

Spoilt for choice – Binding election and the loss of termination rights

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PRACTICES International Arbitration, Litigation

Under English law, a party wishing to terminate a contract (assuming it has the right to do so) must make it sufficiently clear to the counterparty that it is treating the contract as having come to an end. Once the contract has been properly terminated, the innocent party is discharged from all further obligations and can claim damages from the breaching party. This is easily said, but the number of decided cases on termination suggests that it might not be so easily done.

There are two ways of terminating a contract. The first is pursuant to an express contractual provision, for example, because of a material breach, insolvency or some other specified default. The second is termination at common law, on the basis of a repudiatory breach – conduct that deprives the innocent party of substantially the whole benefit of the contract.

Terminating parties must tread carefully to avoid costly mistakes that cannot be undone. This is because they are expected to make ‘elections’ – final and irrevocable choices – at certain junctures. This article looks at some of the key legal principles in play, and considers the recent decision of the Court of Appeal in *URE Energy Ltd v Notting Hill Genesis* [2025] EWCA Civ 1407: this dealt with the question of whether a party can be held to make an election absent certain knowledge of what its contractual rights actually were.

Termination under the contract - notices

Termination under a contractual provision will usually require service of a notice. That notice must be clearly expressed and comply with any requirements set out in the contract. English law takes a strict approach to the validity of notices. As Lord Hoffmann famously held in *Mannai Investment Co Ltd v. Eagle Star Assurance* [1997] UKHL 19:

“If the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been that the tenant wanted to terminate the lease ...”

While it might be surprising to find a contract specifying the stationery to be used for notices, requirements as to service methods, the address of the notified party, or the addressee, are very common. They need to be observed, otherwise the notice risks being invalid.

It is not just form but also substance that matters. In *Mannai*, Lord Steyn explained that any contractual notice had to be sufficiently clear so that its intent could be understood by a reasonable recipient. The Commercial Court in *QOGT v International Oil & Gas Technology* [2014] EWHC 1628 (Comm) elaborated on this. Popplewell J (as he then was) elaborated on this in the context of a notice of a material breach which would only give rise to a right to terminate if it was not cured or remedied. He held:

“The present case is concerned with a contractual right to give notice of persistent or material breach, failure to remedy which gives rise to a right to terminate the contract. Its purpose is to enable the recipient to understand what contractual right is being relied upon, and what he is alleged to have done wrong, with sufficient clarity that he can assess the validity of the notice and take such steps as are open to him to remedy the alleged breach. The level of detail which is necessary for these purposes will differ from case to case, and may be affected by the express terms of the relevant clause. It will not generally be necessary for the notice giver to identify the steps necessary to remedy the breach, if they can sufficiently clearly be understood from the details given of the breach itself; but where the notice does so, the steps identified as necessary to remedy the breach will usually help the recipient to understand the nature of the breach being alleged. The notice must be interpreted as a whole.

Accordingly in the current context I would formulate the general principle as being that the notice must be sufficiently clear and unambiguous to enable a reasonable recipient (that is to say one having all the background knowledge reasonably available to the recipient at the time of the notice) to understand the contractual basis for the notice and the nature of the breach which is alleged to have occurred, so as to be able to assess the validity of the notice and take such steps as are open to him to remedy the alleged breach.”

This is useful guidance to have in mind when drafting contractual termination notices. Widely worded, sweeping notices expressed in emotional language (of which we have seen a few) are unlikely to serve the terminating party’s interest. Better to be precise, cite the clauses that have been breached, say how and when the breach occurred, and at least identify any cure period.

Accepting a repudiatory breach

The common law does not impose any stringent requirements as to how an innocent party must ‘accept’ repudiatory breach - ‘acceptance’ being the technical term of treating the contract as wrongfully terminated by the breaching party. The communication does not need to take any particular form, and it does not have to use legal terminology such as ‘acceptance’. However, the innocent party must clearly and unequivocally communicate its intention to accept the repudiation. The Courts will look at all the surrounding circumstances, and, as was the case in *Vitol SA v Norelf* [1996] A.C. 800, may find that a failure by the innocent party to perform its end of the bargain (faced with a clear repudiatory breach by the other party) could itself be sufficient to bring the contract to an end.

