 1; *Dominion Corporate Services Ltd v Debenhams Properties Ltd* [2010] EWHC 1193 (Ch). Although see also *Leofelis SA v Lonsdale Sports Ltd* [2008] ETMR 63 and *ENE Kos 1 Ltd v Petrolio Brasileiro SA (No 2)* [2012] UKSC 17.

20. There is, however, more room for argument where, as is often the case, the contract uses expressions such as “material” or “substantial” breach.
21. The expression “material breach” has received judicial consideration in a number of cases. Generally, it has been held to require something less than a repudiatory breach.⁷ However, the breach must still be significant. The courts have suggested a check-list of relevant considerations when determining whether a breach is “material” including:
- the commercial consequences of the breach for the innocent party;
 - any explanation for the breach (in particular, whether it was deliberate or inadvertent);
and
 - the consequences for each party of allowing the contract to be terminated in reliance upon the breach.⁸
22. The expression “substantial breach” has received less judicial consideration. In *Crane v Wittenborg*⁹ considered that it meant this expression also required a repudiatory breach. However, whilst that conclusion may have been correct on the facts of that case, there must be scope for arguing for a different conclusion in other cases. The concept of “substantiality” is not a million miles from “materiality”, which, as indicated above, is generally interpreted as requiring something less than a repudiatory breach.
23. Sometimes the contract will provide that breach of a particular provision or provisions will justify termination. Where this is the case, there will obviously be less scope for the court to intervene. As Leggatt J commented in *Newland Shipping and Forwarding Ltd v Toba Trading FZC*,¹⁰ “in principle, a contractual right to cancel or terminate a contract (these terms generally being interchangeable) arises when the contract says it arises”. And, as Tomlinson LJ said in *Firodi Shipping Ltd v Griffon Shipping LLC*,¹¹ “a contractual right of termination exercisable upon the happening or non-happening of an event usually brooks of less argument” than circumstances of repudiatory breach. Nevertheless, if the provision breached is trivial in the overall scheme of the contract, it may be expected that the court will look to see whether there

⁷ See, among others, *Glolite Ltd v Jasper Conran* Times, 28 Jan 1998; *National Power v United Gas* 3 July 1998; *Phoenix Media v Cobweb* (2000) unreported, 16 May 2000; *Fortman Holdings v Modem* [2001] WL 825140; *Dalkia Utilities v Celtech* [2006] EWHC Civ 63; *Gallagher International v Tias Enterprises* [2008] EWHC 804 (Comm); *Vivergo Fuels v Redhall* [2013] EWHC 4030 (TCC).

⁸ See, in particular, the endorsement in *Gallagher International* above of the checklist provided by Neuberger J (as he then was) in *Phoenix Media* above.

⁹ Unreported, 21 Dec 1999.

¹⁰ [2014] EWHC 661 (Comm).

¹¹ [2014] 1 Lloyd’s Rep 471

is any way it can interpret the contract so as to qualify the termination right to prevent unfairness to the party in breach. The court may also look for assistance from other quarters such as statutory control of unfair terms or the principles governing penalties and relief from forfeiture.

24. Three further features of contractual termination rights should be noted.
25. First, such rights are often overlaid with other procedural requirements which prevent termination being accomplished speedily by simply serving a notice to terminate. For example, there may be a requirement to serve a notice to remedy the breach and to allow a period for compliance with that notice before proceeding to terminate the contract. Or there may be an escalation process requiring the matter to be discussed in the first instance between lower management for each party and then to be referred to higher management, and possibly then to some form of mediation or other ADR process, before any steps can be taken to terminate the contract. This latter arrangement can often be a major impediment in practice.
26. Secondly, the contract may prescribe the effects of exercise of the right and limit the remedies that might otherwise be available to the innocent party. The most important potential limitation is the exclusion of a right to claim damages for loss of bargain. Sometimes contracts provide that a party who exercises contractual termination rights shall not then be entitled to bring a claim for loss of the profits it would have earned over the remaining life of the contract. The rationale for such a restriction is that the innocent party's remedy is to take advantage of the contractual termination rights and thereby to extract itself from the contract.
27. Thirdly, the contract may provide that the contractual termination rights are to form a complete and exhaustive code for termination of the contract, which expressly (or impliedly) excludes exercise of common law termination rights.¹² Again, whilst not particularly common, this kind of arrangement is sometimes found in practice.

