

Repudiation of a Contract - How to Tell When it Occurs

S Hill & A Heikkonen Trading as Benchmark Homes v Canberra Centre Holdings Limited, unreported, ACT Supreme Court, Miles CJ, 1 August 1995.

The ACT Supreme Court was recently faced with the issue of whether a breach of a contract by a party amounted to a repudiation of the contract by that party.

In the case of *S Hill & A Heikkonen Trading as Benchmark Homes v Canberra Centre Holdings Limited*, the court held that a lender had repudiated a loan agreement to a builder partnership when it refused to advance further funds under a property development progress payment loan. The court, after interpreting the critical letter of offer and considering the impact of property valuations, determined that the builder was entitled to a further payment although not for the sum requested.

The significance of the case is the treatment of the concept of "a breach going to the root of the contract" which constitutes a repudiation of the contract. The judge thought it misleading to concentrate on the term "root of the contract". For a party to have repudiated the contract the court said:

"that the breach must be of such magnitude to entitle the innocent party to treat the contract as at an end."

Going beyond the apparent circularity of this statement, the result is that a repudiatory breach does not have to be as serious or as critical as the phrase "root of the contract" would imply.

The lender responded to the allegation of repudiation by saying that the builder had elected to affirm the original contract when it accepted further advances of money from the lender. The court canvassed the contentious issue of how much knowledge an innocent party must have before it can be held to have affirmed a contract which has been repudiated by the other party.

The court held that the builder had made "an independent and alternative contract" by accepting the further advances from the lender and by this conduct had done enough to accept the lender's repudiation of the original contract. The builder, in accepting the further advances was not affirming the original contract but was accepting the lender's repudiation by entering into a new and different contract.

The case, in addition to highlighting the development of the principles concerning termination of contracts, emphasises the importance of continually assessing the

nature of contractual relationships with others particularly during periods of contract variation and negotiation.

- **David Toole, Deacon Graham & James, Solicitors. Reprinted with permission from Deacon Graham & James's Critical Path.**