

LOSING THE RIGHT TO TERMINATE—ELECTION AND NO WAIVER CLAUSES

Leighton O'Brien, Partner

Stephen Sander, Senior Associate

Allens Arthur Robinson, Melbourne

HOW DOES IT AFFECT YOU?

- The decision in *Tele2 International Card Company SA and Others v Post Office Limited* is a timely reminder that parties under an agreement should enforce their rights without delay.
- It reinforces that if a party continues to perform its obligations under an agreement despite the ongoing breach of the other party, there is a danger it may be unable to exercise its rights in relation to that breach, regardless of the existence of a 'no waiver' clause in the agreement.
- Those entering into new agreements should also be aware of the court's consideration of 'no waiver' clauses, which casts doubt on whether parties can effectively contract out of the doctrine of election.

BACKGROUND

Tele2 International Card Company SA and others (the Tele2 Parties) entered into an agreement with Post Office Limited (POL) whereby the Tele2 Parties were to supply POL with phone cards and phone card services and POL agreed to market and sell those products and services (the agreement).

Under the 9 November 2001 agreement, the Tele2 Parties were required to provide parent company letters to POL within 20 days of the execution of the agreement and then annually by 24 December each year. The letters were to guarantee the provision of operating capital to the subsidiary for the following year. The Tele2 Parties failed to provide the requisite parent company letter for 2004 by 24 December 2003. This gave POL the right to terminate the agreement, but it did not do so until 1 December 2004, when it gave written notice to the Tele2 Parties terminating the agreement as from 1 April 2005, on the basis that the Tele2

This article reports on an English Court of Appeal decision and its implications for the effectiveness of 'no waiver' clauses when breach and termination of a commercial agreement are separated by many months of contractual performance.

Parties had failed to provide parent company letters for 2004 in accordance with the agreement.

The Tele2 Parties argued that as POL had delayed giving notice by nearly a year and continued to perform the agreement without any protest about the breach, POL had affirmed the agreement by election and was now not entitled to give notice to terminate for this breach. In fact, doing so was a wrongful anticipatory renunciation of the agreement.

POL, in turn, relied on clause 16 of the agreement, which stated:

Waiver

In no event shall any delay, neglect or forbearance on the part of any party in enforcing (in whole or in part) any provision of this Agreement be or be deemed to be a waiver thereof or a waiver of any other provision or shall in any way prejudice any right of that party under this Agreement.

JUDGMENT—ELECTION

The Court of Appeal held against POL, finding that it had elected to abandon its right to terminate by:

- continuing to perform its contractual obligations;
- agreeing or accepting the ongoing performance by the Tele2 parties; and
- not protesting the breach or reserving its rights.

The Court of Appeal reached this conclusion by reference to the analysis of the doctrine of affirmation by election that Lord Goff stated in *Motor Oil Hellas (Corinth) Refineries v Shipping Corporation of India* [1990] 1 Lloyd's Rep 391:

- if a contract gives a party a right to terminate upon the occurrence of defined actions or inactions of the other party and those actions or inactions occur, the innocent party is entitled to exercise that right;

- the innocent party has to decide whether or not to do so, and its decision is, in law, an election;

- it is a prerequisite to the exercise of the election that the party concerned is aware of the facts giving rise to its right and the right itself;

- if the innocent party does not make a decision, 'the time may come when the law takes the decision out of [its] hands, either by holding [it] to have elected not to exercise the right which has become available to [it], or sometimes by holding [it] to have elected to exercise it';

- where a party acts in a manner consistent only with it having chosen one or other of the two inconsistent courses of action open to it, then it will be held to have made its election accordingly; and

- an election can be communicated by words or conduct but where it is alleged that a party has elected not to exercise a right, it will be held only to have elected not to exercise the right if it has communicated its election in clear and unequivocal terms.

JUDGMENT—THE 'NO WAIVER CLAUSE'

The Court of Appeal also found that the 'no waiver' clause did not assist POL in the circumstances. The clause could not prevent the fact of an election to abandon the right to terminate from existing (ie either the party does or it does not), and the wording of the clause did not deal with the issue of electing whether or not to exercise a contractual right—the clause did not attempt to say that the doctrine of election shall not apply. Notably, in respect of this last point Lord Justice Aikens added the qualifying comment 'even assuming that any contractual provision could exclude the operation of the doctrine'.

THE OUTCOME

For these reasons POL was not entitled to give the notice of termination dated 1 December 2004 and doing so was an anticipatory renunciation of the agreement. Its later cessation of performance was a repudiatory breach of the agreement, which entitled the Tele2 parties to claim damages from POL.

IMPACT OF THE DECISION

'No waiver' clauses are generally designed to guard against a waiver arising in circumstances where a party has failed to fully enforce its rights under a contract. For example, where the agreement requires X to do something by a certain time but Y has on one or more occasions accepted late or non-performance of that obligation, the 'no waiver' clause is designed to ensure that that party can insist on timely performance of that obligation in the future without a waiver arising.

As highlighted by the court, the 'no waiver' clause did not deal with election—it did not attempt to say that the doctrine of election shall not apply. Even if additional drafting overcame this, there is a concern that such a clause will not prevent the fact of an election to abandon the right to terminate from existing. Accordingly, parties must be vigilant in the exercise of their rights.

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