Overlap between common law and contractual rights

¹² See eg *Lockland Builders Ltd v Rickwood* (1996) 77 Build LR 38. Although see also the discussion in *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75

28. Where both rights are available, there is nothing wrong in principle with relying on both. This may protect the party attempting to terminate against the risk of failing on one of the grounds of termination.
29. Where a party relies only upon a contractual right, issues may arise as to whether it can then treat the resulting termination as having been effective at common law so as to enable it to recover damages for loss of bargain. In *Stocznia Gdynia SA v Gearbulk Holdings Ltd*¹³ a purchaser under contracts for the supply of vessels exercised contractual rights to terminate following non-delivery of the vessels and to recover under a bank guarantee instalments of the purchase price already paid, and then sought damages for loss of bargain. The seller objected that by terminating the contracts and recovering the instalments under the terms of the contract the purchaser had affirmed the contracts and lost the right to treat them as repudiated and to claim damages at common law for loss of bargain. The Court of Appeal disagreed, holding that a party exercising contractual termination rights was not inevitably prevented from treating the contract as terminated at common law and recovering damages for loss of bargain. On the facts of the case the purchaser had intended when exercising the contractual termination rights to treat the contract as terminated with the same consequences as if it was terminating the contract at common law. Therefore, the termination could be regarded as having also been effective at common law so as to enable the purchaser to claim damages for loss of bargain.
30. It appears therefore that, where contractual termination rights correspond with common law rights, it is unnecessary to elect between them when terminating. A clear statement that the terminating party is treating the contract as at an end can be effective to exercise both contractual and common law rights.

Choosing which right to exercise

31. Sometimes, of course, there will be no choice, either because there are no contractual rights or because the contract has excluded common law rights and replaced them with contractual rights. However, in many cases, there will be a choice and, in such cases, it is important to give careful thought to the pros and cons of each right, having regard to the client's commercial

¹³ [2010] QB 27. See also *Vinergy International (PVT) Ltd v Richmond Mercantile Ltd* [2016] EWHC 525

objectives, before deciding which to pursue.

32. When doing this, it is important to consider:

- what the client will need to prove to establish its right to terminate;
- what steps will need to be taken to implement the termination;
- how long these will take;
- how the other party is likely to react; and
- on what grounds the termination might subsequently be challenged.

33. Having done this, potentially relevant considerations when deciding which right to exercise will include:

- Speed

This may be an important consideration. For example, the client may need to extract itself from a contract quickly in order to proceed with a transaction with another party. In such circumstances, the common law right (assuming it can be established) may be more attractive because termination can be accomplished immediately whereas, as noted above, contractual rights often contain mechanisms (eg notices to remedy or escalation provisions) which can lead to lengthy delays.

- Certainty

Another important consideration may be achieving certainty regarding the validity of the termination so that the client knows where it stands and can proceed to enter into other arrangements without the threat that the termination may be challenged and it may be exposed to a substantial damages claim. This consideration may militate in favour of contractual termination rights if the relevant provisions establish a clear ground for termination. The problem with common law rights is, as noted above, that “repudiation” is a nebulous concept requiring, as explained above, a “multi-factorial assessment” of all relevant circumstances. In many cases there will be room for argument about whether the circumstances relied upon do in fact justify termination. Reliance on common law rights may open up the terminating party to a long period of uncertainty whilst the validity of the termination is tested in court or arbitral proceedings.

- Avoidance of opportunity to remedy

This consideration comes into play where the contractual rights either require service of a notice to remedy the breach in question and a period for compliance with that notice before termination can take place or impose some other mechanism which could allow the defaulting party to remedy the breach before termination takes place. If the party not in default is set on terminating the contract, it may prefer to pursue the common law route because this will avoid giving the defaulting party any opportunity to remedy.

- Consequences for damages

In some cases, the ability to pursue a claim for damages is not a major consideration for the terminating party. Its primary concern is simply to extricate itself from the contract. If so, the consequences for damages will not be an important consideration. In other cases, however, the ability to pursue a claim for damages, particularly damages for loss of bargain, is a major consideration. Sometimes the damages claim relates to losses caused by previous breaches. Such damages can be very substantial, particularly where the contract is a substantial commercial contract with many years yet to run. In cases where the client wants to be able to pursue a damages claim, it is vital to check that the contractual termination rights will not prevent this. As noted above, some contracts restrict the ability to claim damages following exercise of contractual termination rights. The logic behind such provisions is that the party's remedy lies in terminating the contract. There is no need, and it would be inappropriate, for the terminating party also to be able to pursue the other party for damages. If there are provisions to this effect, the common law route is likely to be more attractive because this will leave the terminating party free to claim damages.