The general position is that a repudiatory breach can be accepted immediately, and there is no need for the breaching party to be afforded a cure period. The drafting of particular termination clauses can, however, give rise to a further complication: did the parties agree that the right to terminate for repudiatory breach must be exercised by giving a notice under the contract, or did they go further still and agree that even repudiatory breaches were within an agreed cure period? Clear words would have to be used to reach that result, considering that the common law right exists outside of the contract. In *BSkyB v HP Enterprise Services UK* [2010] EWHC 86 (TCC), Ramsey J considered that a contractual requirement to give 30 days’ notice of termination only applied to breaches that fell within the express ambit of the clause in question, but more serious and repudiatory breaches did not. Another good illustration is the Court of Appeal’s decision in *Lockland Builders v. Rickwood* (1995) 46 Con LR 92, where the employer had a right to terminate for delay by the contractor, but subject to following a particular procedure. It was held that if the contractor simply walked off the site long before completion or failed to build in accordance with the

drawings in some fundamental manner, the employer could terminate at common law – with immediate effect.

Another important principle is that the innocent party must choose whether it accepts the repudiatory breach or instead waives the breach and affirms the contract. Affirmation of the contract means that both parties continue to be bound by their obligations – because as the Court of Appeal noted in *Howard v Pickford Tool Co Ltd* (1951) [1951] 1 KB 417, “*unaccepted repudiation is a thing writ in water*”. Affirming the contract might enable the parties to come to some kind of agreement in order to salvage the transaction, but it also means that the innocent party loses any right to terminate unless and until the other party commits a further repudiatory breach. In making that choice, the innocent party can only wait for so long until (absent any other indication that it wants to terminate or is itself unwilling to perform) sitting on the fence will be taken as an affirmation. Having to choose between affirmation or termination is an example of the common law requiring parties to make a binding election.

Election between different termination rights

Another situation where an election will have to be made is where a right to terminate under the contract and a right to terminate at common law for a repudiatory breach co-exist. That situation, of two potentially overlapping termination rights, can easily arise. The inclusion of a termination clause in the contract (even if detailed) will not automatically displace the general common law right to terminate. The starting point is that the express contractual rights in the termination provision are agreed in addition to, and not in substitution of, the general common law right to terminate for repudiatory breach. The contract may also have boilerplate clause to the same effect.

In *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75, the Court of Appeal held that:

“If the contract and the general law provide the injured party with alternative rights which have different consequences, ... he will necessarily have to elect between them and the precise terms in which he informs the other party of his decision will be significant, but where the contract provides a right to terminate which corresponds to a right under the general law (because the breach goes to the root of the contract or the parties have agreed that it should be treated as doing so) no election is necessary. In such cases it is sufficient for the injured party simply to make it clear that he is treating the contract as discharged If he gives a bad reason for doing so, his action is nonetheless effective if the circumstances support it. ...”

This requires some unwrapping. Where there is a difference in the legal consequences between a contractual and a common law termination right, an election is required. If, however, the contractual and common law termination rights lead to the same result, then a general statement by the innocent party that the contract is terminated will be sufficient. If, in the second example (the rights are equivalent) the innocent party refers to the wrong reason or basis when communicating its intention to terminate the contract, that may not matter: the innocent party may well be entitled to rely on any actual termination right that existed at the time, even though that was not mentioned in the termination notice.

The decision in *Phones 4u Ltd v EE Ltd* [2018] EWHC 49 (Comm) is a good illustration of the potential dangers. The dispute arose under a contract between Phones 4U and EE. In late 2014, Phones 4U, which charged commission on mobile phone customer connections that it sold to network providers, was in financial trouble. A number of counterparties terminated their contracts

with Phones 4U, or decided not to renew them. EE followed suit, choosing not to extend its contract with Phones 4U. That contract still had a year to run. Phones 4U then appointed administrators. EE seized on this, and terminated the contract. EE's notice of termination specifically referred to Clause 14.2, which contained an immediate termination right in the event that a party became insolvent and appointed an administrator. Clause 14.2 was a no-fault termination right. EE's termination notice did not refer to a breach of contract by Phones 4U, or any repudiatory conduct. The matter went litigious. EE claimed that because Phones 4U was in administration and had ceased trading, Phones 4U could not actually perform its remaining obligations under the contract, and that was a repudiatory breach which EE had accepted by virtue of its letter.

