

Recent Court of Appeal decision highlights limited application of “no waiver” clauses

The Court of Appeal has recently held that, where a party is aware of a default giving rise to a right to terminate a contract, continued performance of that contract may lose the innocent party the right to terminate for that default if it “has communicated its election [to affirm the contract] to the other party in clear and unequivocal terms”.

Facts of the case:

The innocent party delayed in exercising its right to terminate a contract until a year after the breach had occurred. It continued to perform the agreement during the interim period, did not notify the party in default of the breach and did not reserve its rights.

The contract contained a standard waiver clause which provided that:

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

Decision:

The Court of Appeal held that:

- Where a party is aware of a default giving rise to a right to terminate, continued performance of the contract may lose the innocent party the right to terminate for that default where that party “has communicated its election [to affirm the contract] to the other party in clear and unequivocal terms.” The facts of this case amounted to a clear affirmation of the contract; and
- A waiver clause such as the one in the contract in question did not preserve the innocent party’s rights; these had been lost as a result of the affirmation. The Court of Appeal said that, even if the waiver clause had specifically included wording saying that the doctrine of election by affirmation should not apply, it doubted that such language would be effective to exclude the doctrine from operating.

Conclusion

This case highlights the importance of sending a “reservation of rights” letter once a breach of contract is evident, stating that any delay in exercising the right to terminate does not constitute a waiver or affirmation of the breach. This should serve to ensure that continued performance of a contract in the face of a breach cannot be construed as an election to affirm the breach.

Click [here](#) for the full text of the Court of Appeal judgment in *Tele2 International Card Company SA and others v Post Office Limited [2009] EWCA Civ 9 ...*

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