# Contracts and restitution

## Editor: Michael Borsky

## ALMOND INVESTORS LTD v KUALITREE NURSERY PTY LTD [2011] NSWCA 198

### INTRODUCTION

*Almond Investors Ltd v Kualitree Nursery Pty Ltd* [2011] NSWCA 198 confirms the principle that a party does not lose the right to terminate for breach merely because it is itself in breach of a non-essential term of the contract.

However, up to now, it has been unclear whether this principle applies in circumstances where a party seeks to rely on an *anticipatory breach*, rather than an actual breach, to found the right to terminate. The *Almond Investors case* arguably makes new law because it is now clear that a party, itself in breach of a non-essential term, can nevertheless terminate for *anticipatory breach*.

### FACTS

The appellant, Almond Investors Limited, agreed to purchase 90,000 one-year old almond trees from the respondent. The agreement was contained in a letter from the appellant to the respondent of 30 October 2006, confirming earlier discussions. The letter from the appellant included the following:

> "I confirm my verbal order on 27 October 2006 for 90,000 one year old almond trees."
>
> "Delivery of the trees is to be for planting commencing 1st June 2007…"
>
> "Our [ie the appellant's] expectation is for a tree at a minimum height of 0.9m."

The agreement also included a payment schedule whereby the appellant would pay 25% of the purchase price after inspection and a further 25% after first bud strike, followed by 50% on delivery. The first two 25% installments, being approximately $363,000 in total, were paid by the appellant as agreed.

In June 2007, the respondent delivered around 29,000 (of the agreed 90,000) trees, of which the appellant accepted about 23,000 – the difference being rejected on quality grounds. The value of this delivery, $96,296.20, was invoiced by the respondent but never paid for by the appellant (the appellant's breach).

After delivery of the 23,000 trees it became apparent that the respondent would not be able to deliver the agreed 90,000 one-year old trees of a height of 0.9m by the agreed time in 2007. The respondent made this clear in an email to Almond Investors on 13 August 2007, which stated, among other things, that the remainder of the order that was yet to be delivered would be:

> made up with a combination of 06 plantings backed up by 25,000 new plantings in 07..

Clearly, the "new plantings" would not be one-year old for planting commencing in June 2007.

Further, in an email of 21 August 2007, the respondent (trading under the name, "Nursery Nuts") stated:

> Under the terms provided in the order, [Almond Investors] elected to take only 29,572 trees less 5,915 allegedly unplantable in June 2007 leaving 66,340 to be delivered in winter of 08.
>
> …
>
> The original order is for 90,000 trees. Nursery Nuts intends to complete the delivery of all 90,000 to specification by *June 08*. (emphasis added)

Shortly after receipt of the 21 August 2007 email from the respondent, the appellant purported to terminate the agreement, on the basis that the respondent could not deliver 90,000 trees as agreed in June 2007.

### ISSUES

At first instance, the trial judge found, among other things, that there was no contractual requirement to deliver the balance of the 90,000 trees at a height of 0.9m in June 2007; rather, this requirement could be satisfied by delivery in June 2008.

The trial judge also found that even if the respondent had breached an essential term of the agreement, or had otherwise repudiated the agreement (in failing to supply almond trees as agreed), the appellant, in accepting a number of the trees, had elected to affirm the contract thus extinguishing any right it had or may have had to terminate for breach.

On appeal, Bathurst CJ, with whom Giles JA and Handley AJA agreed, found that there was no affirmation of the contract, given that the relevant (alleged) repudiatory conduct was the communication in the emails of 13 and 21 August 2007,[1] and that there had been no communication or conduct after these emails which could amount to an affirmation. Accordingly, the main issues for the Court of Appeal were:

(a) Did the respondent's emails of 13 and 21 August 2007 amount to a repudiation (renunciation) of the contract?

(b) If so, could the appellant terminate based on that renunciation, notwithstanding its breach of contract for non-payment of the invoice for $96,296.20?

## LAW

The grounds that can be relied on to terminate a contract at common law[2] are well settled. These are:

(a) breach of an essential term;[3]

(b) repudiation (otherwise known as renunciation);[4] and

(c) sufficiently serious breach of an intermediate term which deprives the wronged party of a substantial benefit of the contract (formerly known as "fundamental breach", or a breach that goes to the "root of the contract").[5]

In this case the bases relied on by the appellant for termination were repudiation (renunciation) and breach of an essential term.

