[2012] UKPC 42
**Privy Council Appeal No 0088 of 2011**

# JUDGMENT

# Lancashire Insurance Company Ltd (Appellant) *v* MS Frontier Reinsurance Ltd (Respondent)

## From the Court of Appeal of Bermuda

**before**

**Lady Hale**
**Lord Kerr**
**Lord Wilson**
**Lord Carnwath**
**Sir John Chadwick**

## JUDGMENT DELIVERED BY SIR JOHN CHADWICK ON

## 20 December 2012

**Heard on 8 November 2012**

| *Appellant* | *Respondent* |
| --- | --- |
| Jonathan Small QC<br>Nathaniel Duckworth | Jonathan Gaunt QC<br>David Kessaram |
| (Instructed by Harcus Sinclair) | (Instructed by Charles Russell LLP) |

**SIR JOHN CHADWICK:**

1. This is an appeal from the judgment of the Court of Appeal for Bermuda, dated 5 August 2011, in proceedings for specific performance of an agreement made between the appellant, Lancashire Insurance Company Limited, and the respondent, MS Frontier Reinsurance Limited, for the assignment of a lease of commercial property. The issue raised on the appeal is whether, on the true construction of that agreement and in the events which happened, the respondent ("the Assignee") was entitled to serve a termination notice under the agreement. The appeal is brought with the leave of the Court of Appeal.

***The underlying facts***

2. The underlying facts may be stated shortly. In 2008 the appellant ("the Tenant") was in occupation of premises on two floors at Mintflower Place, 8 Par-la-Ville Road, Hamilton, under a lease which would expire at the end of that year. The Tenant wished, on the termination of its lease, to move to alternative premises at Powerhouse Place, 7 Par-la-Ville Road. The Assignee was willing to take a new lease of the premises at Mintflower Place. By June 2008 it had become clear that the alternative premises at Powerhouse Place would not be ready for occupation before the expiry of the Tenant's existing lease of the premises at Mintflower Place. Faced with the inability of the Tenant to move to its new premises on the expiry of its existing lease, the Tenant, its landlord, Raphael Limited ("the Landlord") and the Assignee, agreed that a new lease of the premises at Mintflower Place would be granted to the Tenant for a term commencing on 1 January 2009; that, when the premises at Powerhouse Place had become available for occupation by the Tenant, the Tenant would assign to the Assignee the new lease of the premises at Mintflower Place; and that the Landlord would consent to that assignment.

3. The terms of that agreement were set out in a document dated 16 October 2008 ("the Agreement"). It will be necessary to refer in detail to certain of those terms later in this judgment. At this stage it is sufficient to note that completion of the assignment was to take place following service by the Tenant of a notice that the premises at Powerhouse Place had become available for occupation: that is to say, in effect, a notice that the Tenant was ready to move. The assignment was to be completed by the execution, by each of the Tenant, the Assignee and the Landlord, of a Deed of Assigment on a date, defined in the Agreement as "the Condition Date", which was no more than 15 working days after receipt by the Assignee of the notice served by the Tenant.

4. In the events which happened, the new lease of the premises at Mintflower Place ("the Lease") was granted to the Tenant on 23 January 2009; the fit-out works to the premises at Powerhouse Place took even longer to complete than had been anticipated; the Tenant served the relevant notice on 18 December 2009; and the period of 15 working days after receipt of that notice by the Assignee expired on 13 January 2010.

5. It is not in dispute – and, in any event, it is clear from the terms of the Agreement - that the parties contemplated, in October 2008, that the fit-out works to the premises at Powerhouse Place would be completed in time for the Tenant to move, and for the assignment to the Assignee of the new lease to be executed, before the end of 2009. It must have been with that in mind that the parties agreed that, if for any reason the Condition Date had not occurred by 31 December 2009, then either the Tenant or the Assignee could serve on the other written notice to determine the Agreement. Upon service of a termination notice the Agreement was to cease to have effect and no party was to be under any further liability to any other party.

