

Contracts: waiver

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Practice notes | **Maintained** | England, Wales

A note on waiver, including waiver, release or variation by contract or deed, waiver by estoppel and waiver by election.

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What is waiver?

Waiver is a doctrine by which a party can give up its legal rights (especially contractual rights) or, more rarely, give up immunities (such as privilege from disclosure, or diplomatic and sovereign immunity from suit).

There are various means by which a right may be waived:

- **Waiver, release or variation by contract or deed:** This amounts to the abandonment of a right by entering into a binding contract or deed to that effect (and it is open to debate whether this is properly termed "waiver" at all). All settlement or compromise agreements waive rights in this sense, as do many contractual variations or new agreements replacing an earlier contractual or non-contractual arrangement. For more information, see [Waiver, release or variation by contract or deed](#) below.
- **Waiver by election:** Some contractual rights give an option that can be exercised once and once only. Exercising the option (or the election, as it is usually called) in favour of choice A, for example, means that alternative choice B is forever lost. This is the fork in a path after which no retracing of steps is possible. The classic example of such an option arises out of the right of the innocent party, following repudiatory breach by the other party, to choose whether to terminate the contract or to affirm the contract and thereby confine itself to the right to damages. Waiver by election is, therefore, little more than the taking of a deliberate choice in such a situation. For more information, see [Waiver by election](#) below.
- **Waiver by estoppel:** This is the broadest and most controversial form of waiver, and that which is usually being referred to when "waiver" is discussed. The focus of waiver by equitable estoppel is not on the actual making of a deliberate choice, but rather on a party acting in such a way that it is fair to treat it as having made a deliberate choice to waive, whether or not it in fact has. For more information, see [Waiver by estoppel](#) below.

In a contractual context, it is useful to note that while a variation of a contract (which must be supported by consideration) alters the terms of the contract, all other types of waiver do not. The effect, however, may be the same, because, upon waiver, one party is permanently or temporarily disabled from relying on a term of the contract.

The doctrines of waiver by [estoppel](#) and waiver by contract or deed can be applied to any right, power or immunity. Waiver by election, however, can only apply to the limited category of right to terminate or to reject a tendered performance. Within that category, however, it is usual to consider both waiver by election (which is permanent) and waiver by estoppel (which is usually temporary).

Waiver, release or variation by contract or deed

Whether there has been a release by contract or deed is a matter of construction of that contract or deed. As with all contracts, a release by a contract is binding without reliance by the other side, providing the other requirements of a binding contract or deed (such as the intention to create a legally binding agreement, consideration, formalities and so on, depending whether a contract or a deed is in issue) are satisfied. See, for example, [Standard document, Settlement agreement and release: civil litigation](#).

The obligations and conditions to a contract (for example, deadlines or specifications for goods or a service) may be varied at any time, including after they have been breached, providing consideration is provided for the variation. Whether the non-breaching party is still entitled to sue for a breach after such a variation will depend on whether, on its proper construction, the variation amounts to an abandonment of the right to damages for the prior breach. Often it will.

In principle, any sort of right can be waived, for example, footballer Wayne Rooney's arbitration agreement with his agent amounted to a waiver of his right under Article 6 of the European Convention on Human Rights to a fair trial (in disciplinary

proceedings) (*Stretford v FA Ltd* [2006] EWHC 479 (Ch)). For a discussion by the Privy Council of waiver of Article 6 rights, see further *Millar v Dickson* [2001] UKPC D 4, [2002] 1 WLR 1615. And as to waiver of legal professional privilege and confidentiality, in relation to which there is, unsurprisingly, a large body of case law (dealing with express waiver, collateral waiver, implied waiver etc), see further *Practice note, Legal professional privilege in civil litigation: an overview: Waiver in the course of litigation*.

Waiver by election

When can there be an election?

