



Technical

Repudiation - How Can it Affect Contractors and Subcontractors

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What is Repudiation?

1. **Repudiation is a term to describe circumstances where** one party makes it clear that it does not intend to accept its obligations and perform them, or that it is incapable of doing so.
2. **Repudiation by one party alone does not terminate the contract**
The innocent party has to accept the repudiation to rescind the contract; that is to bring it to an end.
3. **Acceptance of a Repudiation** can be by communication or conduct conveying that the innocent party is treating the contract as at an end.

BEWARE!

4. There may be very real commercial reasons by you, as the innocent party, may not wish to bring the contract to an end. It may be that you have a whole amount of work ahead of you that in despite of the repudiation remains profitable.

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BEWARE!

5. It is considered that if either party to a building contract operates contractual determination machinery upon a mistaken, albeit bona fide, view of the facts or his legal rights, that will normally be repudiation.

Possible Repudiation by the main Contractor or Subcontractor:

6. Refusal or abandonment is a repudiation.
7. Defects are **likely not** to amount to a repudiation where the works is substantially completed.
8. Defects that occur that have the gravity of breach such as to show that the contractor does not intend to or cannot substantially perform its obligation **is a repudiation**.
9. Delays that occur **are not** normally considered to be repudiation (Felton -v- Wharrie).
10. Where time is of the essence then a delay will amount **to repudiation**.
11. In general, time is of the essence in mercantile contracts, but the normal rule is that time is **not** of the essence in construction contracts (*Lucas -v- Godwin [1837]*).
12. Time can be expressly made of the essence in construction contracts.
13. Time is not of the essence where the contract includes provisions for EOT and LADS.
14. Subcontracting part of the works contrary to an express provision was not repudiation (*Feather -v- Keighley Corp [1953]*).

Possible Repudiation by the Employer or Main Contractor

15. Refusal to carry out its part of the contract **is a repudiation**.
16. Rendering completion impossible is **repudiation**.
17. Failure to give possession of the site at all **is repudiation**.
18. A clear order for the contractor not to complete the works **is a repudiation**.
19. The employment of additional contractors to carry out the same work **is a repudiatory breach**.
20. Failure to make payment is likely **not** to be a repudiation.

Suspension

21. There is no general right to suspend work.
22. Particular contracts give the contractor express rights if certificates are not paid.
23. But there is no general right at common law to suspend work if payment is wrongly withheld.
24. Section 112 of HGCRA 1996 gives the contractor a statutory right to suspend works in the absence of payment in certain circumstances.
25. Clause 30.1.4 of the JCT 1998 gives the right to the contractor to suspend its works when the Employer fails to pay the amount due by the final date for payment.

Does an incorrect suspension, either due to no notice, or no basis, amount to repudiation?

26. Most unlikely but ...
27. *Mayhaven Healthcare -v- Bothma & Anor (t/a DAB Builders [2009])* :
 - DAB were the builders on Mayhaven Down Housing Nursing Home.
 - Adjudicator award of payment to DAB.
 - DAB suspended due to non-payment and following receipt of Mayhaven's solicitor's letter stating that payment would not be made.
 - Payment was made in a subsequent valuation.
 - Mayhaven accepted the suspension as a repudiatory breach and proceeded to arbitration.
28. Held:
 - Arbitrator decided that the incorrect suspension was **not** repudiation.
 - Mayhaven had been aware that they had made payment, but not informed DAB of the misunderstanding prior to suspension.
 - Mayhaven's Solicitor's letter referring to non-payment was taken into account.
 - The court held that there had been no fundamental breach and that the suspension was not repudiation. Two issues that were key were:

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- Mayhaven’s solicitor’s letter stating that Mayhaven, contrary to the Adjudicator’s decision, was not going to make payment; and
- DAB had stated in its notice of suspension that it was willing to complete the works.

In respect to a situation where delays occur, for example

29. A typical subcontract will provide a very clear process for terminating the employment of a subcontractor who is not performing. The JCT Standard Form of Subcontract, for example, sets it all out in clause 7.4. If the subcontractor stops work, fails to proceed regularly and diligently, or ignores an instruction to remove defective work for example, then the contractor can give a notice specifying the default. If the subcontractor does not rectify the default within 10 days, the contractor can terminate.
30. If, however, the contractor doesn’t send the notice or his notice is defective in some way, such as he delivers it to the wrong address or doesn’t wait for 10 days then it is not entitled to take advantage of the termination clause. By removing the subcontractor from site the main contractor has made it clear that it doesn’t intend to comply with the contract terms. There is, therefore, a serious risk that the contractor is the party that has repudiated the contract. The subcontractor will subsequently claim the full value of its work less an allowance for putting right any defects. It will also claim the gross profit that it would have made on the rest of the job and, as there were still several weeks to go before the finish date, it wasn’t actually late.
31. Clearly it is preferable to follow the terms of the contract. Let’s face it; we all should be seeking “*solutions that make business sense*”. The breach that sets up the 10 day notice and contractual termination may not be hugely significant, but if you have followed the procedure the termination will be procedurally correct. Relying on the general law of repudiation will probably lead to a serious argument, an expensive formal process and a very uncertain result.

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