- Potential for relying upon new grounds

A further consideration may be that the terminating party is concerned about the sufficiency of the matters to be relied upon by it to justify termination but may believe that evidence of more extensive or serious breaches will emerge following termination. If so, it may wish to take advantage of the principle (considered further below) which enables terminations to be retrospectively validated by reference to other matters existing at the time of termination, notwithstanding that such matters were not referred to or even known about at the time of termination. As there may be difficulties in relying upon this principle where the termination has been effected pursuant to contractual rights, the common law route may be preferable.

34. In some cases, consideration of the analysis of the pros and cons of each right may lead to the conclusion that both rights should be exercised, perhaps with one being advanced as the primary basis for termination and the other being advanced as a fall-back basis in the event that termination under the first is found to have been ineffective. There is nothing wrong in principle with such an approach, provided that there is nothing in the contract to preclude it.

Additional issues

35. Some further issues which commonly arise when dealing with termination for breach scenarios include the following:-
- deliberate or dishonest breaches;
 - exercise of rights;
 - timing of exercise;
 - loss of rights; and
 - reliance on new grounds.

Deliberate or dishonest breaches

36. Injured parties often consider that the other party has been guilty of deliberate or dishonest flouting of the contract. Where this is the case, they tend to feel that there can be no doubt about their entitlement to terminate the contract. After all, what could be worse than a deliberate or dishonest breach of contract?
37. It is important, however, to keep this in perspective. Whilst the fact that a breach of contract involved deliberate or dishonest conduct is likely to be a material consideration when assessing whether termination is justified at common law or under contractual rights, it is not necessarily conclusive.

38. The fact that a breach of contract is deliberate or accompanied by dishonest conduct will not automatically convert the breach into a repudiatory breach.¹⁴ The same applies where the contract allows termination for “material” breach: as noted above, the fact that the breach was deliberate or dishonest is material, but all the circumstances need to be considered before coming to a conclusion on materiality.
39. Having said this, a deliberate or dishonest breach will be conclusive in two circumstances.¹⁵ The first is where it destroys a necessary relationship of trust embodied in or arising under the contract. In many contracts this will be the case: see the useful discussion of the principles in *D&G Cars Ltd v Essex Police Authority*.¹⁶ However, it will not always be the case. The second is where it is indicative of an intention not to be bound by the contract. Deliberate breaches of contract, especially in circumstances involving dishonesty, will usually manifest such an intention.

Exercise of rights

40. As noted above, there are no particular formalities for the exercise of common law termination rights. All that is required is an overt act evidencing an intention on the part of the terminating party to bring the contract to an end which comes to the notice of the other party. Usually, the termination is accomplished by a letter from the terminating party or its solicitors to the other party stating that the other party has committed a repudiatory breach or other repudiatory acts giving rise to a right to bring the contract to an end and that the terminating party is now exercising that right and bringing the contract to an end.
41. The position in relation to contractual termination rights is generally more complicated in that, as noted above, the contract will usually set out various requirements to be followed when terminating the contract. It goes without saying that these requirements must be complied with if the termination is to be effective.¹⁷

Loss of rights

¹⁴ See eg *De Montfort Fine Art v Acre* [2011] EWCA Civ 87 where one party to a contract for the delivery of artwork generated a fake invoice to support its case that an order had been placed as required by the contract and the other party sought to rely upon this as repudiatory conduct. Whilst the court criticised the behaviour of the first party, the court rejected the assertion that the conduct in question was repudiatory. The first party should not have generated a fake invoice after the event, but it did so with a view to evidencing an order which it genuinely believed had been placed.

¹⁵ See *De Montfort Fine Art* above.

¹⁶ [2015] EWHC 226 (QB).

¹⁷ Although see *Chitty on Contracts*, vol 1, para 22-049, where it is suggested that “strict or precise compliance with the termination clause may no longer be a necessary pre-requisite to a valid termination”. The reasoning or authority for this statement is not entirely clear.

