Good contract law: termination or renegotiation of contracts essay example

Law, Criminal Justice

If the choice is between renegotiation and termination, Missan should renegotiate rather than terminate the contract. Unilateral termination may not be available to the company because of the weak grounds for its justification. It can, additionally, expose the Company to risk for potential wrongful termination, which can result to liability. On the other hand, a renegotiation can give Missan an opportunity to set new terms that are more favourable to it, taking into account the present circumstances.

Repudiatory Breach as Justification for Termination

Missan can only terminate the contract with Depeche if such termination can be justified, otherwise it may be exposed to liability for wrongful termination. An examination of the various ways of committing repudiatory breach reveals that none are applicable to Depeche. A repudiatory breach is a broad term that can apply to several situations: anticipatory breach by renunciation; renunciation at the time of expected performance; substantial breach of the contract, which can involve a condition, a warranty or innominate term, and; a pattern of breach, as was held in Rice v. Great Yarmouth Borough Council. The Court also held in Woodar Investment Development Ltd. v. Wimpey Construction (UK) Ltd that to justify a finding of repudiation, it is important to look at the party’s conduct as a whole to determine whether it indicates intention to abandon or reject performance of obligations.

Depeche had not, by words or conduct, manifested anticipatory renunciation. In Hochster v De la Tour, for example, the defendant wrote to the claimant that he no longer intended to use his services even before the contract was set to begin. The Court held that a person who contracted another for his

services for a certain day and before that day comes renounces that engagement, is liable for breach of contract. This situation is clearly not applicable to Depeche because it never renounced its obligation to deliver batteries to Missan before the delivery date.

Neither had Depeche breached the contract through incapacitation. Incapacitation does not entail overt renunciation, but actions or omissions that frustrate the contract. This was illustrated in Universal Cargo Carriers Corporation v. Citati where the parties entered into a charter party entailing the defendant to provide cargo and shipper on a specific date. However, the defendant failed to provide both forcing the other party to cancel it – an action upheld by the Court.

Depeche cannot be guilty of incapacitation or frustration because it did not fail to deliver the 10, 000 batteries by the end of August. Although Clause 13 of the contract made a provision for an optional order of additional batteries, this provision is contingent on two conditions: that the additional order is made within the first 14 days of the month, and; upon failure to deliver the additional number of batteries, Depeche must make an estimate – in good faith - the number of additional batteries it can supply. Missan placed the additional order on August 19, which is beyond the contemplation of the 14 days specified in the contract.

Another justification for termination within the ambit of repudiatory breach is breach of the terms – conditions, warranties or innominate terms - of the contract. Conditions are important features of a contract because they go the root of the contract, whilst a warranty takes a less important role in a contract because they do not go to its root. Hence, a breach of a warranty

cannot justify termination of a contract. An innominate term, on the other hand, lies between a condition and a warranty, and justifies termination only in certain cases.

The distinctions of these terms can be explained through the cases of L Schuler AG v Wickman Machine Tool Sales Ltd, Poussard v Spiers, Bettini v Gye, and Hong Kong Fir Shipping Co Ltd v Kawasaki Kisan Kaisha Ltd. In L Schuler, the Court held that the contractual provision obligating the defendant to visit UK motor manufacturers once a week was not a condition despite its denomination as such in the contract. If it were, according to the Court, a single omission would have already constituted a cause for the contract termination, which was clearly not the intention of the parties.

In Poussard, the clamant entered into a contract to perform for an opera house for three months, but was unable to perform the first four performances because of her illness. The defendant terminated the contract and the claimant sued. In siding with the defendant, the Court held that the inability to perform went into the root of the contract and, therefore, constituted a condition.

On the other hand, in Bettini, another performing arts case, the Court held that the failure of the performer to arrive exactly six days – as the claimant arrived only 3 days - before the opening night for purposes of rehearsal as provided in the contract did not justify termination of the contract. The requirement of six days rehearsal time was merely a warranty, according to the Court, as it did not go to the heart of the contract.

Finally, the Hong Kong Fir case added the concept of innominate term to the repudiatory breach discourse. In that case, a party had to make repairs of a

ship for 20 weeks before it could be used, but before full repairs could be completed, it decided to terminate the charter party agreement. The Court held that the breach constituted only a breach of an innominate term – a term that cannot be classified correctly as a condition or a warranty. It can only justify termination, according to the Court, if the extent of the breach had substantially deprived the injured party. Since the defendant had still 17 months to use the ship, it was not substantially deprived of its use. The substantiality of the deprivation test was also illustrated in Telford Homes (Creekside) Ltd v Ampurius Nu Homes Holdings Ltd. The Court, in reversing the decision of the High Court, held that the temporary delay in the construction of phase 2 of the commercial units did not justify the termination of the contract. Since the 999 years of lease constituted the entire benefit for the claimant, the few years of temporary stoppage of the constructions only constituted a small fraction of deprivation.

Taking all of the above into account, Depeche cannot be said to have breached a condition, a warranty or an innominate term. The delivery of additional batteries cannot be classified as a condition because it did not go into the root of the contract as the contract’s objective was for Depeche to augment Missan’s battery supply. The provision on additional batteries was also important, which implies that it cannot be merely a warranty, but neither was it a condition. It was, therefore, only an innominate term and this is strengthened by the fact that Depeche was not obligated to deliver the requested number of additional batteries, but was required to make a good faith assessment of the number it can deliver by the end of the month.