This was, therefore, a case where there were said to be two parallel termination rights with very different consequences, and the Court had to find which one had been exercised. The no-fault termination due to Phones 4U's insolvency did not entitle EE to any damages. A termination for repudiatory breach, however, would entitle EE to loss of bargain damages – representing the profit that EE would have made on the customers that Phones 4U would have continued to bring to the EE network over the remaining term, on the assumption that Phones 4U had been able to uphold its side of the contract. The Judge found that the matter came down entirely to construing EE's termination letter. If EE did have a right to terminate for repudiatory breach, but had not exercised it, then that was the end of it:

“I find EE's termination letter as sent entirely clear ... It communicated unequivocally that EE was terminating in exercise of, and only of, its right to do so under clause 14.1.2, a right independent of any breach. Phones 4U was not accused of breach. EE made clear it was not to be taken as waiving any breach that might exist, any rights in respect of which were reserved. But a right merely reserved is a right not exercised. EE can still sue upon any breach of contract committed by Phones 4U prior to termination. For any such breach, it may pursue all remedies that may be available to it bearing in mind that the contract was terminated under clause 14.1.2 and not for breach. But what EE cannot do is re-characterise the events after the fact and claim that it terminated for breach when that is simply not what it did. Nor can it say that it treated Phones 4U's renunciation (as now alleged) as bringing the contract to an end when that, again, is just not what actually happened.”

Of particular note is the Judge's comment that a 'right reserved is a right not exercised'. EE had made a binding election, and it could not hedge its bets.

URE v Notting Hill Genesis – the facts

There was no suggestion in the *Phones 4U v EE* case that EE had made a mistake, or that it had not appreciated that by choosing to rely on a contractual right it would be held to give up a potentially valuable termination right. EE's knowledge or understanding of the legal position was not relevant, not least because EE had not raised it. Knowledge can, however, be a decisive factor as illustrated by *URE Energy Ltd v Notting Hill Genesis* [2025] EWCA Civ 1407.

The facts were as follows. The claimant URE was a start-up company owned by one Gary Ensor. URE intended to supply cheaper electricity to a local housing association, Genesis. URE's plan was to build a solar farm and install LED lighting across the communal areas of the housing estate and then supply Genesis with electricity from the solar farm (and other renewable sources) at an attractive rate – including to power all the lighting that URE would procure. Implementing this required URE to borrow substantial capital so that it could construct or install both the lighting and

the solar panels. Prospective lenders in turn required URE to have secured a long-term electricity supply contract to give them sufficient comfort. Such long term agreements were unusual in the industry. Genesis was keen on contracting with URE because of potential cost savings – under its existing electricity Genesis was about to move out of a fixed rate period and face a steep price increase. However, Genesis was unable to agree the 25-year term agreement that URE wanted, and instead entered into a 4-year electricity supply agreement with URE, intended to be a placeholder. To assist URE during its start-up period, it was agreed (as a side-deal) that Genesis would pay URE monthly in advance, against estimates of how much electricity URE would be supplying in the upcoming month. The contract itself, however, provided for billing and payment in arrears only.

Under this placeholder agreement (the only binding contract), URE would be paid based on metered charges, and had a right of reasonable access to Genesis' housing estate for the purposes of reading, installing or replacing meters – including 'smart' meters that could be read remotely. Clause 10 of the contract set out nine grounds of termination, including a clause entitling URE to terminate if Genesis failed to cure a material breach within 10 days from it having been notified. URE also had the right to terminate the supply only to some specific Genesis premises to which URE was supplying electricity under the contract (with the remainder of the supply remaining live). Clause 10 gave URE a specific right to terminate in the event of an "*amalgamation, reconstruction, reorganisation, administration, dissolution, liquidation, merger or consolidation*" of Genesis that happened without the prior consent of URE. In case of a termination under any of the sub-provisions in Clause 10, URE would become entitled to a termination payment, representing 50% of the remaining value of the contract to URE in respect of any premises for which the supply had been terminated.

On 1 October 2017, URE started to supply electricity to Genesis at the same time as trying to raise all the funding it needed. Negotiations for the 25-year replacement contract proceeded in parallel, but no final agreement was reached. As additional funding became available, URE started to buy smart meters with the intention to install them in Genesis' premises under the existing contract. The smart meter roll out did not start until June 2018, and was beset with problems. Genesis' site managers failed to engage, and so URE could not book any appointments to install the smart meters. In the interim, in February 2018, Genesis had by special resolution agreed to merge with another housing association, the Notting Hill Housing Trust. That merger would create Notting Hill Genesis, which would succeed to all of Genesis' obligations, including those under the existing URE contract.