Waiver by election or, more simply, "election", only applies in the narrow situation in which there is a choice between two rights or powers (see *Delta Petroleum (Caribbean) Ltd v BVI Electricity Corp* [2020] UKPC 23 at paragraph 21). There is no election where a buyer gives a seller more time to deliver goods, or reduces the price of something. In essence, there are a small number established categories of election, and little or nothing else can be waived by election:

- The right of an innocent party, following a repudiatory breach (or other termination event expressly specified in a contract), to terminate a contract or, alternatively, to affirm the contract (restricting its remedies to the right to damages or specific performance). This includes the right to forfeit or affirm a lease (*Matthews v Smallwood* [1910] 1 Ch 777; *Greenwood v WEF* [2008] EWCA Civ 47).
- The right of an innocent party to rescind a contract for misrepresentation, non-disclosure (in insurance cases), duress, undue influence or similar or, alternatively, to affirm the contract (restricting its remedies to tortious claims or damages in lieu of rescission). In the insurance context, see the summary in *Brit UW Ltd v F&B Trenchless Solutions Ltd* [2015] EWHC 2237 (Comm) at paragraphs 115-118.
- Linked to the previous two bullet points: a contractual right or option to terminate or rescind (*BDW Trading Ltd (t/a Barratt North London) v JM Rowe (Investments) Ltd* [2011] EWCA Civ 548).
- The right to reject a tender of performance as contractually non-compliant (which leaves the tenderer having to re-tender performance, if the time for performance has not yet passed), or to accept a tender as contractually compliant despite a condition precedent having not been satisfied. This arises commonly in sale of goods cases (see *Termination in sale of goods cases*) where non-conforming goods are tendered, but also, for example, in the nomination by a charterer of a safe port (*Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391 (HL)).
- The right to refer a dispute to arbitration under a permissive but non-mandatory arbitration clause (*Anzen Ltd v Hermes One Ltd* [2016] UKPC 1).
- The choice between inconsistent remedies or the basis of obtaining remedies (often required to be made at the trial or date of judgment) (see the summary in *Twinsectra Limited, Haysport Properties v Lloyds Bank plc* [2018] 672 (Ch) at paragraph 72).

The distinction between waiver by election and waiver by estoppel was considered by the Court of Appeal in *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] Lloyd's Rep IR 489. Rix LJ explained that an election, with all the certainty its unilaterality and unequivocalty provide, arose where there is a choice as to whether a contract "lives or dies (or at least whether purported performance under it, such as a delivery of goods, is accepted or not)" (*Kosmar Villa Holidays* at paragraph 66).

In *Kosmar Villa Holidays* it was argued, because the non-waiving party wanted the waiver to be permanent, that a particular waiver of a condition precedent in an insurance policy (the requirement of prompt notification) was an election rather than a waiver by estoppel. The Court of Appeal held, on the contrary, that an insurer's waiver of its right to refuse cover on the basis of late notification could be a waiver by estoppel but not an election. A right to avoid for misrepresentation or non-disclosure could be waived by election, but not a right to refuse cover for breach of a condition precedent.

The mental state required

For an election, it is necessary not only that the electing party appears objectively to have exercised the right of election, but also that the electing party is aware of that right. In the case of an election following repudiatory breach, the electing party must know that there has been a repudiatory breach or right to rescind and the facts giving rise to it (*Peyman v Lanjani* [1985] Ch 457 (CA)). This is the crucial distinction between waiver by election and waiver by estoppel: the former must be an actual (subjective) exercise of a choice, whereas the latter can be the mere objective appearance of a promise to waive.

Proving knowledge of the right to rescind is assisted by the presumption that a party with a legal adviser received appropriate advice, and therefore that if the party knew of the facts giving rise to the right to rescind it also knew of that right. (See *Moore Large & Co Ltd v Hermes Credit & Guarantee plc* [2003] Lloyd's Rep IR 315 at paragraphs 92 to 100.)