6. Completion of the assignment of the Lease to the Assignee did not take place between 18 December 2009 and 13 January 2010. In those circumstances, the Agreement required that the assignment be completed, by execution by all parties of the Deed of Assignment, on 13 January 2010. On that day, before completion had taken place, the Assignee served notice of termination. In reliance on that notice, the Assignee has taken the view that it is no longer under any obligation to take an assignment of the Lease; and that, accordingly, the claim for specific performance must fail.

7. That contention succeeded before the trial judge, Kawaley J. For the reasons set out in his judgment dated 7 October 2012, he dismissed the Tenant's claim for specific performance. His decision was upheld by the Court of Appeal. Their reasons are set out in the judgment of Ward JA (with whom the other members of the Court, Zacca P and Auld JA agreed).

***The questions for determination***

8. As has already been indicated, the issue raised on the appeal is whether, on the true construction of the Agreement and in the events which happened, the Assignee was entitled to serve a termination notice on 13 January 2010. In order to determine that issue it is necessary to address two questions: (i) whether, under the terms of the Agreement, it was open to either party, by the service of a termination notice on the Condition Date, to determine its liability to complete the Assignment on that date ("the construction issue") ; and, if so, (ii) whether, by reason of its conduct between 18 December 2009 and 6 January 2010, the Assignee ceased to be entitled, by waiver or election, to exercise the right to do so ("the election issue") .

***The construction issue***

9. Clause 6.6 of the Agreement is in these terms:

> "6.6 If for any reason the Condition Date has not occurred by the 31 December 2009 then the Tenant or the Assignee may serve written notice on the other to determine this Agreement and upon service of such this Agreement shall determine and cease to have effect and no party shall be under any further liability to any other party under this agreement without prejudice to any pre-existing right of action of any party in respect of any breach by any party of its obligations under this Agreement."

It can be seen that clause 6.6 does not, by its express terms, impose any temporal restriction on the right to serve a termination notice. It is submitted on behalf of the Tenant that it is necessary, in order to give business efficacy to the agreement between the parties, to imply a restriction to the effect that a termination notice under clause 6.6 must be given (if at all) before the Condition Date. It is submitted on behalf of the Assignee that it is unnecessary to imply any temporal restriction on the right to serve a termination notice; or, in the alternative, that, if such a restriction is to be implied, there is no reason why the restriction should take effect earlier than the end of the day which is the Condition Date.

10. Relating those submissions to the facts of the present case, the Tenant contends that a termination notice served after midnight on 12 January 2010 is too late: the Assignee contends that (on any view) a termination notice may be served at any time up to midnight on 13 January 2010. In the present case, the Court of Appeal seems to have taken the view (se paragraphs 26 and 50 in the judgment of Ward JA) that the termination notice could be served "up to the last second of the business day of 13th January 2010"; and it found that the notice was served "before the close of business on that day". It has not been argued on this appeal that anything turns on the time at which the notice was served on 13 January 2010. On the Tenant's case any time on that day was too late: on the Assignee's case, service at any time on that day was in time.

11. Clause 6.6 of the Agreement must, of course, be construed in the context of the Agreement as a whole. It is necessary, therefore, to set out other relevant terms to which the parties have drawn attention. "Condition Date" is defined in clause 1.1. It means:

> "1.1. . . . the date falling no more than fifteen (15) Working Days following the latter of:
>
> 1.1.1 completion of the Lease

1.1.2 receipt by the Assignee of the tenant's written notice confirming completion of their fit out works in relation to their occupation of the 5th & 6th Floors of 7 Par-la-Ville Road, Hamilton and such written notice shall be given by the Tenant immediately following the completion of its said fit out works."