42. As is well-known, common law and contractual termination rights will be lost where the injured party elects to press on with the contract notwithstanding the breach. In such cases the injured party is said to have “affirmed”¹⁸ the contract. It is important to be aware of the principles governing affirmation so that you can take steps to ensure that your client does not inadvertently lose its termination rights.
43. Affirmation can be either express or implied from words or conduct which point unequivocally towards an intention to go on with the contract. Mere inactivity after the breach will not itself amount to affirmation. Nor will the fact that the injured party has called on the party in breach to change its mind and to perform the contract. As Moore-Bick J said in *Yukong Line Ltd v Rendsberg Investments Corporation*,¹⁹ “the law does not require an injured party to snatch at a repudiation and he does not automatically lose his right to treat the contract as discharged merely by calling on the other to reconsider his position and recognise his obligation”.
44. Before a party can be said to have affirmed a contract it must have knowledge of both:²⁰
- the facts giving rise to the breach and
 - its right to elect between bringing the contract to an end or going on with the contract.
45. When considering whether a party has affirmed a contract, the courts are not conducting a “mechanical exercise” but exercising a judgment. This is therefore a further area where, whilst the principles may be easy to state, they can be difficult to apply in practice and different people may reasonably come to different conclusions on the same facts.
46. It is therefore always sensible to err on the side of caution when acting for a client with potential termination rights which it may wish to exercise. How best to do this will depend on the circumstances of each case. However, express reservations of rights will generally be advisable. Moreover, it may be helpful, when circumstances arise which give rise to reason to believe that there may be a breach justifying termination, to lay down in correspondence with the other party a timetable for dealing with the situation – eg explaining that the client is currently investigating the position with a view to establishing the facts and will write further by such-and-such a date, but in the meantime all its rights are reserved.

¹⁸ In the context of contractual termination rights, the situation is often described in terms of the non-defaulting party “waiving” the breach. However, the underlying principles are the same whether the situation is described in terms of “affirmation” or “waiver”.

¹⁹ [1996] 2 Lloyds Rep 604, 608.

²⁰ See *Peyman v Lanjani* [1985] Ch 457.

Reliance upon new grounds

47. It is important to bear in mind the (so called) *Boston Deep Sea Fishing*²¹ principle which allows a party who has terminated a contract without giving any reason, or giving a wrong or inadequate reason, to justify the termination after the event by reference to facts existing at the time which would have provided a good reason for the termination.
48. This principle's main application arises in relation to terminations pursuant to common law rights. It is generally difficult to invoke the principle where the termination has been carried out pursuant to contractual rights because the contractual rights usually require, in one way or another, specification of the facts justifying termination as part of the termination procedure.²² This is likely to preclude substitution of a different ground later on. However, there may be scope for invoking the principle even in the contractual context if the contractual mechanism does not require the particular facts relied upon to be specified at the time, merely that grounds for termination must exist.
49. Where the principle is available, it is irrelevant that the terminating party did not refer to the further facts justifying termination or did not even know of them at the time. However, where the terminating party did know of the facts, there is a danger that the other party might try to argue that the terminating party somehow "waived" its right to rely upon them. Such arguments do not normally succeed but, as they can complicate the situation, it is advisable whenever terminating a contract to add an express reservation of the right to rely upon any other matters, known or unknown, that might justify termination. This should preclude any "waiver" arguments and make it much easier to take advantage of the *Boston Deep Sea Fishing* principle.
50. A word of caution should be sounded where new material (eg board minutes or communications with third parties) is uncovered which shows that the other party had no intention of performing the contract. It might be thought that discovery of such material should be a perfect case for the operation of the *Boston Deep Sea Fishing* principle because it demonstrates renunciation of the contract (which, as noted above, is a form of repudiatory conduct). That would be correct, save for the requirement, in cases of renunciation, that the

²¹ See *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339.

²² Note also the possibility that there may be a statutory regime applying to the relationship between the parties which requires particularisation of the grounds for termination at the point of termination: see eg the Commercial Agents Directive.

intention not to perform the contract must “cross the line” and be communicated to the other party to the contract.²³ As an unknown renunciation will not justify termination at common law, such a renunciation cannot be relied upon under the *Boston Deep Sea Fishing* principle.

Position of non-terminating party

51. It may be helpful to conclude by considering the position of the non-terminating party, who will often find itself facing a very tricky situation.
52. The first question for the non-terminating party will be to assess the validity of the termination. However, as it will be appreciated from the summary of the principles set out above, this can be far from straightforward. Where the termination involves the exercise of common law rights, it is necessary to weigh up whether the circumstances of the case (whether they involve renunciation, impossibility of performance or repudiatory breach) are sufficiently serious to justify termination at common law. Applying the various expressions used in the cases, do they go to the root of the contract or frustrate the commercial purpose of the contract or deprive the party not in breach of substantially all the benefit it was to obtain under the contract? Where the termination involves the exercise of contractual rights, it is necessary to construe the relevant rights and ask whether the facts of the case trigger those rights. Whilst this may be straightforward in some cases, in many other cases (particularly where reliance is placed on clauses permitting termination following “any” or “material” or “substantial” breach) it will not be straightforward.
53. These are all highly-fact sensitive issues on which different people may reasonably be able to come to different conclusions. Moreover, they are issues which may have to be addressed in a very tight time-frame.
54. Moreover, there may also be a question as to whether the terminating party has affirmed the contract, another highly-fact sensitive issue on which different people might reach different conclusions.
55. Finally, there is the possibility that there may be other circumstances in the background which would or might justify the termination in the event that a successful challenge could be made to those upon which the termination was expressed to be based.