It is probably not, however, necessary that the electing party subjectively intends to make the election. As with most forms of communication, statements and conduct are interpreted objectively in their context; if the reasonable person would understand the electing party to have intended to elect and the electing party subjectively knew of its right to elect, then an election will probably have taken place.

The conduct required

Making an election requires an outward representation or some conduct that unequivocally indicates, when interpreted objectively, that the electing party has made a knowing, irrevocable election (*Insurance Corporation of the Channel Islands v The Royal Hotel Ltd* [1998] Lloyd's Rep IR 151 at paragraphs 162-163).

Any statement or conduct that is only consistent with knowing exercise of one of the alternative rights, or is inconsistent with the continued existence of the other alternative right, will amount to sufficient conduct for an election. It must be clear and unambiguous, that is, unequivocal.

Although each case and the meaning of particular conduct depends upon particular facts, the courts are slow to find that conduct (as opposed to a statement) is the exercise of an election. For example, the following conduct, even with knowledge of the repudiatory breach, has been held in the particular cases not to amount to an election either way (that is, either to affirm or to terminate):

- Inaction for a short period of time. (Although in the case of an express right to terminate, it is often implicit that such a clause must be exercisable within a reasonable time if at all, such that the right is lost—a de facto election—by the passage of such time: *'The Laconia'*, *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia* [1977] AC 850 and *The Antaios Compania Naviera SA v Salen Rederierna AB* [1983] 1 WLR 1362).
- Giving time to perform (*State Securities plc v Initial Industry Ltd* [2004] All ER (D) 317 (Jan)).
- Pressing for performance, at least for a short period of time (*Yukong Line Ltd of Korea v Rendsberg Investments Corp of Liberia* [1996] 2 Lloyd's Rep 604 at paragraph 608).

- Deciding not to pursue a remedy for specific performance (*Bear Stearns Bank plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm) at paragraph 127).
- Purporting to terminate or refuse cover on a different ground (*Nasser Diab v Regent Insurance Co Ltd* [2007] 1 WLR 797 (CA)).
- Exercising a contractual right (such as to inspect documents) which would in any event survive a termination or rescission (*Involnert Management Inc v Aprilgrange Ltd* [2015] EWHC 2225 (Comm) at paragraphs 171 to 178).
- Acting after having made an express reservation of the right to terminate. (Although note that the effectiveness of a reservation in preventing election or waiver is not total: *Lombard North Central Plc v European Skyjets Ltd* [2022] EWHC 728 (QB) at paragraphs 88-90.)

Conduct that will often amount to affirmation of a repudiatorily breached contract (where no express reservation of rights has occurred) includes:

- Express affirmation.
- Calling for further performance by the breaching party (*The Kanchenjunga* (shipowner serving a notice of readiness in a charterparty)).
- Asserting rights to payments or otherwise that only arise if the contract has been affirmed (*The Kanchenjunga* (assertion that a charterparty's laytime was running); *Cornillie v Saha* (1996) 72 P&CR 147 (landlord bringing access proceedings)).
- Continuing to perform your own obligations for a significant period of time (*Tele2 v Post Office*).
- Accepting performance by the other party (*Frans Maas (US) Ltd v Sun Alliance & London Ins plc* [2004] 1 Lloyd's Rep 484 (insurer accepting payment of the premium following a breach of warranty entitling it to avoid a policy)).
- Pursuing an arbitration or other dispute resolution without taking the point that the contract has been terminated (*Insurance Corporation v Royal Hotel*).