In that context "Working Day" means ". . . a day when banks in Bermuda are open for business other than a Saturday or a Sunday or a public holiday": clause 1.7. Clause 2.1 (read with clauses 1.3 and 1.6) provides that the Landlord will grant to the Tenant and the Tenant will accept from the landlord a lease ("the Lease"), substantially in the form of the draft lease in the first schedule to the Agreement, of the 5th and 6th floors of Mintflower Place. Clause 2.2 is in these terms:

"2.2 In consideration of the agreement by the Tenant contained in clause 2.1 above the Landlord consents to an assignment of the Lease to the Assignee on the Condition Date and the Tenant will assign to the Assignee on the Condition Date and the Assignee will accept from the Tenant an assignment of the Lease on the terms set out in this Agreement."

Counsel for the Tenant points to that clause as imposing on the Assignee the obligation to accept an assignment of the Lease on the Condition Date.

12. Clause 6 of the Agreement is headed "Assignment". It contains, in addition to clause 6.6, the following provisions:

"6.1 The Deed of Assignment and two counterparts shall be prepared by the Tenant's attorneys and engrossments shall be sent to the Assignee's attorneys at least five Working Days [before] the Condition Date."

The word "before" has been substituted for the word "after" which appears in the text of the Agreement as executed. It has been common ground throughout this litigation that that substitution is necessary in order to give effect to the parties' common intention.

"6.2 Completion of the Deed of Assignment shall take place on the Condition Date."

"Deed of Assignment" is defined, at clause 1.4, to mean a deed in the form of the draft assignment in the second Schedule to the Agreement.

"6.3 On the Condition Date :

6.3.1 the Tenant shall assign the benefit of the Lease to the Assignee;

6.3.2 the Assignee shall accept an assignment of the Lease and the Assignee shall execute the Deed of Assignment; and

6.3.3 the Landlord will consent to the assignment and shall execute the Deed of Assignment."

6.4 At any time on or after the Condition Date [if] either the Tenant or the Assignee are ready able and willing to complete the Deed of Assignment and perform their other obligations under this Agreement they may invoke the provisions of clause 6.5 by serving a Notice to Complete to the other or on the Landlord but without prejudice to any other available right or remedy.

6.5 The Deed of Assignment shall be completed within 20 Working Days after service of the Notice to Complete (excluding the day of service) and time shall be of the essence of this provision."

13. It has been common ground on this appeal, first, that (subject to the service of a termination notice under clause 6.6 of the Agreement) the Assignee was obliged to accept an assignment of the Lease, by executing the Deed of Assignment, on the Condition Date (clauses 2.2, 6.2 and 6.3.2 of the Agreement); and, second, that (in the events which happened) the Condition Date was 13 January 2010. There was some difference of view between the parties on the question whether that obligation required the Assignee to execute the Deed of Assignment during business hours (or before the end of business hours) on 13 January 2010; or at any time during the 24 hours of that day. But it was common ground that (on the facts) it was unnecessary to resolve that question. Given the terms in which the Condition Date is defined in clause 1.1 of the Agreement – "the Condition Date is the date falling no more than fifteen (15) Working Days following, etc . . ." – the Board is inclined to accept that the latter is the better view: the Assignee would not be in breach of the obligation to complete until midnight on 13 January 2010.

14. It has also been common ground that, at any time on 13 January 2010, either party (and, in particular, the Tenant), being ready, able and willing to perform its own obligations under the Agreement, could have served a Notice to Complete on the other under clause 6.4; and that service of a Notice to Complete would have had the effect, under clause 6.5, that if the Deed of Assignment had not been executed within the period of 20 Working Days thereafter, the party serving the notice would be entitled to treat the Agreement as repudiated. But it should be kept in mind, first, that the obligation under the Agreement was to complete on the Condition Date and that that obligation was not dependent upon (or varied by) the service of a Notice to Complete.

