

Common Law versus Contractual Rights of Termination

The prospect of terminating a contract poses many problems which may deter individuals from backing out of a disagreeable situation. Now changes in the law mean that termination of contract can be made a lot easier. This article looks at a recent case in England that has made use of a clause that should make the process easier in the future.

The Old Law

The relationship between common law and express contractual rights has recently come in for some judicial revisionism in *Lockland Builders Ltd. v Rickwood*¹. Previously it has been the considered view that contractual right of termination *did not* limit common law rights of termination as a general rule unless there was provision to the contrary. This view could be found as discussed in both textbooks and in much of the caselaw². However, the *Lockland Builders* case has limited a party's right to determine a contract as common and has gone so far as to suggest that such common law rights (when there are contractual rights of termination provided) will only be exercisable in exceptional cases. Beginning with the facts then we may then see how this change has come about.

Background and Lockland Builders

The dispute in *Lockland Builders* arose in the following way: The defendant 'Rickwood' purchased a plot of land and then agreed informally with one Neil Ryan, 'Ryan'- who was closely associated with the plaintiff contractor (Lockland), that Lockland would build a house on Rickwood's part of the plot in exchange for cash and the transfer of another part of the plot to Ryan, and upon which he could construct a second house for sale upon the open market. Following this, and the commencing of

construction, solicitors were instructed by Ryan and Lockland and two formal agreements were signed. One agreement was a building contract between Ryan and Rickwood for the construction of Rickwood's house. The other agreement was a contract of sale of part of the plot by Rickwood to Lockland. The contract of sale stated Rickwood was under no obligation to convey the plot until completion to his satisfaction of all works under the building contract and the issue of a certificate of completion of the work. The building contract contained a clause which gave Rickwood a right, if he was dissatisfied with progress or quality etc., to have an architect or surveyor appointed who could then certify such matters. The clause also required Rickwood to notify Ryan of any such complaint and give him 21 days to remedy it failing which Rickwood could re-enter. Rickwood eventually gave notice to Ryan purporting to terminate the contract *but without following the procedure set out in the clause*. Lockland in turn sought specific performance of the contract of sale; and Rickwood claimed for defective work. At first instance, judgment was given for Lockland and it was held that Rickwood had not been able to terminate the contract and debar Ryan from the site.

Lord Justice Russel LJ in the Court of Appeal: "There was some debate in this court as to whether cl 2 excluded or restricted Mr. Rickwood's right to bring

the building contract to an end. This clause undoubtedly provides machinery for the determination of the very type of dispute which arose in this case, and it is not a clause which was expressed to be subject to or without prejudice to other rights and remedies. We were referred to by counsel to an *Architectural Installation Ltd.* With all respect to the judge, for my part, I do attach significance to the absence of such words as "without prejudice to other rights and remedies", and I do not think that to include them would, as Judge Bower thought, involve verbiage in drafting...My own view-returning to the facts of the instant case is that cl 2 *and the common law right to accept a repudiatory breach can exist side by side, but only in circumstances where the contractor displays a clear intention not to be bound by his contract*³ (emphasis added).

Clause 2 was of course the contractual right and route for termination. On the facts of the case Lord Justice Russel held that clause 2 created the *only* effective way in which Mr. Rickwood could determine this agreement. His lordship found it difficult to understand why the clause should be there at all if that were not the true position.

The New Law

This is a change to the law. It has been remarked upon by the editors of the *Building Law Reports* as follows; "The effect of this case is that it is apparently

easier to exclude common law rights by implication than might have been thought. It seems that what is sufficient is provision for certain events which provide a mechanism and absence of any express reservation of common law rights. This approach differs from that of His Honour Judge Bowsher QC in *Architectural Installation Services Ltd...* [where he] held that clear words were necessary to exclude common law rights and that therefore the words "without prejudice to other rights" were not necessary to preserve such rights".⁴ The change that this marks in the law is that common law rights of termination may now be excluded by *implication*. Once again, previously, *clear words* were thought necessary⁵.