In all cases of repudiatory breach or non-conforming tender, the innocent party would be well advised expressly to reserve its rights so as to prevent any of its actions otherwise amounting to an unequivocal affirmation of the contract. There may come a point in time where even reserving rights or expressing dissatisfaction is not enough to prevent continuing conduct from amounting to an affirmation of the contract (Flaux J *obiter* in *Automotive Latch Systems Ltd v Honeywell International Inc* [2008] EWHC 2171 (Comm) at paragraph 665, also Teare J in '*The Fortune Plum*', *White Rosebay Shipping SA v Hong Kong Chain Glory Shipping Ltd* [2013] EWHC 1355 (Comm)). For an example taken from the 2008-9 global financial crisis, see the New York Bankruptcy Court's finding that failing to terminate for a year after the other party to an ISDA swap suffered a bankruptcy termination event amounted to waiver of the right to terminate the swap for the bankruptcy, that is to an irrevocable election to affirm the swap contract (*In Re Lehman Brothers Holdings Inc Case No 08-13555 (JMP) Bankruptcy Court, SDNY, 19 September 2009*).

However, where the right as to which the election arises is an express right to terminate, it may well not, on the proper construction of the contract, require immediate exercise. In *BDW v Rowe*, an express right to terminate a lease arose upon certain events but did not have to be exercised immediately. In those circumstances, conduct consistent with the continued performance of the lease (negotiating a particular specification) did not amount to an election not to exercise the option to rescind nor did it otherwise waive that option, since the conduct was not inconsistent with continuing to hold the option open. The court explained that continuing to accept rent might operate as a waiver of a landlord's right to terminate for repudiatory breach but not an election not to exercise or other waiver of an express break clause exercisable up until a particular later date.

Timing

An election can only take place when the choice has arisen. In the case of a repudiatory breach, an election to affirm can only take place after the repudiatory breach has occurred (*Westbrook Resources Ltd v Globe Metallurgical Inc* [2009] EWCA Civ 310 at paragraph 12).

No requirement of reliance

Unlike in the case of waiver by estoppel, an election does not require that the other party relied on the election for it to be binding (*BDW v Rowe*).

Permanent effect

An election is a one-off, permanent decision by which the path not chosen becomes permanently unavailable (in contrast with waiver by estoppel, which in some senses is temporary (see *Temporary or suspensory effect*)).

An election to affirm a contract means the end forever of the right to terminate or rescind the contract, but will not, without more, amount to a waiver of the right to claim damages. (A waiver of both the right to terminate *and* the right to damages is possible, and is called a "total waiver".) The waiver of the right to terminate is a waiver by election, but waiver of the right to claim damages is not an irrevocable choice between alternatives and so is a waiver by estoppel (unless it is a waiver by contract, such as in a compromise agreement). (See *University of Wales v London College of Business Ltd* [2015] EWHC 1280 (QB) at paragraph 78.)

Termination in sale of goods cases

Sections 11(4) and 31 of the *Sale of Goods Act 1979* (SGA) modify for sale of goods cases the common law rules in the following ways:

- If a buyer has an opportunity to examine defective goods tendered by the seller then it will be *deemed* to have accepted them if it retains them for a reasonable time (*section 31(4) and (5), SGA*) or does an act inconsistent with their remaining the seller's goods (*section 31(1),(2) and (6), SGA*).
- For these purposes, acceptance is deemed even if the buyer does not in fact know of its right to terminate.

Form

There is no formality requirement for an election, which can be written, oral or by conduct, although an express clause providing that termination or affirmation be communicated in a particular way to be effective would probably successfully impose such formality requirements (and prevent an informal election taking effect as an election).

Distinguish "total waiver"

A statement or conduct that amounts to an election to affirm a contract or accept a non-conforming tender might, on its proper construction, also amount to a waiver of the right to sue for damages for the contractual breach, but will rarely do so (see, for example, *ETS v Soules & Cie International Trade Development Co Ltd* [1980] 1 Lloyd's Rep 129 (CA), also see *University of Wales v London College* at paragraph 78).

Waiver by estoppel

Waiver by estoppel can apply to any situation where the waiving party has a right. This is the most common and general form of waiver, and is effectively the same as the doctrines of promissory estoppel and equitable forbearance. (There may be a residual historical common law doctrine of waiver by estoppel or forbearance, but in practice the broader equitable doctrine is the one that is applied by the courts.)

