WHAT ARE MY OPTIONS IF THE OTHER PARTY IS NOT HONOURING OUR CONTRACT

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When a party to a contract indicates it will not perform the contractual terms, that party has committed an anticipatory repudiation of a contract. In this circumstance, an innocent party has two options. First, the innocent party may terminate the contract by accepting the repudiation and sue for damages. Second, the innocent party may elect to reject the repudiation and hold the other party to its obligations. If the repudiating party fails to perform, the innocent may sue for specific performance. The remedy of specific performance is not available if the contract's repudiation is accepted.

Overview of Anticipatory Repudiation

An anticipatory repudiation occurs when one party manifests, through words or conduct, an intention not to perform or be bound by the agreement's future performance provisions.\(^1\)

The test for determining whether a repudiatory breach has occurred is objective.\(^2\) A court must consider whether the consequences of the breach, in the particular circumstances of the case, deprive the innocent party of "substantially the whole benefit" of the contract.\(^3\)

In general, a repudiation of a future obligation provides the innocent party with the same rights as an actual breach of the obligation in question.\(^4\) This means that the innocent party may, at its option, elect to terminate the contract.\(^5\) In Ali v O-Two Medical Technologies Inc., the Ontario Court of Appeal outlined an innocent parties' options as follows:

Once the counterparty shows its intention not to be bound by the
The principle was applied in Brown v Belleville (City), where the Ontario Court of Appeal confirmed that an anticipatory breach "does not, in itself, terminate or discharge a contract". Instead, the innocent party may elect to treat the contract as continuing, as the Supreme Court stated in Guarantee Co. of North America v Gordon Capital Corp.:

"Contrary to rescission, which allows the rescinding party to treat the contract as if it were void ab initio, the effect of a repudiation depends on the election made by the non-repudiating party. If that party treats the contract as still being in full force and effect, the contract "remains in being for the future on both sides. Each (party) has a right to sue for damages for past or future breaches."[8]

The innocent party is entitled to disaffirm the agreement at the time of the repudiation or may "simply wait and see whether the repudiating party does in fact eventually refuse to perform his or her contractual obligations when they fall due."[9]

Accepting the Anticipatory Repudiation

Accepting the anticipatory repudiation will end the contract.[10] Electing to accept the repudiation is irrevocable, meaning the innocent party cannot later call for the contract to be performed.[11] Actual notice or adoption of the repudiation is not required, if the adoption may be reasonably inferred from all the circumstances.[12] A party is not required to elect to accept immediately but a party may be estopped from terminating the contract if the repudiator acts on the innocent party's representations and tenders performance.[13]

The effect of accepting the repudiation is that the contract is terminated and the parties are discharged from future obligations.[14] However, rights and obligations that have already matured are not extinguished.[15] As stated above, the contract is not rescinded ab initio; however, neither party is required to continue performance and the innocent party may pursue a remedy for breach of contract.[16]
Rejecting the Anticipatory Repudiation

The second option is to reject the anticipatory repudiation and affirm the contract. Clients should elect this option if they wish to hold the other party to the terms of the contract. However, the fact that the innocent party has urged the repudiating party to retract the repudiation or has attempted to settle the dispute will not necessarily constitute an affirmation that precludes subsequent disaffirmation by the innocent party. If the client elects to reject the anticipatory repudiation they will be under a continuing obligation to perform the contract. The result is that if a counterparty fails to comply with the terms of the contract the innocent party may sue for specific performance, if that is an appropriate remedy for the particular breach.

Conclusion

In short, if repudiation has clearly occurred, the solicitor must ask the client one question: do you want to sue for specific performance? When damages will not be sufficient, the client should reject the anticipatory repudiation and continue to perform the contract. This will allow the innocent party to sue for specific performance. Encouraging the other party to comply with the terms of the contract may not be deemed as an affirmation, and may be viewed favourably by a court in an upcoming dispute.


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