And, second, that, in circumstances where the Condition Date fell after 31 December 2009 (as it did in the present case), a party who wished to terminate the Agreement for non-performance would have no need to serve a Notice to Complete under clause 6.4 and to rely on clause 6.5: it could serve a termination notice under clause 6.6. Clause 6.4 is stated to be without prejudice to any other available right or remedy.

15. It is said on behalf of the Tenant (at paragraph 17 of its Case) that, in circumstances in which a termination notice under clause 6.6 is served on or after the Condition Date, "the positive duty to complete imposed by clauses 2.2, 6.2 and 6.3 comes into conflict with the provisions of clause 6.6 which, if they remain exercisable, would entitle either party to do the opposite of complete". In order to avoid that conflict, it is said, the Agreement must be construed "in a manner which permits parties to exercise the termination right under clause 6.6 before the Condition Date arrives, but not thereafter."

16. The Board accepts the premise. The Agreement must be construed so as to avoid a conflict between the duty to complete on the Condition Date (imposed by clauses 2.2, 6.2 and 6.3.2) and the right to terminate further obligations under the Agreement by the service of a notice under clause 6.6. But the Board does not accept the conclusion which the Tenant seeks to draw from that premise. It is not necessary to construe the Agreement so as to restrict the right to serve a termination notice under clause 6.6 to a period which ends on the day before the Condition Date.

17. As the Board has already observed, clause 6.6 of the Agreement does not, by its express terms, impose any temporal restriction on the right to serve a termination notice. In those circumstances it must be asked whether it is necessary, in order to give business efficacy to the agreement between the parties, to imply such a restriction; and, if so, what that restriction must be. The Board is satisfied that the answer to the first limb of that question is that it is necessary to do so.

18. If no temporal restriction is implied, then a termination notice could be served after there had been a breach of the obligation to complete imposed by clauses 2.2, 6.2 and 6.3.2. The effect of serving a termination notice after there had been a breach of the obligation to complete would be twofold: first, the Agreement would determine and cease to have effect and, thereafter, no party would be under any further liability to any other party; second, the determination would be without prejudice to any pre-existing right of action of any party in respect of any breach by any other party of its obligations under the Agreement. What, then, would be the remedy of the other party in respect of the breach of the obligation to complete which had already occurred? A claim for specific performance would be met by the defence that, by the time the matter came before the Court, the defendant was no longer obliged to take an assignment of the Lease: *Chitty on Contracts* 30th Ed, (2008) at paragraph 27-038 and the cases there cited. A claim for damages would be met with the defence that damages for failure to complete a contract which had, subsequently, been determined by the service of a notice of termination would be nominal. But it cannot have been the intention of the parties that, after 31 December 2009, a party who was ready,

willing and able to complete the assignment on the Condition Date should be left without remedy if, after failing to complete on that day, the other party were, subsequently, to serve a termination notice. In order to give business efficacy to the bargain which the parties have made it is necessary to imply a term that a termination notice under clause 6.6 cannot be served in circumstances which would give rise to that result.

19. That conclusion points inexorably to the answer to the second limb of the question. In order to give business efficacy to the bargain which the parties have made it is necessary to imply a term that a termination notice under clause 6.6 cannot be served after there has been a breach by the party serving the notice of its obligation to complete on the Condition Date. It is not necessary to imply a term that a termination notice cannot be served at a time when there has been no breach by the party serving the notice of its obligation to complete. So there is no basis for implying a term that a termination notice cannot be served on the Condition Date itself.

20. As the Board has explained the better view is that the Assignee would not have been in breach of its obligation to complete until midnight on 13 January 2010; but, on any view, it would not have been in breach of its obligation to complete at the time when, in fact, the termination notice was served on that day. Accordingly, the Board concludes that, under the terms of the Agreement, it was open to the Assignee to serve the termination notice when it did.