When can there be a waiver by estoppel?

The doctrine of waiver by estoppel is very broad. In particular, by this doctrine a party can waive:

- Any obligation another party owes to the waiving party, either in whole or in part. It is common to waive a requirement for a particular mode of performance such as a formality requirement of notice under a contract, a date for delivery or a type of payment.
- Any right the waiving party has. This includes the right to terminate a contract, reject a non-conforming tender or claim damages.
- Any condition precedent to the waiving party's own obligation to perform. Therefore, a party can waive the right to withhold delivery until it has received payment, or the right to withhold payment until it has received goods or a certificate of completion of a service, or the right to refuse insurance cover for late notification.

Typical examples of waiver by estoppel include:

- Waiving a particular deadline in a contract, for example for delivery of goods (*Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616 (CA)), completion of a film (*Active Media Services Inc v Burmester Duncker & Joly GmbH & Co KG* [2021] EWHC 232 (Comm)), or for payment (*MSAS Global Logistics Ltd v Power Packaging Inc* [2003] EWHC 1393; *PM Project Services*).
- Waiving the requirement (condition precedent) that the buyer open a confirmed letter of credit before the seller is obliged to deliver (*Panoutsos v Raymond Hadley Corp of New York* [1917] 2 KB 473 (CA)).
- Waiving defects in a notice or other documents (see, for example, *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 HL in relation to a force majeure notice).
- Waiving a shareholder's right of pre-emption (*Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023).
- Waiver of a breach of warranty in an insurance contract (see *Liberty Insurance Pte Ltd v Argo Systems FZE* [2011] EWCA Civ 1572, and section 34(3) of the *Marine Insurance Act 1906*).
- Waiving an insured's non-disclosure (where it amounts to failure to satisfy a condition precedent) (*Ayrey v British Legal and United Provident Assurance Company* [1918] 1 KB 136).
- Waiving an obligation to pay damages (this is rare and is discussed above as part of "total waiver", see *Distinguish "total waiver"*).

Timing

A waiver by estoppel can only legally arise when the right or obligation being waived has arisen (for example, when the time for performance has passed), but the conduct that leads to the waiver may take place either before or after the time for the relevant performance. Therefore, a party's statement as to next week's deadline as much as to last week's deadline may prevent (estop) the party from relying on that deadline.

The mental state required

The crucial feature of waiver by estoppel which distinguishes it from election is that a party can waive a right without knowing they have a right to waive. Therefore, if a reasonable person would have understood a waiving party to have intended to waive its right then, subject to the other requirements (see *The conduct required* and *Reliance and inequity* below), a waiver will have taken place even if the waiving party neither intended to waive nor even knew it had a right to waive.

The conduct required

The conduct requirement is essentially the same for waiver by estoppel as for waiver by election, that is, an unequivocal statement or conduct objectively indicating an intention to give up, or promise not to, enforce a right.

Typical types of waiving conduct include:

- A statement or promise that satisfaction of a particular obligation or condition precedent will not be required.
- A forbearance from enforcing an obligation or requiring a condition, coupled with conduct indicating that the contract is to proceed.
- A failure to inquire or object after a reasonably prudent insurer would have been put on inquiry that there had been a material non-disclosure (discussed in *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476).
- Conduct indicating that everything is to be put on hold pending discussions. Therefore, where a seller agreed to consider an alternative method of payment over the weekend following a deadline for payment, that amounted to an implied promise not to rely on the strict legal right to payment before the weekend, and the seller was therefore required to give the buyer a reasonable period of time after the weekend to pay (*MSAS v Power Packaging*). Likewise, negotiations between a landlord and tenant impliedly amounted to a promise to defer the period allowed for the tenant to complete certain repairs (*Hughes v Metropolitan Railway Company* (1877) 2 App Cas 614).

