

URE Energy Ltd v Notting Hill Genesis [2025] EWCA Civ 1407 – No Waiver of Contractual Right to Terminate Without Knowledge

by Joseph Lewin, Yelim Jun, and Miles Rennie

Background

This is a scenario that will be all too familiar to in-house counsel and commercial teams alike: a counterparty to a contract has breached an agreement, and the business is weighing whether, and when, to terminate.

From a legal perspective, the risks on either side of that decision are well known. Terminate too hastily, or on the wrong contractual footing, and an otherwise innocent terminating party may itself be exposed to a claim for repudiatory breach. Continue performance for too long without taking any action, and the business may instead be taken to have affirmed the contract, losing the right to terminate altogether. This dilemma lies at the heart of the doctrine of waiver by election. At common law, once a party knows that it has a choice between affirming a contract or terminating it, if it wishes to terminate, then it must not do anything that indicates an affirmation, otherwise the termination right will be lost.

In *Peyman v Lanjani* [1985] Ch 457, the Court of Appeal held that a party cannot waive a right unless it actually knows: (i) the facts giving rise to the right to terminate, and (ii) the right to terminate itself. In *Peyman*, the right to terminate arose under a common law right, not an express contractual right.

In *URE Energy Ltd v Notting Hill Genesis*, the Court of Appeal reaffirmed the principle in *Peyman* in the context of an express contractual termination right and held that a party does not waive an express contractual termination right merely by continuing to perform the contract after the occurrence of a trigger event, unless it had actual knowledge of the right at that time.

Facts

URE Energy Ltd (“**URE**”) supplied electricity to the housing provider Notting Hill Genesis (“**NHG**”) under a four-year short term supply contract. The contract contained an express termination right which allowed URE to terminate in the event that NHG passed a resolution for amalgamation.

In April 2018, NHG merged with another housing association, triggering the termination right. URE was notified of the amalgamation, but despite this, continued to perform the contract for seven months without objection.

At the time, URE was aware of the amalgamation, but was unaware that it had triggered a termination right under the supply contract. Later, following a deterioration in the commercial relationship by October 2018, and having obtained legal advice, URE became aware of the termination right and attempted to exercise it, claiming a substantial contractual termination payment totalling nearly £4 million.

NHG contended that URE had waived its termination right by continuing performance with knowledge of the amalgamation.

Related People

- Joseph Lewin
- Yelim Jun
- Miles Rennie

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At first instance, the High Court rejected NHG's argument. Applying *Peyman*, the court held that URE could not have elected to affirm the contract where its director was unaware of the existence of the termination right.

Court of Appeal

NHG appealed, but the Court of Appeal upheld the High Court's decision.

The Court of Appeal reaffirmed that waiver by election requires knowledge of both the facts giving rise to the right and the existence of the right itself. While URE knew of the amalgamation, it did not know that this event triggered a contractual termination right.

The Court of Appeal stated that *Peyman* "rested on the principle of fairness that a person 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".

Although this conflicts 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" the court considered that unfairness could be mitigated in a number of ways:

1. **Reasonable time limits:** An express contractual right might be construed as requiring exercise within a reasonable time, so that excessive delay could cause the right to lapse.
2. **Judicial scepticism:** First instance judges should exercise scepticism when a commercial party claims not to have known the right to terminate. However, this has less force where the contractual framework is complex, or the right is "buried in small print" as was the case here.
3. **Estoppel:** If a party's conduct in delaying or in dealing with the counterparty amounts to an unequivocal representation that it will not enforce the right, and the other party has detrimentally relied on that representation, then estoppel (rather than waiver by election) could prevent later enforcement. This remains available even where there is no knowledge of the right but was not made out on the facts in this case.
4. **Legal advice:** There is a rebuttable presumption that a party who has taken legal advice will be aware of its rights. This may be rebutted by evidence (as here, where URE waived legal privilege and evidenced that it genuinely did not know of the termination right).

Practical Implications for Commercial Teams

1. A party will only waive a right if it knew that it had it. If the business genuinely didn't know a termination right existed, it will not usually be treated as waived. This is helpful for complex contracts. The risk of "accidentally" losing rights is lower where contracts are long, technical, or heavily drafted. However, courts will look closely at whether the business really was unaware, especially if lawyers were involved.
2. A party will not lose a termination right just because it keeps working under the contract. Carrying on with delivery, invoicing, or negotiations does not automatically mean it has "given up" a right to terminate.
3. Once a party becomes aware of the right, behaviour matters. Delaying, sending reassuring messages, or acting as if the contract will continue can create risk.
4. If something significant happens (restructure, breach, change of control), pause, seek

legal advice, and avoid commitments until rights are checked.