On 22 March 2018, URE received a notice of this amalgamation (the same letter went to all of Genesis' suppliers). The notice did not ask for consent and stated:

"Notice of amalgamation between Notting Hill Housing Trust and Genesis Housing Association

As you are a supplier to Genesis Housing Association I am writing about the contract(s) we have with you and the proposed merger. Genesis Housing Association Limited (Genesis) and Notting Hill Housing Trust (Trust) are proposing to merge. The merger will be completed through the amalgamation of Genesis and the Trust under section 109 of the Co-operative and Community Benefit Societies Act 2014 (Amalgamation). The Amalgamation will create one new "combined" society which has a new legal identity which will be called Notting Hill Genesis (NHG). We have been progressing toward the Amalgamation for some time and are aiming to complete the Amalgamation around Easter ..."

It would not therefore have been difficult to work out that this was, indeed, an “*amalgamation*” of the kind that Clause 10 in the contract was aimed at. The evidence showed that URE, through its owner Mr Ensor, had no objection to this. On the contrary, the amalgamation was likely to be a positive development because Notting Hill Genesis was a larger entity with greater demand for electricity. URE did not reply to the notice of amalgamation. On 20 April 2018, URE having been told of the formal completion of the amalgamation, Mr Ensor asked for invoicing details for the new entity.

The relationship between URE and Notting Hill Genesis then deteriorated to the point of breaking down. Notting Hill Genesis felt that URE was overcharging it, and URE complained of being unable to install smart meters that would enable accurate billing. In October 2018, Notting Hill Genesis stopped paying URE in advance. A meeting between principals took place. Mr Ensor objected to no longer being paid in advance, and asked if he could have a grace period of three months before reverting to billing in arrears. Notting Hill Genesis declined and informed URE that the negotiations for the new long-term agreement would proceed no further. This was devastating news to Mr Ensor, who had not appreciated that there was no obligation on Notting Hill Genesis to agree the new contract.

Mr Ensor sought legal advice on how URE might be able to terminate the existing contract. He then drafted a termination notice himself, alleging that Notting Hill Genesis had failed to provide access to URE as it was obligated to for the installation of smart meters. The termination notice was sent on 31 October 2018. In it, URE claimed a termination payment of £3.9 million, which was URE’s calculation of 50% of the estimated charges which would be payable to URE over the remaining term of the contract. URE’s solicitors then asked whether Mr Ensor had given 10 days’ notice in his letter. He had not, and so withdrew URE’s notice of termination.

On 5 November 2018, Mr Ensor spoke to a litigation partner at URE’s firm of solicitors. He was advised that URE had a right to terminate the contract because of the amalgamation. That was the first time Mr Ensor became aware that URE had such a right. Two days later, URE’s solicitors served a new notice of termination, now relying on the amalgamation, and again claiming a termination payment of £3.9 million. The Court of Appeal commented on the motives behind that letter:

“It is perfectly clear that the amalgamation, which URE had known about for more than seven months and to which it had never had any objection, was seized on as a justification for termination of the contract with a view to claiming a termination payment, once it became clear that there would be no long-term contract, that NHG was no longer willing to pay for electricity in advance, and that URE was facing insolvency.”

Notting Hill Genesis responded to URE’s termination notice, alleging that it had been wrongful and amounted to a repudiatory breach by URE and raising a claim for damages in turn. The matter went to court. Notting Hill Genesis argued that URE had elected to affirm the contract by supplying electricity, invoicing and receiving payment after February 2018, when URE had been told of the amalgamation, and that URE could not now go back on that when it suited URE.

Knowledge matters – the decision at first instance

At first instance, Dias J made a number of important findings of fact. The judge held that although there was a presumption that a party who had received legal advice had been properly advised and was aware of all of its legal rights, URE had been able to rebut that presumption. URE had waived

privilege over the legal advice it had received, thus proving that it had not been aware of the right to terminate due to the amalgamation until 5 November 2018. Prior to receiving the advice on that day, Mr Ensor was found to have only skimmed the contract, and did not therefore appreciate the contractual importance of the amalgamation when he learnt of it. The Judge also found that Mr Ensor had not been guilty of turning a blind eye to the question of whether the amalgamation could entitle URE to terminate, since he had not suspected that it might do so in the first place. In reaching her decision, Dias J relied on an earlier decision of the Court of Appeal, *Peyman v Lanjani* [1985] Ch 457, as confirming that before a party could be held to have made a binding election, it had to be “*aware both of the facts giving rise to the right to terminate and of the right itself.*”

On those findings of fact, which could not be appealed, the Judge dismissed Notting Hill Genesis’ defence of election. She held that if URE had known of its right, its conduct subsequent to being told of the amalgamation would have amounted to a binding election, or a waiver of its right to terminate. However, URE did not have the requisite knowledge, and Notting Hill Genesis could not raise a defence of estoppel since it could not show that it relied to its detriment on URE continuing to perform the contract and supplying electricity after 18 February 2018.