While, as set out above (see *The mental state required*), it is not necessary for the waiving party to actually know that it has a right to waive or to intend to waive it, it is necessary that it would objectively appear to a reasonable bystander that the waiving party knew it had a right to waive and intended to waive it (*HIH Casualty and General Insurance Ltd v Axa Corporate Solutions* [2002] EWCA Civ 1253; *Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd* [2009] EWCA Civ 1108 at paragraphs 57-58).

Reliance and inequity

An estoppel, preventing (estopping) the waiving party from relying upon the waived right, will only arise if the other party relied upon the waiver having taken place, therefore making it inequitable for the waiving party to go back on the waiver. If the other party has not relied on the waiver having taken place (for example, because it did not even know of the conduct or statement that might amount to a waiver) then it is not unfair for the waiving party to go back on the waiver, and no estoppel will arise.

In essence, this means that the other party changed its position as a result of the waiving statement or conduct, such as by not doing something it should (but for the waiver) have done (as in *Hughes v Metropolitan Railway*, where the tenant did not do the repairs, believing the obligation to do so had been postponed). Other conduct in reliance on a waiver will include spending money and performing obligations that need not otherwise have been performed (for example, that would not have been performed had the waiving party had not indicated that it was affirming the contract).

Temporary or suspensory effect

Estoppel is a creature of equity and arises only where, and for so long as, it would be unfair to allow the waiving party to rely upon the right having represented that they would not do so.

Often, therefore, equity will allow a waiving party to go back on its waiver by giving reasonable notice to the other party (see for example *PM Project Services Ltd v Dairy Crest Ltd* [2016] EWHC 1235 (TCC) at paragraphs 43-44). If delivery is due in January, for example, and the buyer represents that it will take delivery in the following December or whenever the seller can manage, it cannot complain in February when delivery has not arrived. In that sense, the waiver (of the right to delivery in January) is permanent. However the buyer can, in March say, tell the seller that it demands delivery and will not wait until December or whenever the seller can manage. In these circumstances the law will allow the buyer to demand delivery within a reasonable time. In that sense, the waiver (of the right to immediate delivery, or of the right to delivery before December) is only suspensory, depending on what time would be reasonable in the circumstances.

Likewise, if a seller is entitled not to ship goods until the buyer opens a confirmed letter of credit, but ships them anyway, it has waived the condition precedent. It can nevertheless refuse to *deliver* the goods without a confirmed letter of credit (therefore effectively going back on the waiver), but if it delivers the goods and accepts alternative payment from the buyer, the waiver is in that sense permanent as the obligations to which the waived condition was a condition precedent have themselves been performed, so the condition can have no more force or come back into effect in any meaningful way.

Form

Unless the doctrine of waiver is modified by an express clause, there is no requirement of a particular form for a waiver by estoppel. The relevant conduct can take the form of a written or oral representation or promise, or conduct.

Where a written contract expressly provides that a variation must be in writing, that will not ordinarily be construed as preventing a waiver by estoppel taking place orally or through conduct (*MSAS Global Logistics v Power Packaging*).

As to estoppel and its requirements, see [Practice note, Estoppel](#) for more detail

"No waiver" clauses

It is common for written contracts to provide a clause along the lines of the following:

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

The purpose and effect of such a clause is to prevent mere inaction, even without an express reservation of rights, from amounting to an unequivocal representation that the inactive party will not be enforcing a particular right, which representation might in some circumstances give rise to a waiver by estoppel. This is pursuant to the principle that the parties are entitled to contractually

cut down what may amount to a waiver. See *Prakash Industries Ltd v Peter Beck Und Partner* [2022] EWHC 754 (Comm) and *Lombard North Central Plc v European Skyjets Ltd* [2022] EWHC 728 (QB) at paragraph 86 onwards where such a clause did not prevent a waiver arising from positive statements (rather than inaction and delay), and the discussion in *A v B* [2020] EWHC 2790 (Comm) at paragraph 41 as to how such clauses may not preclude waiver but may make it harder to prove a waiver in a particular case.