In relation to repudiation, a party's conduct will amount to a repudiation of the contract if that party:

> renounces his liabilities under it – if he evinces an intention no longer to be bound by the contract ... or shows that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way.[6]

In considering repudiation (renunciation), Bathurst CJ[7] found, as a matter of construction of the 26 October 2006 letter agreement, that it was a term of the contract that the respondent would deliver 90,000 trees by June 2007. The Chief Justice came to this view based on a number of factors including that:

(a) The order was for 90,000 one-year old trees;

(b) It was these trees which needed to be delivered "for planting commencing 1 June 2007"; and

(c) The contractual requirement could not be satisfied by delivery of 90,000 trees 12 months later in June 2008.

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[1] It should be noted that the appellant at trial did not rely on the 21 August 2007 email as the trigger for renunciation; this email was only relied on in this way on appeal. The Court of Appeal was satisfied that this change of tack by the appellant caused the respondent no prejudice, and it partly explains why the Court of Appeal came to a different view on affirmation than the trial judge.

[2] The term "common law" is used here to distinguish from contractual rights to terminate that may arise under a contract by express agreement between the parties.

[3] *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) SR (NSW) 632 at 641-642.

[4] *Shevill v Builders' Licensing Board* (1982) 149 CLR 620 at 625-626; *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 at 634, 647-648, 658. It should be noted that the term "repudiation" has at least two meanings: (1) renunciation as described in *Shevill*; and (2) any breach of contract which justifies termination: *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at [44].

[5] *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at [44].

[6] *Shevill v Builders' Licensing Board* (1982) 149 CLR 620 at 625-626.

[7] Who delivered the court's judgment, and with whom Giles JA and Handley AJA agreed.

Interestingly, despite the submissions of the appellant that the requirement to deliver 90,000 trees in June 2007 was an essential term of the contract, breach of which gave rise to a right to terminate, Bathurst CJ did not consider it necessary to determine this issue. Instead, the Chief Justice based his judgment on the issue of repudiation (renunciation) rather than breach of an essential term.[8]

## DID THE RESPONDENT REPUDIATE THE AGREEMENT?

Having concluded that the proper construction of the agreement required delivery of 90,000 trees in June 2007, Bathurst CJ then considered whether the respondent's failure to comply with this requirement evinced an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with its obligations and in no other way.

In this regard the Chief Justice focused on the respondent's emails of 13 and 17 August 2007. His Honour found that these emails showed not only that the respondent did not intend to perform the contract in accordance with its obligations – given its intention to complete delivery in June 2008 instead of June 2007 – but that it was in fact unable to comply with its obligation to deliver in June 2007 in any event, given its reference to "25,000 new plantings in 07" (see reference to the 13 August 2007 email above), which would make it impossible for these trees to be one year old in June 2007.

Accordingly, the appellants succeeded in establishing that the respondent had repudiated the agreement.

## DID THE APPELLANT'S EARLIER BREACH PREVENT IT FROM TERMINATING?

The respondent contended that, despite any repudiatory conduct on its part, the appellant was not entitled to terminate on account of anticipatory breach because the appellant itself was in breach for failing to pay the earlier invoice.

An "anticipatory breach", sometimes called a "prospective breach", occurs where, prior to the time when the promisor is obliged to perform its obligations, the promisee terminates the performance of the contract on account of the promisor's repudiation or inability to perform.[9] In this case, on one view, the breach occurred after the time for performance – given the trees were due to be delivered in June 2007 but were not delivered in full at that time (ie the breach was an actual rather than anticipatory breach). However, a breach can sometimes be described as "anticipatory" despite the fact that performance by the promisor has commenced, and regardless of the fact that the promisor may have committed an actual breach by failure to perform.[10] The parties and the court seem to have adopted this approach in this case.

The first issue Bathurst CJ considered was whether the appellant's failure to pay the outstanding invoice amounted to either, (a) breach of an essential term, or (b) a sufficiently serious breach of a non-essential term giving rise to a substantial loss of the benefit of the contract. This was important because:

> A party who is in breach may nevertheless have the right to terminate, so long as the breach is not repudiatory or of an essential term such as to deprive the other party of the substantial benefit of the contract.[11]

That is, if the appellant's failure to pay the invoice was repudiatory, or a breach of an essential term (thus, in either case, giving the respondent a right to terminate), then this would prevent the appellant from being able itself to terminate for breach.

