

A Litigator's Guide to...

# Terminating Contracts



There will be times when your client wants to bring a deteriorating business relationship to an end. Whether this deterioration happens slowly or due to a catastrophic event, the immediate focus is typically on how to lawfully terminate the contract and preserve any rights and remedies, if necessary.

As litigators, we see the problems that can occur when businesses terminate contracts hastily which can sometimes lead to serious consequences. So, we are sharing our advice about how to minimise the risk to your client.

### Terminating For Reasons Other Than Breach

The first port of call when considering whether a client can bring a contract to an end is examining the contract itself. Contracts often include provision for termination on notice or simply run their course, either at the end of a defined time period or following fulfilment of obligations and, in those circumstances, it usually isn't necessary to consider who was at fault.

Where there is uncertainty, there is often a need to consider what implied terms might be read into the contract. What that means will vary, but generally we look at those terms required to give the contract business efficacy, and it's crucial to understand the context of the contract and the commercial relationship it seeks to govern. Contracts don't tend to run in perpetuity and so for example it is common to argue that there might be implied terms regarding 'reasonable' notice. What is reasonable will need to be inferred from the particular circumstances at play.

Notwithstanding termination, clients will often need guidance on any obligations that are intended to survive. Examples might include around protection/disposal of confidential information and data or non-poaching/solicitation provisions.

### Termination For Breach

Where termination arises because of a perceived breach, the position can be more complex. Not all contractual obligations are equal, and different consequences can flow from breaches of particular terms. Breach of a very serious obligation can give a right to terminate whereas others would only give a right to claim damages.

Express termination provisions will need careful thought. Sometimes a contract may define a list of scenarios that constitute breach and which allow for termination. Sometimes terminology, such as a 'material' breach, is used and this might either be defined in the contract or if not, a body of case law has built up to give guidance on what those terms mean. Contracts will sometimes prescribe what steps are required following discovery of a breach, to include defined notice periods or an opportunity to remedy before termination rights arise.

Overarching what is expressly written in a contract, parties can usually terminate if there has been a repudiatory breach, namely a breach of a term that 'goes to the very

root of the agreement' and where non-performance by a party is considered a substantial failure to perform the contract. This is a high, but not necessarily insurmountable, bar. Clients will need help to understand whether they could confidently rely on such a breach.

We cannot overstate the importance of forensically examining evidence both of the relevant contractual terms and evidence of breach. No breach should ever be taken at face value as being a fundamental breach giving your client rights to terminate. Wrongful termination can in itself amount to repudiatory breach, and can expose an otherwise innocent business to a potential claim in damages for wrongful termination.

### Losing The Right to Terminate On Breach

It's important to deal with matters promptly after discovery of a perceived breach. An innocent party often has a choice whether or not to terminate or by affirming the contract and continuing to perform their end of the bargain.

An innocent party's entitlement to terminate can be lost or waived where no action is taken in response to a breach, or alternatively the parties agree to continuation of the relationship in spite of earlier breaches. Silence on the matter may be taken as affirmation.

Additionally, parties may inadvertently incur additional obligations, depending on what was agreed, so the period immediately following discovery of a breach is a key stage for clients to take legal advice.

### Other Considerations

Termination isn't the only potentially valuable right in the event of breach. A right to claim damages or seek specific performance can also offer an acceptable remedy to a client and particularly in the context of a live contract, can offer very valuable negotiating leverage. It may be that, by asserting their rights, a client can negotiate a payment that enables the parties to 'reset' a difficult relationship and rebuild trust or otherwise to use the threat of a claim to negotiate a termination in circumstances where there might not be a strict entitlement to do so.

We often help clients in the background to understand what ammunition is available to strengthen their position in commercial negotiations.

### How We Can Help

In many cases early strategic input from us will go a long way towards ensuring the business relationship is brought to an end smoothly (or can be saved on acceptable terms), minimising the risk of a dispute developing. We encourage our partners to reach out and get some early advice before making a decision as this will very often improve your client's rights and save both time and money in the long run.

We are always happy to speak informally in the first instance and help where we can. If the case warrants a formal instruction, we offer a high level of service from our experienced team. Please get in touch if you would like to discuss.

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