

Behaviour trumps 'non-waiver' clauses, says Court of Appeal

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The Post Office was not allowed to walk away from a contract because it had continued to perform its duties for 11 months after the other company breached the contract, the Court of Appeal has ruled.

That continuation of the contract after the breach undermined the Post Office's ability to walk away from the deal, even though the contract had a waiver clause that specifically said that the right to terminate was not affected by delays in taking termination action.

The Post Office had a deal with Swedish telecoms firm Tele2 for pre-paid international phone cards, which the Post Office branded as its own.

The contract was signed in 2001 and said that Tele2 must write to the Post Office seven days before the start of each year guaranteeing that the Swedish parent company would provide the subsidiaries which had signed the contract with enough capital to fulfil their side of the contract.

Tele2 did not provide 2004's guarantee by 24th December 2003. That gave the Post Office the right to terminate the agreement. It did not give Tele2 notice that it was terminating, though, until December 2004.

The contract contained a waiver, which said that delays in making use of terms of the contract did not affect the rights of a party to make use of those terms.

"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," said clause 16 of the contract.

Contracts often contain clauses which allow one party to abandon the agreement if the other parties does or fails to do certain things. When that happens the other company can decide to exercise its right to terminate the contract. Alternatively it can affirm that the contract is still valid either verbally or by continuing to act as if that is the case.

Tele2 said that the Post Office had elected, by its actions, to affirm the contract because it continued to abide by it for 11 months.

The Post Office said that clause 16 meant that it could wait before exercising its right to terminate, and that this wait could not be taken as a waiver of its right to terminate.

The High Court agreed with the Post Office, but the Court of Appeal did not.

"The continued performance by POL 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," Lord Justice Aikens in the ruling. "It is a clear and unequivocal communication, by conduct, of POL's election to affirm the Agreement and to abandon its right to terminate it."

The ruling said that the clause which said that a delay did not affect a party's right to take action did not undermine that view.

"Clause 16 of the Agreement is of no particular help to POL, except perhaps in terms of emphasising the requirement that an election to abandon a right will only be shown if there was a clear and unequivocal communication of an election to abandon the right to terminate and to continue the Agreement," said the ruling. "As a matter of fact, either POL elected to abandon its right to terminate the Agreement for Tele2's breach of clause 3.10.2 or it did not. If POL did elect to abandon its right to terminate for breach, then the whole contract, including clause 16, would continue in existence."

In short, clause 16 cannot prevent the fact of an election to abandon the right to terminate from existing: either it does or it does not," said the judgment. "The general law demands that a party which has a contractual right to terminate a contract must elect whether or not to do so. This clause does not attempt to say that the doctrine of election shall not apply".

The Court of Appeal said that the Post Office had unfairly terminated the contract early.

Tele2 had claimed damages, but the Court of Appeal said that because of the complexities of which subsidiary of Tele2 performed which function, only Tele2 Ireland was entitled to damages from the termination of the contract, but it had not actually suffered any damage. It could only claim nominal damages, the Court said.

Myles Blewett, a partner with Pinsent Masons, the law firm behind OUT-LAW.COM, said that it can be difficult to make non-waiver clauses effective.

"Non-waiver clauses are of limited value. They may buy you some time in which to decide how to act, but they are subject to what you do in practice, which can defeat the clause."

It was the Post Office's behaviour that the Court looked at when making its decision. When large, complex service contracts are involved, this means that a company's behaviour has to be very disciplined when it comes to affirmation of contracts.

"Whether a party has affirmed the contract will involve looking at whether that party did anything in accordance with the contract which would amount to affirmation," said Blewett. "The complication with the larger IT projects is that there is always a lot going on on a day-to-day basis, such as change control and governance meetings. Unless you are quick to make your election to terminate it is all too easy to be seen to be affirming the contract."