

The Effectiveness of 'No Waiver' Clauses

The recent decision of the English Court of Appeal in *Tele2 International Card Co SA v Post Office Ltd* (2009) EWCA Civ 9 (**Tele2 case**) suggests that boilerplate clauses in contracts which purport to preserve a party's right to 'waiver' may not be effective if that party has acted in a way which is consistent with affirming the contract.

A 'no waiver' clause is one which seeks to safeguard a party's right to enforce a provision of a contract, even if tardy or neglectful in taking any action subsequent to a breach. In the Tele2 Case, a prepaid phone card company committed a 'material breach' of a contract between itself and the UK Post Office company (**Post Office**). The Post Office therefore had a right to terminate the contract 'at any time by giving notice in writing' to Tele2, but continued to engage with them in performance of the contract for approximately one year after the date of the material breach.

Tele2 argued that the conduct of the Post Office was such that it represented an affirmation of the contract. The Post Office attempted to rely on the following 'no waiver' provision:

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 a waiver of any other provision or shall in any way prejudice any right of that party under this Agreement.

The Court of Appeal held that the above clause was not effective, and the question as to whether a party has chosen to terminate or affirm a contract was one of fact. The Court found that the Post Office had clearly affirmed the contract by their continued performance of its terms for nearly a year in the absence of any protest in relation to the breach, and the fact that it had never purported to reserve its rights with respect to the breach.

The Australian position is similar to that of the Court of Appeal in the Tele2 case. A 'no waiver' clause is likely to be of limited effectiveness if a party's conduct appears to waive the 'no waiver' provision or affirm the contract.

In *Canberra Advance Bank Ltd v Benny* (1992) 38 FCR 427, the Court held that even though agreements in dispute contained 'no waiver' clauses, it was possible that affirming conduct could waive such provisions. This notion was also applied in *Kostopoulos v GE Commercial Finance Australia Pty Ltd* (2005) QCA 173, however, they could not provide sufficient evidence that the other party had waived its rights by affirming conduct.

The state of the law is confused and uncertain as no underlying principles with consistent rationales may be found in cases on the subject. Doctrines of estoppel, waiver and election are variously raised, often jointly.

In practical terms, a party should act quickly to preserve their rights in the event of a breach and avoid any acts which might be taken to constitute a waiving of their rights under the contract. A party should unequivocally communicate to the breaching party that they reserve their rights.

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