URE v Notting Hill Genesis – Court of Appeal

Notting Hill Genesis appealed instead on the law. It argued that the decision at first instance went against the fundamental principle that ignorance of the law, or indeed of the contract, is not a defence. It pointed to the well-known decision of *L’Estrange v F. Graucob Ltd* [1934] 2 KB 394, where Ms L’Estrange was held to be bound by an exclusion clause in a contract which she had simply signed without reading. Notting Hill Genesis also argued that the importance of certainty and predictability in commercial transactions required a different result, since it would be highly unsatisfactory if a party’s private and subjective understanding (or rather lack of understanding) could alter the contractual rights and obligations of the parties. The Court of Appeal was invited not to follow *Peyman v Lanjani* and to find that URE had ‘deemed knowledge’ of the amalgamation.

Males LJ reviewed the authorities. Lord Goff had said in *The Kanchenjunga* [1990] 1 Lloyd’s Rep 391 that:

“Election itself is a concept which may be relevant in more than one context. In the present case, we are concerned with an election which may arise in the context of a binding contract, when a state of affairs comes into existence in which one party becomes entitled, either under the terms of the contract or by the general law, to exercise a right, and he has to decide whether or not to do so. His decision, being a matter of choice for him, is called in law an election. ... In particular, where with knowledge of the relevant facts a party has acted in a manner which is consistent only with his having chosen one of the two alternative and inconsistent courses of action then open to him - for example, to determine a contract or alternatively to affirm it - he is held to have made his election accordingly ... [An election] can be communicated to the other party by words or conduct; though, perhaps because a party who elects not to exercise a right which has become available to him is abandoning that right, he will only be held to have done so if he has so communicated his election to the other party in clear and unequivocal terms ... Once an election is made, however, it is final and binding.”

That explanation included a clear reference to making an election with knowledge of the relevant facts – and Mr Ensor plainly had that knowledge. Other decisions noted that it was knowledge both by the party making the election, and knowledge by the other party that the election had been

made, which made the rule fair: see *Kosmar Villa Holidays Plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147.

In *Peyman v Lanjani* [1985] Ch 457, the Court of Appeal expanded the kind of knowledge that the party making the election must have in order to be held to their choice. Stephenson LJ stated that:

“... knowledge of the facts which give rise to the right to rescind is not enough to prevent the plaintiff from exercising that right, but he must also know that the law gives him that right yet choose with that knowledge not to exercise it.”

Peyman concerned ignorance of a right that arose at law generally, not a contractual right. The facts are perhaps unique. Lanjani intended to transfer a lease of a restaurant to Peyman. To do that validly, Lanjani needed the landlord's consent. According to the judgment, Lanjani was of scruffy appearance and spoke no English. It transpired that the landlord had never met the real Lanjani, because he had been dealing with a more presentable and loquacious imposter throughout whom Lanjani had fronted. This fake Mr Lanjani asked for and received the landlord's consent for the assignment of the restaurant lease to Peyman, the landlord having (again) been misled into believing that the person he was dealing with was in fact his tenant. Peyman was aware of this deception but did not care. He paid Lanjani the first instalment of the price for the lease and started running the restaurant.

Lanjani and Peyman then fell out. An issue arose as to whether Peyman could undo the assignment of Lanjani's lease. When Lanjani had originally acquired the lease (before the assignment to Peyman), this had also been procured by the same kind of deception and impersonation. Peyman was in on the second deception, but the judge found that he did not know about the first one. In the litigation with Lanjani, Peyman's counsel raised the first deception as creating an irremovable defect of title in the restaurant lease, which was liable to forfeiture by the landlord. At law, this would give Peyman the right to undo the transaction with Lanjani, because Lanjani had never had good title. However, Peyman had arguably already affirmed the assignment of the lease (as against Lanjani), because he had the first instalment of the consideration and taken possession of the premises. The Court of Appeal found that:

“Since the plaintiff had no knowledge of his legal right to rescind the restaurant agreement, until he consulted new solicitors, his conduct in entering into possession of the restaurant and paying £10,000 to the first defendant, for this reason if no other, cannot in my opinion have amounted to an election to affirm the contract; the only remaining question can be whether the plaintiff by that conduct has estopped himself from relying on his right to rescind.”