The Drafting Lesson

In summary, and contrary to *Architectural Installation Services*, if a party wishes to be sure of maintaining

both his contractual and common law rights to terminate the contract it should be expressly stated. For instance, use of the phrase 'without prejudice to other rights and remedies' would achieve this. Apart from using such a phrase or other equally clear wording a party may be able to have recourse to common law termination rights only in exceptional cases; for instance, a contractor walking off-site, or a contractor failing to comply with plans in a fundamental way. Another way in which this could be achieved would be when such recourse could be implied on the facts. Lastly, one remaining way in which an employer seeking to demonstrate an entitlement to have access to common law rights of termination in the absence of clear language to this effect in his agreement with the contractor would be to seek to rely upon the statement of Russel LJ that recourse may still be had to common law rights in 'those circumstances where the

contractor displays a clear intention not to be bound by his contract...' However, as both contractor and employer will be aware, just when that clear intention can be said to exist on any given set of facts is sometimes very difficult to say.

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¹ *Lockland Builders Ltd v Rickwood (1996) 46 Con LR 92 (CA).*

² *Eg Gilbert-Ash (Northern) v Modern Engineering (Bristol) [1974] AC 689 (HL); Architectural Installation Services v James Gibbons Windows (1989) 46 BLR 91; and as for textbooks: Hudson's Building and Engineering Contracts (11th Edn) p 1246; and Keating on Building Contracts (6th Edn) p 162.*

³ *Op cit*, 92, 97.

⁴ (1996) 77 BLR 38,40.

⁵ *Op cit*, footnote 2 again.

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APPOINTMENTS

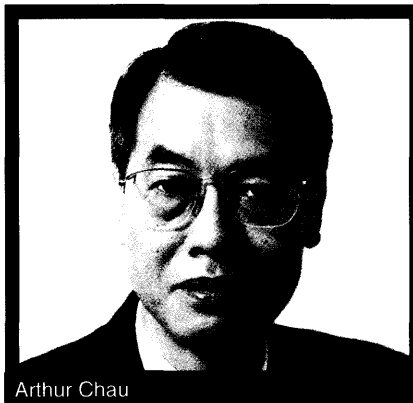
Otis Managing Director

Otis Elevators has announced the appointment of Arthur Chau as Managing Director of the Otis Elevator Company (HK) Ltd.

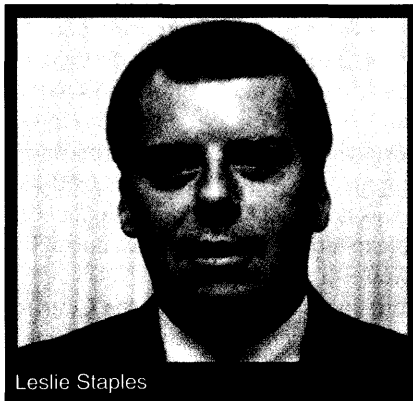
Employed with Otis since 1972, Chau returns to Hong Kong to take up the position of Managing Director following his successful assignment in the Pacific Asia Operations Headquarters, Singapore as Director, Business Planning and Development and later Treasurer. Prior to this, Chau held the post of Managing Director in Hong Kong from 1986.

Chau replaces Ray White who has transferred to Otis Pacific Asia Operations Headquarters in Singapore to take up the position of Vice President, Service.

Commenting on his re-appointment as Managing Director, Chau said: "Having spent some time in Singapore, I am very excited about returning to Hong Kong and the development of Otis' operations in this region. We need to remain one step ahead of the fierce competition and this means developing major strategies to strengthen our presence."



Arthur Chau



Leslie Staples

New head of ACN Corporate Services

Leslie Staples has been promoted to Director of Corporate Services at ACN Real Estate Advisors Ltd. Based in Hong Kong, Staples is responsible for the management of corporate real estate activities and related business services for multi-national firms headquartered in the territory and the Asia/Pacific region.

Staples has had over 15 years of experience in the property market field, participating in significant projects including the redevelopment of the Hong Kong Bank Building. Aside from this achievement, Staples is also an expert in appraising sites, corporate strategies and planning as well as allied investment communications. ACN Real Estate Advisors Ltd. is a full services real estate consultancy with global strategic alliances serving property, investment and the development of general commercial interests.

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