***The election issue***

21. It is submitted on behalf of the Tenant that, whether or not the Assignee would otherwise have been entitled to serve a termination notice of 13 January 2013, it had lost that right by waiver or election. The matters relied upon were set out in the Tenant's Notice of appeal (under paragraph 8 in Box 5: "Information about the decision being appealed") and at paragraph 8 in the Appellant's Case. They, and other matters which provide a context, may fairly be summarised as follows:

> (1) In advance of the service by the Tenant of written notice confirming completion of its fit-out works in relation to the premises at Powerhouse Place to which it intended to move, its attorneys had prepared engrossments of the Deed of Assignment and counterparts for the purpose of complying with the obligation imposed by clause 6.1 of the Agreement. Those documents were sent to the attorneys for the Assignee on 30 November 2009. On 21 December 2009, following service on 18 December 2009 of the notice confirming completion of the fit-out works, Ms Fox, acting for the Tenant in the absence of her colleague, Mr Robinson, who was then on holiday, sent an e-mail to Mr Harry Kessaram, acting for the Assignee, enquiring when she could expect to receive the executed assignments from his client. Mr Kessaram's response, by an

e-mail of the same date was in these terms (so far as material):

> "I met with the client this morning and gave him the documents.
> I think my client will want to view the state of the premises before completion.
> I presume the premises are vacant but perhaps you can confirm."

(2) Later that day, 21 December 2009, Mr Devery, then Controller of the Assignee company, with responsibility for administrative functions, sent an e-mail to Ms Landy, the Tenant's Office Manager, asking for a time when representatives of the Assignee could "come over to Mintflower to inspect the fixtures and fittings for sale".

(3) Also on 21 December 2009, but after the matters just mentioned, in the course of a telephone conversation between Ms Fox and Mr Kessaram, an "agreement in principle" was reached for completion of the assignment to take place on 31 December 2009.

(4) That inspection of fixtures and fittings took place on the following day, 22 December 2009. It was attended by Ms Landy and Mr Soares, the Tenant's Group Chief Operating Officer, and, on behalf of the Assignee, by Mr Devery and Ms Yoshimoto. Ms Landy and Mr Soares gave evidence at the trial, which was not contradicted, that Mr Devery and Ms Yoshimoto ". . . gave every indication that the assignment would proceed and they would be moving into the premises in short order."

(5) On the same day, 22 December 2009, Mr Soares sent an e-mail to Mr Devery asking whether the Assignee would be interested in taking over the UPS unit and the additional AC unit on the 5th floor at Mintflower Place. He explained in that e-mail that he would like an answer as soon as possible, so that, if the Assignee did not want to take over those units, he could "arrange for the trades to do the removal and replacement work". Mr Devery's response, by return e-mail, was that the Assignee was not interested in either unit.

(6) Also on 22 December 2009, Ms Fox sent an e-mail to Mr Kessaram, referring to the "walk through" of the premises which had taken place earlier that day and informing him that "the final cleaning is scheduled for 27th December following which the parties have agreed to a further walk through". The e-mail continued:

> "On this basis I believe that a 31st December completion is feasible. I am aware however that you are away from close of business tomorrow. Please would you let me know who will be

> handling this in your absence or otherwise what arrangements can be made for completion in your absence."

Mr Kessaram's response, by e-mail on 23 December 2009, was to identify the colleague (David Cooper) who would "have conduct of the file in my absence" and to confirm that Ms Fox could deal with him "on agreeing the condition/completion date as well as any other matters."

(7) Christmas intervened. On 30 December 2009 Mr Robinson, the associate in the property department of the Tenant's attorneys with responsibility for the transaction, having returned from holiday, sent an e-mail to Mr Cooper, in which he referred to his understanding that it had been agreed between Ms Fox and Mr Kessaram that completion of the Deed of Assignment and a Bill of Sale (in respect of fixtures and fittings) would take place "tomorrow [31 December 2009] so avoiding the parties having to apportion the rental and other outgoings under the lease". He asked for confirmation that "you are in a position to complete". There was no response to that e-mail.

