TRAVERS SMITH

Don't waive goodbye to your rights:

The Tele2 decision

Commercial contracts and loan agreements often include a clause which provides that where a party to a contract has breached its terms, inaction on the part of the non-defaulting party does not constitute a waiver of the defaulting party's breach. A recent decision of the Court of Appeal throws into doubt the efficacy of such clauses and raises additional questions as to whether parties can provide an effective drafting solution to this issue.

This is of particular relevance to banks where their borrowers are in default, as they will want to ensure that their usual rights and remedies to accelerate the debt or enforce security remain available to them.

Tele2

In *Tele2 International Card Company SA and others v Post Office Limited* [2009] EWCA Civ 9, the Post Office Limited ("**POL**") sought to rely upon a "no waiver" clause in a contract with a supplier ("**Tele2**") that provided that any delay in POL enforcing a provision of the contract was not a waiver of its right to do so:

> *"[I]n 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."*

Tele2 breached the terms of their contract but POL then continued to perform the contract for nearly a year before protesting at the breach and then giving written notice of termination of the contract. At the trial the judge found that, had it not been for the "no waiver" clause, POL's inaction would have constituted an election to affirm its contract with Tele2 (effectively waiving the breach). However, he found that the effect of the "no waiver" clause was that the delay could not be held against POL, so that they had not affirmed the contract by election, and were therefore able legitimately to terminate the contract.

The Court of Appeal granted Tele2's appeal, holding that POL's inaction did in fact constitute an election to affirm the contract as it was consistent with choosing to abandon the right to terminate for the breach. The court decided that the "no waiver" clause in question could not prevent the occurrence of an election to abandon the right to terminate: POL either made that election or it did not. Giving the judgment of the court, Aikens LJ considered that the wording of the clause reinforced the court's findings, as it did not provide that the doctrine of election did not apply, "even assuming that any contractual provision could exclude the operation of the doctrine".

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Points to note

If your contractual counterparty is in breach of its obligations (including, for example, the occurrence of an event of default in finance documentation), it is inadvisable to rely on a "no waiver" clause without considering the effect of your conduct after that breach. In practice, if you are looking to protect your position you should always consider sending a letter reserving your rights as soon as you become aware of such an event.

"In practice, if you are looking to protect your position you should always consider sending a letter reserving your rights as soon as you become aware of a breach"

In addition, given Aikens LJ's comments about the clause's failure to deal with the issue of election, you may also wish to consider amending your standard "no waiver" clause to expressly exclude the possibility of affirmation of contract by election (although this approach is by no means guaranteed to succeed). As a result of this judgment it is probably more likely that any dispute as to whether your right to terminate still exists will be decided on the basis of your conduct following the relevant breach rather than the content of a "no waiver" clause which, far from preserving your rights definitively, may only buy you limited time to decide a course of action.

If you would like to discuss any of the issues covered by this note, please contact any of the following members of our Banking Department:

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