²³ See *Seadrill Management Services Ltd v OAO Gazprom* [2010] 1 Lloyd’s Rep 543 at [265].

56. If the non-terminating party concludes that the termination was invalid, it must then decide whether it wishes to press on with the contract – whether by continuing to perform its obligations or by seeking declarations or orders for specific performance from the court or arbitrators – or to rely upon the purported termination by the other party (and the associated refusal to perform/non-performance) as circumstances justifying it in terminating the contract.
57. It is not uncommon for the non-terminating party to elect for the latter – i.e. to decide itself to terminate the contract. Sometimes this is because the non-terminating party is also looking for an excuse to extricate itself from the contract. In other cases, however, the decision to terminate may seem the most sensible option in the light of the breakdown in relations between the parties or the practical difficulties of trying to compel a recalcitrant party to continue to perform the contract.
58. Before proceeding down this route, however, the party must be wary. Whilst one might think that a wrongful attempt to terminate a contract must be repudiatory in nature in that it involves the party who has purported to terminate refusing, without justification, to perform the contract, this is not necessarily the case. It might be, for example, that the terminating party genuinely believed on reasonable grounds that it was entitled to terminate. In so doing, it would not necessarily be repudiating the contract. It would just be mistaken as to its rights. Indeed, where it relied upon contractual termination rights, it would, in a sense, have been seeking to implement the contract.
59. The test applied by the courts in dealing with these situations can be stated in relatively straightforward terms, namely whether, looking at all the circumstances objectively (i.e. from the perspective of a reasonable person in the position of the innocent party), the other party has clearly shown an intention to abandon and altogether refuse to perform the contract.²⁴ However, the application of the test to individual cases is often less than straightforward and involves what has been described²⁵ as yet another “highly fact sensitive” enquiry.
60. A party contemplating termination on the basis of a breach arising from a wrongful termination by the other party needs therefore to weigh up whether the conduct of the other party demonstrates, objectively, an intention to abandon and altogether refuse to perform the

²⁴ See Chitty on Contracts, vol 1, para 24-020; *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277; *Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ 1168.

²⁵ See *Eminence Property Developments* above at [62].

conduct. This may not be easy. If eg what is ultimately at issue is a dispute over the proper construction of the contract or if the other party has been acting under an obvious mistake, this requirement may not be satisfied.

61. Moreover, the principles discussed here are also important from the perspective of the party who first purports to terminate. Even where a party is confident that it has good grounds for termination, it will generally be well-advised to act in a manner which is demonstrative of a general intention and willingness to adhere to the contract. It is difficult to spell out in the abstract how this can best be done. Each case will turn on its own circumstances. However, if the underlying dispute can be portrayed as one of construction of the contract, it will generally help to present the termination as being based on a genuinely held view regarding the proper construction of the contract. It will also generally help to indicate a willingness to stand by and perform the contract if the termination is subsequently shown to be invalid. The more the terminating party can do to portray its stance as a reasonable one based on genuinely held beliefs and to manifest a willingness to stand by the contract if its stance is shown to be wrong, the less risk there will be of the court regarding its conduct in purporting to terminate as repudiatory at common law or as justifying termination by the other party under contractual rights.
62. Given these risks, it is not uncommon for one or both parties to hold back from actually taking the steps necessary to terminate and instead merely threatening to terminate or alternatively applying to court for a declaration as to the existence of a breach of contract justifying termination.

Conclusion

63. In practice, cases of this kind often turn into something akin to a game of poker. One party threatens to rely upon the conduct of the other as entitling it to terminate the contract. Behind the scenes, however, the first party may be nervous about actually taking that step and thereby exposing itself to the risk of a counter-termination and claim for damages for loss of bargain by the other party. Equally, however, the other party may also be unsure of its position. It may be concerned that the first party is already entitled to terminate or, if this is not the case, that any counter-termination by it will be wrongful and will give the first party a better basis for terminating and claiming damages. In the circumstances, neither party dares to take any positive step and instead they dance around each other, shadow-boxing and asserting an

intention to terminate but not actually doing so. Eventually, though, come to a head and one of the parties finds that its bluff is called ...

64. It is hoped that the summary of the principles in this paper will assist you in negotiating such a situation when you next meet it.