COLLAS CRILL

Terminating contracts: A one sided affair?

OCTOBER 2019

de Sousa v Danny Yau Limited t/a Princess Garden [2019] JRC 169

In this briefing note we review the recent case of *de Sousa v Danny Yau Limited t/a Princess Garden* [2019] JRC 169, where the Bailiff gave further confirmation as to the Jersey courts' approach to unilateral termination of a contract as a result of a fundamental breach of contract.

Background

The case was an appeal against a decision of the Jersey Employment and Discrimination Tribunal who dismissed Ms de Sousa's (the **Claimant**) claim for unfair dismissal arising from the termination of her employment with Danny Yau Limited t/a Princess Garden (the **Employer**). The Claimant told the Employer that she was going away for the month of August without providing a reason. When the Claimant failed to return at the end of August and was not contactable, the Employer assumed that the Claimant had resigned and was not returning to work. The Claimant did eventually return to work on 19 September, by which time the Employer had employed someone else to do the Claimant's job.

The Court held that the failure to return to work did constitute a fundamental breach of the implied duty of good faith in an employment contract, and that this entitled the Employer to unilaterally treat the employment contract as having come to an end, without notice being given to the Claimant.

The (wider) effect of *de Sousa*

Although an employment case, it is clear that there are wider implications applicable to contracts more generally. It is possible to unilaterally terminate a contract where there has been a sufficiently serious breach of a fundamental condition going to the root of the contract. It follows that, in terminating the contract, no formal communication between the parties is required.

The caveat is that if a unilateral termination is made without judicial sanction (and where the contract is silent as to such unilateral termination), the termination remains open to challenge, to be determined by the courts.

When entering into a contract, the parties should consider including specific provisions setting out the circumstances where the contract is to be treated as repudiated, as well as the right of either party to terminate the contract. This is due to the nature of *la convention fait la loi des parties* whereby the courts of Jersey will not generally intervene where the parties have agreed contractual terms between them under a valid contract; a fundamental principle of Jersey contract law, which has been reaffirmed in *de Sousa*.

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

There is a balance to be struck here. It is impossible to foresee all eventualities in a contract, especially where two parties are agreeing terms at the outset of their relationship, and so the parties may wish to keep such options generally broad. However, to avoid any potential uncertainty, advice should be taken at the outset to identify any particular concerns which need to be addressed and ensure that these are adequately covered.

In making this finding, the Court expressly rejected arguments that it must follow English law principles, stating unequivocally that "*we are not bound by the English law of contract*". Whilst the Court considered English case law, it came to its conclusion having regard to developing case law in France which enables a contracting party to unilaterally bring an end to a contract in the case of serious non-performance. The Court held that this approach was consistent with the approach of the Jersey courts.

Key takeaway points

- The courts will not generally intervene where parties have agreed terms between them under a valid contract. Consequently, where parties have expressly set out circumstances where a party will be entitled to unilaterally terminate for breach, the courts will respect that agreement.
- In the absence of express agreement, it is possible to unilaterally terminate a contract where there has been a fundamental breach without first obtaining court sanction. This had previously been slightly unclear in Jersey.
- However, that termination will remain open to challenge, subject to the court exercising its discretion with regard to the facts of the case.
- The Bailiff reminded his contemporaries and successors that, in matters of contract law, although subsequently influenced by English principles, the law of Jersey is separate and distinct, with its roots based in civil principles. Although the final judgment of the court may be broadly in line with English principles and authority, the Jersey courts should not simply follow those principles and authority without full considerations of any applicable civil law principles, such as from France.

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.