However, even if this was the case Depeche cannot be faulted because Missan placed the order beyond the period specified in the contract.

Exemption Clauses: “ All reasonable endeavours” and “ reasonable endeavours”

An exemption clause is a provision in a contract that limits the liability of either party in that contract. The term includes the concept of exclusion or limitation, which means that it can either totally exclude a party from total liability or lessen his liability up to a certain amount. UCTA governs exemption clauses between consumers and businesses.

In the contract between Missan and Depeche, there are two clauses that may come within the ambit of exemption clauses. Under Clause 13, Depeche is required to use ‘ all reasonable endeavours’ to provide Missan with the additional orders it may place. On the other hand, Clause 22 made reference to ‘ reasonable endeavours’ to limit the liability of Depeche. The phrases ‘ all reasonable endeavours’ and ‘ reasonable endeavours’ were explained in Rhodia International Holdings Ltd v Huntsman International LLC. The Court held that ‘ reasonable endeavours’ does not have the same meaning as ‘ best endeavours,’ but ‘ all reasonable endeavours’ has, more or less, the same meaning as ‘ best endeavours.’ It also defined ‘ best endeavours’ as taking all possible courses to achieve a certain result. In IBM United Kingdom Ltd v Rockware Glass Ltd, the Court characterised the phrase ‘ best endeavours’ as taking all steps within the power of a party that are material to achieving the obligation. Moreover, in Phillips Petroleum Co UK Ltd v Enron Europe Ltd the Court held that the phrase ‘ reasonable endeavours’ does not entail the surrender of the party of its own commercial interests to obtain

the goals of the contract. This is distinguished from the case of Jet2. com Ltd v Blackpool Airport Ltd where the Court held that an obligation to use ‘ best endeavours’ entails a party to bear the financial cost of the obligation.

The use of both terms in the contract in issue creates confusion with respect to the liability of Depeche to deliver additional batteries. On one hand, it is required to exert ‘ best endeavours’ to produce and deliver additional batteries, although not obliged to deliver the full number of additional orders. This imply that Depeche should shoulder the costs, if need be, of producing and delivering the additional batteries. This may, however, fail to pass the reasonableness test provided by UCTA. According to the test, the fairness and reasonableness of the term must take into consideration the circumstances present at the time the contract was entered into. It must be remembered that at the time the contract was entered into, Depeche played only the role of supplementary supplier to Missan. Moreover, as a new player in the industry, it did not have the same bargaining position as Missan. On the other hand, Clause 22 only mentioned ‘ reasonable endeavours’ implying that Depeche cannot subvert or set aside previous commitments to other customers to satisfy all the demands of Missan. The implication of the absence of harmony between the two clauses is lack of clarity. According to the contra preferentum rule, any vagueness in the clause of a contract is interpreted against the party relying on it as was held in Wallis, Son & Wells v Pratt & Haynes.

The Canada Steamship rule, taken from the case of Canada Steamship Lines Ltd v The King provides that an express exemption clause integrated into a contract must be given effectivity, but this refers to liability from negligence

only. Since negligence is not expressly included in the clauses, this cannot be used by Missan as grounds for claim against Depeche.

Economic Duress and the Sanctity of the Contract

Neither can Missan rely on economic duress to terminate the contract and recoup the amount it paid for the additional batteries in August. Economic duress is a restitutionary remedy that grants a party justification for the termination of contract and to recoup any amount paid to. Economic duress was first highlighted as a concept in DSND Subsea Ltd v Petroleum Geo Services ASA where the Court held that for pressure to be actionable such pressure must be such that it compelled and provide the claimant no other choice but to act as he did. In Kolmar Group AG v Traxpo Enterprises Pvt Ltd, the defendant threatened to breach the contract if the other party did not agree to a change in the contract terms that would make it favourable to it. The concept of economic duress cannot be relied on by Missan because there was no threat from Depeche to break off the contract if it did not pay the increased amount of the batteries. The contract would have still stayed even if Missan did not pay it, although Depeche cannot deliver the additional batteries, which were ordered beyond the time stated in the contract. Moreover, Missan had other choices, which was to procure batteries from other suppliers.

Conclusion

Missan should not unilaterally terminate the contract it entered into with Depeche. There is no well-founded justification for such termination because in the first place, Missan placed the order for additional batteries beyond the

period stated in the contract. Even if the period stated in the contract is set aside, the case for Missan is not well delineated because of lack of clarity and the unreasonableness of some terms, taking into account the unequal position of the parties at the time they entered into the contract. The weakness of Missan's case is also reinforced by the principle of the sanctity of the contract, which underpins common law contracts. The implication of this principle is that the courts are not likely to intervene in the agreements of the party, unless there are strongly persuasive grounds to do so. The courts have even upheld this principle over other public policy rules, as was in the case of Belmont Park Investments PTY Limited (Respondent) v. BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc (Appellant). In that case the Court upheld the freedom to contract over anti-deprivation public policy invalidation. It is, therefore, advisable for Missan to renegotiate with Depeche, rather than terminate the contract, so it can incorporate clearer terms into the contract.

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