Putting the Genie Back in the Bottle: Irremediable Breaches and Contractual Termination Rights

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It is not uncommon in the energy and construction sectors - particularly in the offshore space - for one or possibly both parties to have a contractual termination right linked to whether a breach is "*capable of remedy*."

These clauses can come in different forms. Often, the clause will apply only in relation to "material" breaches with a termination right arising after the terminating party has afforded the alleged defaulting party a defined period of time to remedy its breach, assuming the breach is even capable of remedy. Alternatively, the termination right can arise immediately in the event of a breach that is not capable of remedy, but without any indication as to the nature (or seriousness) of the breach at hand.

These provisions can present significant uncertainties for the terminating party. Assessing whether a breach is capable of remedy is a highly fact-sensitive enquiry. In energy and construction projects, it will almost certainly also require technical expert input to determine attendant questions such as the seriousness of the breach, the length of time needed (by the alleged defaulting party) to remedy and the effect of any remedial action already undertaken by the alleged defaulting party.

In several confidential international arbitrations, we have seen both the decision-making process of the terminating party and the actions of the alleged defaulting party carefully scrutinised – but many months after termination and with the benefit of detailed factual and technical expert evidence. There are clear themes that emerge from these disputes, some of which have been helpfully highlighted in the Court of Appeal's recent decision in *Kulkarni v Gwent Holdings*[1]. Here, the Court of Appeal considered whether a repudiatory breach is necessarily irremediable, when a breach is capable of remedy and the impact of the notice requirement.

Background Facts

The dispute arose from a shareholders' agreement (**SHA**) between a company and its two shareholders – Mr. Kulkarni, a consultant surgeon at the company, and Gwent Holdings Limited (**Gwent**).

Clause 7 of the SHA provided for compulsory transfer of shares in certain circumstances including: "(d) *the Shareholder committing a material or persistent breach of this agreement which, if capable of remedy, has not been so remedied within 10 Business Days of notice to remedy the breach being served by the Board (acting with Shareholder Consent)*."

Mr. Kulkarni brought proceedings against Gwent and the company claiming that Gwent had breached the SHA by procuring the company to allot the 1,651 A Shares to it (**A Shares Breach**), by causing the company to allot 2,000 B Shares to it (**B Shares Breach**), by purporting to terminate the SHA on 28 August 2020 (**Termination Breach**) and by refusing to recognise Mr. Hussain's

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appointment as a director of the company (**Hussain Breach**). Mr. Kulkarni sought declarations that each of these breaches resulted in deemed service of a transfer notice under Clause 7(d) in respect of Gwent's shares. He did so notwithstanding that the board had not served a notice requiring Gwent to remedy its breaches.

The First Instance Judgment[2]

By the time of the trial at first instance, Gwent had admitted the A Shares Breach, the B Shares Breach, the purported Termination Breach and that each of these breaches were "*material*" within the meaning of the SHA (and, in two cases, repudiatory). Mr. Richard Farnhill, sitting as a District Deputy Judge in the Chancery Division, found that all three breaches were "*persistent*" as well as "*material*" within the meaning of Clause 7.1(d). He also found that the delay in recognising Mr. Hussain's appointment was also a breach that was "material" and "persistent". However, the court also held that all four breaches were capable of remedy and had been remedied. As a result, he concluded that Mr. Kulkarni was not entitled to the declarations sought.

Court of Appeal Judgment

Mr. Kulkarni appealed to the Court of Appeal. He argued that a repudiatory breach of contract can never be remedied and because (as Gwent had admitted) two of the breaches were repudiatory, they could not have been remedied. As a result, he said Gwent should be treated as having served a transfer notice. The Court of Appeal disagreed and dismissed the appeal in a judgment given by Lord Justice Newey with Lord Justices Asplin and Lewis agreeing. The court found that where a "*material or persistent*" breach is capable of remedy, Clause 7.1(d) requires service of a notice to remedy and failure to cure within 10 business days before any deemed transfer notice takes effect. In reaching their conclusion, the court considered the following issues:

1. **Is a Repudiatory Breach Necessarily Incapable of Remedy?**

   No. While Mr. Kulkarni had argued that a repudiatory breach is never capable of remedy, the court disagreed. Mr. Kulkarni had relied on the decision in *Bournemouth University v Buckland*[3] where the court had determined that "*a repudiatory breach of contract, once it has happened, cannot be 'cured' by the contract breaker*" and that the innocent party retains the "*right to go*". The court considered, however, that this only addresses the common law consequences of a repudiatory breach (which was not at issue here), not whether a breach is "*capable of remedy*" under a contractual cure regime. The parties had specified that the breaches had to be "*material or persistent*", which the court acknowledged might also be a repudiatory breach. If that was the case, the parties could have stipulated in the SHA that repudiatory breaches are deemed irremediable; however, no such distinction was drawn in the agreement.

2. **When Is a Breach "Capable of Remedy"?**

   The court considered that the approach for interpreting the meaning of "capable of remedy" within a contractual provision is normally practical and not unduly technical. The question is whether, as a matter of common sense and practicality, the mischief caused by the breach can be redressed and matters put right for the future. It was found that "remedy" requires a cure going forward; it does not require undoing all past effects because, as the court said, the "*moving finger writes and cannot be recalled*" [4]. The court acknowledged that for certain breaches, this is not possible - for example, where confidential information has been

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disclosed - due to the enduring prejudice resulting from the breach. In those cases, the "*genie cannot be put back into the bottle*."[5]

The judgment also noted that whether a breach was committed deliberately or willfully may be significant where the contract includes a good faith provision[6].

3. **Is a Notice to Remedy Required?**

   The court also accepted that, as a matter of construction, the cure period informs remediability and a breach that cannot be cured within that timeframe will generally not be "capable of remedy" under the clause. In this case, the cure period was 10 business days. However, the cure period runs from service of the notice to remedy and because no such notice was served here, the time limit did not bar remediation.

Comment

This Court of Appeal judgment has provided welcome clarity on the following issues:

1. When it comes to contractual termination, repudiatory breaches are not inherently incapable of remedy unless expressly stated in the contract.
2. "*Capable of remedy*" is a practical, forward-looking test.
3. Where cure is possible, a notice to remedy and failure to cure within the contractual window are necessary preconditions to termination.

For parties that have included cure provisions in their termination clauses, it is important to carefully comply with their terms. This includes serving the appropriate notice to remedy and not terminating prematurely. When a party receives such a notice, they should preserve evidence of the steps taken to remedy any breaches, as this is likely to be scrutinised if a dispute arises.

Drafting Notes

When it comes to drafting such clauses, parties should ideally address the following matters to avoid uncertainty:

1. Consider whether certain breaches (e.g., repudiatory conduct, confidentiality breaches, illegal acts) will be considered irremediable, and if so, state that clearly.
2. Set out precisely the cure standard and time (specifying if the cure period runs from notice, what constitutes adequate cure and whether certain formalities must be completed within the period).
3. Consider whether common law repudiation principles are to be relevant to the meaning of "capable of remedy", and if so, again state this clearly.

[1] [2025] EWCA Civ 1206.
[2] [2023] EWHC 484 (Ch).
[3] [2010] EWCA Civ 121.
[4] *Savva v Hussein* (1996) 73 P&CR 150.
[5] *Force India Formula One Team Ltd v Etihad Airways PJSC* [2010] EWCA Civ 1051.
[6] *Phoenix Media Ltd v Cobweb Information Ltd* (16 May 2000, unreported).

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