The Chief Justice considered the appellant's failure to pay the invoice in the following context:

(a) the appellant had already paid a substantial deposit in excess of the amount due on the invoice for the trees actually delivered;

[8] While the Chief Justice did not explicitly reject the appellant's submission that delivery for planting in 2007 was an essential term, the clear inference is that this submission by the appellant was rejected and that the term was non-essential.

[9] Michael Kirby (ed), *The Laws of Australia* (Thomson Reuters, July 200) at [7.6.10].

[10] *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 50.

[11] *Almond Investors Ltd v Kualitree Nursery Pty Ltd* [2011] NSWCA 198, Bathurst CJ at [72] quoting Cheshire GC, *Cheshire and Fifoot's Law of Contract*, (8th ed, LexisNexis Butterworths, 2002) p 943.

(b) there was no fixed date for delivery of the trees delivered; and

(c) objectively speaking, it could not be said that the respondent would not have entered into the contract but for an assurance of strict compliance with the *payment on delivery* requirement.

On this basis, the Chief Justice found that the requirement to pay on delivery was not an essential term of the contract. For similar reasons, and in particular because of the substantial deposit already paid, the court also found that the failure to pay on delivery did not deprive the respondent of the substantial benefit for which it contracted. Accordingly, at the time the appellant purported to terminate for breach, it was merely in breach of a non-essential term.

Bathurst CJ then considered a number of authorities[12] and stated (at [73]) that:

> These authorities establish my opinion that in the case of an actual breach entitling the other contractual party to terminate the right to terminate would not be lost merely because the other party was in breach of a non-essential term. However, in the present case the appellant relied expressly on anticipatory breach. The question is whether the same principles apply.

## Anticipatory breach and the right to terminate

The uncertainty in the case of anticipatory breach compared with actual breach seems to have originated from the fact that a party in breach, who may wish to terminate for the other party's anticipatory breach, may itself be in a position where it is not ready, willing and able to perform the contract. This lack of an ability to perform may preclude the wronged party from validly terminating the contract. This was explained in *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 by Stephen, Mason and Jacobs JJ at 433:

> A party in order to be entitled to rescind [terminate] for anticipatory breach must at the time of the rescission himself be willing to perform the contract on its proper construction. Otherwise he is not an innocent party, the common description of a party entitled to rescind [terminate] for breach.

Deane J in *Foran v Wight* (1989) 168 CLR 385 expressed a contrary view. However, rather than having to choose to follow Deane J or Stephen, Mason and Jacobs JJ in *DTR Nominees*, Bathurst CJ in *Almond Investors* side-stepped the issue in this way (at 443):

> Stephen, Mason and Jacobs JJ in *DTR Nominees* did not say that a party in breach of a non-essential term was not entitled to terminate for anticipatory breach. Rather they stated the party must have been willing to perform the contract according to its proper construction. It is not inconsistent with such willingness that there is a failure to perform a non-essential term when the other contracting party is either incapable or refusing to perform the contract according to its terms.

Accordingly, by this reasoning, the court found that the appellant was able validly to terminate the contract despite the fact that at the time it did so it was in breach of its payment obligations. This was because the respondent, at the time, was refusing to perform the contract on its proper construction. In other words, the appellant's conduct in refusing to pay the invoice did not mean it was not able to perform the contract on its proper construction, rather it was refusing to perform on the basis of the erroneous construction put forward by the respondent. In these circumstances the appellant was entitled to terminate.

## Conclusion

This case is authority for the proposition that a party, willing to perform a contract on its proper construction, will not be precluded from terminating for breach by virtue of it having breached a non-essential term, in circumstances where the other party has repudiated (renounced its obligations under) the contract by way of anticipatory breach.

Nevertheless there may still be cases where the difference of opinion between Deane J in *Foran v Wight* on the one hand, and Mason, Stephen and Jacobs JJ in *DTR Nominees* on the other, has to be

[12] Including *Roadshow Entertainment Pty Ltd v (ACN 053006269) Pty Ltd (Receiver & Manager appointed)* (1997) 42 NSWLR 462; and *Emhill Pty Ltd v Bonsoc Pty Ltd (No. 2)* [2007] VSCA 108.

met head on – that is, where the party wishing to terminate is not, on a proper construction of the agreement, ready and willing to perform the contract. Determination of this issue will have to be left for another day.

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