In theory, a "no waiver" clause might (ignoring for present purposes the possible application of unfair terms legislation in consumer cases) also prevent inaction from amounting to a waiver by election, although it has been held that the above-quoted clause wording does not extend to the doctrine of election (*Tele2 International Card Co SA v Post Office Ltd* [2009] EWCA Civ 9). For more information, see the integrated drafting notes to *Standard clause, Waiver*. The Court of Appeal in *Tele2* also reserved its view on whether such a clause could ever prevent inaction amounting to a waiver by election, that is, could ever reduce a party's right to terminate a contract. The better view is that a properly worded clause could do so (just as a properly worded clause can prescribe what amounts to a repudiatory breach, and what form of communication amounts to acceptance of that breach).

For more information on the drafting of no waiver clauses, see the integrated drafting notes to *Standard clause, Waiver*.

Drawing the threads together: waiver in practice

A typical example

X is obliged to Y under a contract between them to perform a certain service or take a certain step by 1 January. X fails to do so, and on 8 January Y agrees to give X until 1 May.

- On 1 March, when X has still not performed, is X in breach of the contract?
- Can Y require X to perform the service or step at any date before 1 May?

Answer

It is possible that Y's agreement that X can delay until 1 May amounted to a binding variation of the contract, although this is unlikely because X did not provide any consideration for the variation (see *Williams v Roffey Bros* [1991] 1 QB 1 (CA) and *In re Selectmove Ltd* [1995] 1 WLR 474 for the principles applicable to consideration and amendments, but note the uncertainty identified in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24 at para 18).

If the delay of seven days as at the 8 January amounted to a repudiatory breach, then Y's conduct clearly affirmed the contract (a waiver by election of the right to terminate) and as such irrevocably prevents Y from terminating the contract for that breach.

Y's conduct probably also amounted to a waiver by estoppel of the right to claim damages or any other remedy for breach, estopping Y from arguing on 1 March that X had breached the contract by delaying past 1 January. (X has most probably relied on the waiver by not trying harder to perform before 1 May, which reliance is a requirement of waiver by estoppel.)

The previous two paragraphs deal with the pre-1 March position. But as for the prospective position, from 1 March forwards, under the doctrine of waiver by estoppel, Y may well be legally entitled to give X notice on 1 March to require X to perform the service or take the step a reasonable period after that date, albeit before 1 May. Provided the reasonable period would give X (who had been planning to perform on 1 May) enough time to change its plans, it would not be inequitable to allow Y to go back on the promise as regards the 1 May deadline (*Hughes v Metropolitan Railway*).

END OF DOCUMENT

RESOURCE HISTORY

Case updates (January 2023).

We have updated the sections *When can there be an election?* and *"No waiver" clauses* with further case examples and added reference to *Lombard North Central Plc v European Skyjets Ltd [2022] EWHC 728 (QB)*.

Case updates (March 2022).

We have updated this practice note to include reference to *Active Media Services Inc v Burmester Duncker & Joly GmbH & Co KG [2021] EWHC 232 (Comm)* as an example of waiver by estoppel, *Delta Petroleum (Caribbean) Ltd v BVI Electricity Corp [2020] UKPC 23* with respect to waiver by election as well as other minor updates.

Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24.

We have updated the section "Drawing the threads together: waiver in practice" to refer to the Supreme Court decision in *"Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24*.

Resource history.

We have reviewed the cases of *Glenn and another v Watson and others [2016] EWHC 3259 (Ch)*, 16 December 2016; *Maxted and another v Investec Bank Plc [2017] EWHC 1997 (Ch)*, 10 July 2017; and *Holyoake and another v Candy and others [2017] EWHC 387 (Ch)*, 27 February 2017, but do not believe at any change is needed to this Practice note as a result of these decisions.

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