

Conduct prevails over "non-waiver" clauses: Court of Appeal

The Court of Appeal has ruled that the Post Office could not rely on a contracting party's breach of contract to entitle it to terminate the contract when the Post Office had continued to perform its obligations for nearly one year after the other party's breach. This was the case even where the contract had an express waiver clause which provided that no "delay, neglect or forbearance" by either party in enforcing the contract would be deemed to be a waiver, or in any way prejudice any right, of that party under the contract.

In November 2001, the Post Office had entered into a contract with Tele2 International Card Company in relation to the sale of pre-paid phonecards at post offices under which the Post Office agreed to promote Tele2's phonecards through its Post Office outlets. The agreement required Tele2's parent company to give a letter to the Post Office "7 days prior to the commencement of each calendar year" guaranteeing that Tele2's parent company would provide each of its subsidiaries which had contracted with the Post Office with sufficient capital to continue its operations under the contract. The parties accepted that, by 24 December 2003, the parent company guarantees had not been provided to the Post Office for the calendar year 2004 and that this gave the Post Office a prima facie right to terminate the contract by giving written notice to Tele2. However, the Post Office did not give notice to Tele2 until December 2004.

The contract contained a clause ("clause 16") which provided that ""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". Commercial contracts frequently include clauses which permit a party to terminate the contract if the other party does, or fails to do, specific things required of it under the contract. In that event the company which is not in default can choose to exercise its right to terminate the contract or it can affirm the contract, either expressly (by stating so in writing or verbally) or by continuing to act as though the contract was continuing. Tele2's argument was that the Post Office had elected, by its actions, to affirm the contract because it continued to comply with its obligations until giving notice to terminate in December 2004. The Post Office argued that clause 16 entitled it to defer exercising its right to terminate, and that its continuing to perform the contract could not be taken as a waiver of its right to terminate.

The Post Office succeeded in the High Court but the Court of Appeal reversed that decision. Lord Justice Aikens held that "The continued performance by [the Post Office] of the Agreement for nearly a year without any protest or reserve of any kind in relation to the failure to provide the Parent Company Letters is, in my view, only consistent with an election to abandon the right to terminate for that breach. It is a clear and unequivocal communication, by conduct, of [the Post Office's] election to affirm the Agreement and to abandon its right to terminate it."

The Court of Appeal held that clause 16 was of no particular help to the Post Office: factually, either there had been an election or there had not and clause 16 did not attempt to say that the doctrine of election shall not apply to the contract.

The result was that the Court of Appeal held that the December 2004 letters sent by the Post Office to Tele2 amounted to a repudiatory breach of contract by the Post Office. The Court of Appeal went on to consider Tele2's claim for damages

but held (for reasons beyond the scope of this article) that the Tele2 company which was seeking damages had not actually suffered any damage and could claim only nominal damages.

This judgment casts doubt on the effectiveness of a non-waiver clause and such clauses may now have limited value in a contract because the court will judge a party by its behaviour, which may defeat such a clause. If a clause entitling a party to terminate a contract is going to be relied on, the party seeking to rely on the clause must exercise great care to ensure that it does not inadvertently affirm the contract by behaving in ways which are inconsistent with an intention to terminate it. This is an area in which early legal advice is essential if important contractual rights are to be preserved.