Court of Appeal Rejects Waiver of Contractual Termination Right

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The English Court of Appeal has confirmed that a party cannot be held to have waived a contractual right to terminate unless it knew that it possessed such a right. In *URE Energy Limited v Notting Hill Genesis*[1], the Court of Appeal upheld the first instance judgment and affirmed that URE was entitled to terminate the contract.

Background
The Claimant, URE Energy Ltd ("URE"), a start-up energy supplier, entered a four-year short-term contract to supply electricity to a housing association that subsequently merged to become Genesis Housing Association ("NHG"). URE's aim was that this "placeholder" contract would eventually be superseded by a long-term 25-year contract (critical for URE's survival), but this was not to be.

A year into the contract, the relationship broke down and NHG gave written notice that it no longer intended to proceed with the long-term contract. URE then consulted lawyers, who advised that the contract provided nine grounds of termination, one of which was the passing of a resolution for amalgamation without URE's prior approval, which would entitle URE to a termination fee of 50 percent of the remaining contract value.

Consequently, some seven months after URE had received, and ignored, notice of the forthcoming amalgamation, URE terminated the contract and sought payment of almost £4 million.

The First Instance Judgment
Following a summary judgment hearing, the substantive hearing proceeded on the basis that: (1) URE had not given consent to the amalgamation in advance, so that a termination right had arisen under the contract[2] and (2) no defence of estoppel was available to NHG[3].

Mrs. Justice Dias held that URE's right to terminate the contract was not lost as a result of an election to affirm, because URE did not know that the amalgamation provided it with a contractual right to terminate.

NHG's Appeal
NHG appealed on the principle of waiver. NHG submitted that the judge was wrong to find that URE did not have knowledge of its right to terminate the contract for the purposes of waiver by election, and knowledge of that right was "obviously available" to it.

NHG accepted that an election to affirm requires knowledge by the electing party that it has a right to elect, (as established by the Court of Appeal in *Peyman v Lanjani*[4], the "Peyman Principle"), but argued that a contracting party must be deemed, as a matter of law, to have knowledge of the express terms of the contract to which it has agreed. NHG said the Peyman Principle was distinguishable because there, the right arose under the general law of landlord and tenant, rather than an express contractual right, as was the case here.

The leading judgment from the Court of Appeal given by Lord Justice Males held that the Peyman Principle is not unprincipled and rests on the fairness that a party who has a right to choose between alternative courses of action, should not lose that right, if they do not even know that they have it. The problem, Males LJ said, was that the principle conflicted with others that sought to promote certainty and predictability, for example, the principle that "*in the field of commerce the existence of legal rights should depend on objective manifestations of intent and not on a party's private understanding.*" The Peyman Principle also gave rise to problems of proof, but despite its criticism, both academic and judicial, it remained binding.

However, Males LJ considered that the unfairness of the rule that an election to affirm requires knowledge of that right could be mitigated in a number of ways:

1. First, when the election arises from an express contractual right, it may be possible to construe the right in question as having to be exercised within a reasonable time, so that if not exercised, the right will lapse. That, however, had not been suggested here by NHG about URE's right to terminate.
2. Second, the "*healthy scepticism*" of first-instance judges faced with a party claiming lack of awareness. For example, a shipowner who says he was unaware of his right to withdraw a ship for non-payment of hire may struggle to be believed. Yet, it was noted that judicial scepticism will have rather less force where the contractual right is buried in the small print of a detailed contract, as was the case here. URE's right was one of nine sub-clauses in which URE was given a right to terminate. Even within the sub-clause, solvent amalgamation was only one of a number of events that would trigger the right.
3. Third, whilst it is presumed that a party who has obtained legal advice is aware of its contractual rights, this presumption can be rebutted by waiving privilege. What matters is what the party actually knows. Here, URE waived privilege of its legal advice and successfully rebutted the presumption.
4. Finally, an estoppel may step in to provide a just result where there is no relevant knowledge of a right to elect. There was, however, no arguable estoppel defence for NHG, as the summary judgment application had already found that there was no evidence of detrimental reliance by NHG.
   The Court of Appeal therefore dismissed NHG's appeal on all grounds, rejecting NHG's argument that a party must be deemed, as a matter of law, to know its express contractual rights, and URE was entitled to recover the £4 million termination fee.

Lessons Learnt
Perhaps unsurprisingly, both parties would likely have benefitted from obtaining legal advice sooner than they did. It is likely that lengthy and expensive proceedings could have been avoided if they had. If legal advice is sought by commercial parties upon the occurrence of a significant event or change, the advice should be considered prior to any action being taken.

Whilst here, "*the result seems counter-intuitive, and indeed unmeritorious on the particular facts of this case,*" URE were entitled to terminate the contract several months after the right had arisen.

[1] [2025] EWCA Civ 1407

[2] As it had been held there was no real prospect of NHG succeeding in its defence that the amalgamation was approved in advance.

[3] As it had been held that there was no evidence of detrimental reliance by NHG.

[4] [1985] Ch 457