

Rescuing a Wrongful Termination

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PRACTICES Shipping Dispute Resolution, Energy Litigation, Europe, Middle East and Africa, Offshore Oil and Gas Dispute Resolution, Oil and Gas Litigation, International, Litigation

Can a party wrongfully purporting to terminate a contract ever not be in repudiatory breach? This was the question which fell to be decided by His Honour Judge Stephen Davies, in the Technology and Construction Court in *Thomas Barnes & Sons PLC (in administration) v Blackburn with Darwen Borough Council*.¹ The Court held that the answer was yes, at least where the termination was wrongful only for a formal reason, and provided indicative factors as to when this might be the case, including that the innocent party could not show any detriment from the wrongful termination.

This question arose in the context of a contract for the construction of a new bus station in Blackburn (the “**Contract**”), entered into between Blackburn with Darwen Borough Council (the “**Council**”), as the employer, and Thomas Barnes & Sons plc (the “**Contractor**”), as the contractor. HHJ Davies found that the Contractor had failed to properly progress the works and that this entitled the Council to terminate the Contract under Clause 8.4, which permitted the Council to terminate where the Contractor (amongst other potential triggers) “*failed to proceed regularly and diligently with the works*”, by providing notice to the Contractor. As well as entitling the Council to terminate under Clause 8.4, HHJ Davies also found that this conduct constituted an independent repudiatory breach.

Clause 8.2.1 of the Contract required that notices given under Clause 8.4 be in accordance with Clause 1.7.4, and that the notices would take effect upon receipt of the relevant notice. Clause 1.7.4 required that notices given in accordance with that Clause (which the termination notice was) were to be delivered “*by hand or sent by Recorded Signed for or Special Delivery post*” and that, where sent by post, the notice would be deemed delivered 2 days after the date of posting.

The Council, on 4 June 2015, purported to cancel the Contract in accordance with Clause 8.4 and also by accepting the Contractor’s repudiatory breach. The termination notice was sent by email to the Contractor, and a copy was also sent by recorded delivery. Later that day the Council took steps to ensure that the Contractor was removed from the premises. The Contractor argued that this constituted a repudiatory breach in and of itself on the part of the Council, as the termination notice under Clause 8.4 would only take effect upon receipt of the notice sent by post (i.e. two days later).

The Court firstly found that the Council had validly accepted the Contractor’s repudiatory breach within the termination notice sent by email (and termination under common law was both not subject to the particular notice requirements imposed by the Contract and not excluded by the Contract which provided that the Council’s remedy under Clause 8.4 was “*without prejudice*” to its other rights²) such that the termination, and the Contractor’s immediate removal from the site, was not wrongful. Secondly, however, even if this was wrong, the Court held that the Council’s conduct would not be repudiatory.

HHJ Davies considered the Court of Appeal’s judgment in *Eminence Property Developments*³, identifying three core observations as to whether conduct would be repudiatory:

- The core question is whether, from the viewpoint of a reasonable observer in the position of the innocent party, the “*contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract*”;
- The question is highly fact specific and precedents are therefore of limited utility;
- The motive of the breacher, insofar as it would be known by the reasonable innocent party, may be relevant.

Applying these factors to the case at hand, the Court found that the Council’s wrongful termination would not have been repudiatory (even if it had not validly accepted the Contractor’s repudiatory breach). This was for a number of “*principal*” reasons including the fact that:

- The Contractor had, by the date of termination, ceased to meaningfully perform activities and could not be said to have suffered from being removed from the site two days before the valid notice took effect.
- The Contractor must have been taken to have known that the Council was seeking to invoke its (substantively subsisting) legal right to terminate under Clause 8.4; and
- The Contractor must have been taken to have known that the Council was in the process of sending notice in the correct form.

As well as these factors, substantial weight was likely given to the fact that HHJ Davies was of the view that the *substantive* right to terminate had accrued to the Council and all that was left was for the machinery invoking the same to be activated by the Council. As HHJ Davies indicated at paragraph 253 of his judgment, had the substantive conditions for termination not been made out, “*it could not realistically be said that termination on a substantially erroneous basis could normally be anything other than repudiatory*”.

Comment

This case offers a, relatively rare, illustration of a (at least hypothetically, in light of the Court’s finding that the Council had validly accepted the Contractor’s repudiatory breach) wrongful termination of a Contract being held not to constitute a repudiatory breach – and a reminder to carefully consider the factual matrix of every dispute.

The distinction made by HHJ Davies between a termination right having *substantively* arisen and a *formal* defect in the invocation of the same, has intuitive appeal. However, in the context of the case at hand, it seems open to some objection.

Clause 8.2.1 of the Contract provided that termination would take effect upon the receipt of a valid notice, such that the right to terminate would seem to be contingent upon such notice having been served. In this context, it seems somewhat challenging to talk of the right having arisen, prior to the satisfaction of that condition. A distinction could be drawn, if one was to say that the notice was not a condition precedent to the accrual of the termination right, however this seemed (if not explicitly) to have been rejected by the court in paragraph 240. Here HHJ Davies rejected the Council’s submissions, including that the notice requirement was not a “*condition precedent to the employer’s entitlement to terminate under Clause 8.4.2*”. While not crystal clear, this would appear to forestall such an argument, such that the above objection remains.

¹ *Thomas Barnes & Sons PLC (in administration) v Blackburn with Darwen Borough Council* [2022] EWHC 2598 (TCC)

² See paragraph 212

³ *Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ 116