So even though Peyman had not elected to affirm the contract, he would still have been estopped from relying on his (surviving) right to rescind the assignment of the lease by conduct that sufficiently clearly indicated that he treated himself as bound by the lease, and Lanjani had relied on that conduct to Lanjani's detriment. On the facts, the Court of Appeal held that there was no such estoppel.

Peyman v Lanjani has been the subject of academic and also judicial criticism. Leggatt J (as he then was) in *Involnert Management Inc v Aprilgrange Ltd* [2015] EWHC 2225 (Comm) highlighted that the rule established by the decision gave rise to difficulties both as a matter of legal principle and in practical terms, when it comes to proving the alleged ignorance of a party's legal rights:

“The need for knowledge of the legal right, although established by authority, is difficult to justify in principle. The requirement is inconsistent both with the principle that ignorance of the law is no defence and with the principle that in the field of commerce the existence and exercise of legal rights should depend on objective manifestations of intent and not on a party’s private understanding. It is also potentially extremely difficult for the other party to prove such knowledge – all the more so since any relevant legal advice which may have been received will be protected from disclosure by legal professional privilege. The unfairness of the rule is mitigated, however, by a presumption that a party which had a legal adviser at the relevant time received appropriate advice. That presumption can only be rebutted by waiving privilege and proving otherwise ...”

The Court of Appeal in *URE v Notting Hill Genesis*, however, declined to distinguish *Peyman v Lanjani*. The case had stood for more than 40 years and so the rule was by now firmly established. Males LJ felt that one could defend the rule on the basis of fairness: a party should not be held to lose a right it genuinely did not know it had. Other factors came into the equation, too. There might be an implied term that a contractual right would lapse after a reasonable time if not exercised (a point not taken by *Notting Hill Genesis* – probably because its contract included a ‘no waiver’ clause which said the opposite). There was also the “*healthy scepticism of first instance judges*” who might not believe a party alleging that it was blissfully unaware of a fairly obvious point, although there might be less such scepticism if the contractual clause in question was buried in the small print. Here, URE’s right to terminate for solvent amalgamation was found in one sentence of a total of nine sub-clauses dealing with termination. To succeed on the facts and prove that it really did not know about the right to terminate due to the amalgamation, URE had effectively been required to waive privilege and disclose all of the legal advice it had received.

The Court of Appeal also rejected *Notting Hill Genesis*’ argument that a party should have deemed knowledge of contractual terms. *L’Estrange v Graucob* held that a party is bound by the contract even if it has not read the agreement. The Court of Appeal concluded that that was a different question to whether a party has affirmed the contract. In the final analysis, a party will only be held to have made an election of either if it knew of the relevant legal or contractual right and the facts giving rise to it, or had ‘blind eye’ knowledge, meaning that the party deliberately chooses not to discover something which is obviously available to it.

Conclusion

Males LJ does not care about spoilers. To quote from the first two paragraphs of his judgment in *URE v Notting Hill Genesis* read:

“1. ... is a party with an express contractual right to terminate the contract in certain events, who continues to perform for a period of months after such an event has occurred, entitled to say that its conduct does not amount to an election to affirm the contract because it did not know that the contract entitled it to terminate?”

2. The judge, Mrs Justice Dias, held that the right to terminate the contract was not lost as a result of an election to affirm in such circumstances and, although for my part the result seems counter-intuitive, and indeed unmeritorious on the particular facts of this case, I have concluded that she was right to do so.”

This was, then, a case where the merits did not influence the outcome. If the point ever reaches the Supreme Court, the law might be changed, but for now, it is clear that knowledge and

appreciation of a right to terminate is required before a party will be held to have made a binding election affirming the contract so as to lose that termination right. On different facts, however, a party who is able to use the rule in *Peyman v Lanjani* to keep its termination right alive could still be estopped from relying on it. Such an estoppel would arise where that party's representations or conduct, looked at objectively, equivocally telling the other party that the contract has not been terminated, and the other party relies on those representations or conduct to its detriment.