(8) Also on 30 December 2009, Ms Landy sent an e-mail to Mr Devery, informing him that everything was out of Mintflower Place; and that he was welcome "to go by anytime to inspect." She enquired:

> "Did you hear back from your lawyer because our lawyer has been chasing your lawyer but has not received a response yet? Can you contact me when you get back as we are looking to close the deal tomorrow as agreed."

Mr Devery's response, by return e-mail, was that:

> "We are still awaiting advice from our lawyers and expect them to get back to CDP [Conyers Dill & Pearman Limited, the attorneys for the Tenant] when ready."

(9) On 5 January 2010 Mr Robinson sent an e-mail to Mr Kessaram, pointing out that he was still awaiting confirmation as to when the Assignee would be in a position to complete. Mr Kessaram replied that he was "stuck here in Denver". He suggested that Mr Robinson contact Mr Cooper.

(10) On the following day, 6 January 2010, Ms Landy sent an e-mail to Mr Devery, enquiring whether he had had a chance to go through the furniture list. His response, by e-mail of the same day, was in these terms:

> "Sorry for not getting back to you earlier but we are a bit swamped as have been badly effected (*sic*) by personnel delays with people stuck in the UK and US.
>
> Can we do this next week"

Ms Landy replied:

> "That would be fine although I understand from our lawyer that we need to complete the assignment by January 12th being next Tuesday according to the terms of the assignment agreement. If you want to go over everything before the 12th, I will make myself available to you."

22. The Tenant's pleaded case until shortly before trial had been that the Condition Date, for the purposes of the Agreement, was 18 December 2009; and that "the [Assignee] was then obliged to take and complete the Assignment without delay" (paragraph 9 of the Statement of Claim). Its case on waiver (paragraph 12A of the Amended Statement of Claim) had been that, if the Agreement required that notice of the completion of the "fit-out" works had to be given 15 working days before 31 December 2009, that requirement had been waived by the matters which have just been set out. By a re-amendment to its Statement of Claim made on the first day of the trial, the Tenant added, as an alternative plea, that by agreement between Ms Fox and Mr Kessaram on 21 December 2009, the completion date for the assignment was 31 December 2009 (paragraph 12A of the Re-Amended Statement of Case); and, in the further alternative, that, having regard to that agreement as to the completion date and the matters relied upon in support of the existing plea of waiver, "the Defendant was no longer entitled to serve the Notice of Termination and/or was otherwise estopped from doing so". It is necessary, when reading the judgment of Kawaley J, to have in mind the basis upon which the Tenant's case had been advanced before him.

23. The trial judge rejected the submission that, on the true construction of the Agreement, the Condition Date had been 18 December 2009; and he rejected the submission that there had been an agreement between Ms Fox and Mr Kessaram that completion of the assignment should take place on 31 December 2009 (paragraphs 27 and 40 of his judgment). Those issues are not the subject of the present appeal. He considered the summary of the law relating to waiver set out by Potter LJ in *Flacker Shipping Ltd v Glencore Grain Ltd* [2002] EWCA Civ 1068, [64]- [68]. At paragraphs 51 and 52 of his judgment he said this:

> "51. The scheme of the Agreement was as follows. Completion could not take place until the [Tenant] served its clause 1.1.2 Notice. Either party could exercise termination rights under clause 6.6 if the Condition Date did not for any reason occur before year end 2009. The Condition Date could

> validly occur after that date; however either party could elect to terminate should this eventuality occur. In the absence of completion taking place on December 31, 2009, the right to terminate crystallized at the beginning of the New Year at the earliest and on January 13, 2010, when the Condition Date actually occurred at the latest. What is the evidence said to amount to an unequivocal representation that the [Assignee] intended to waive its right to terminate?
>
> 52. Before the right to terminate even crystallized, cogent evidence would be required to support the [Tenant's] waiver claim. Such cogent evidence is simply lacking. . . ."

And, after, reviewing the communications passing between the parties and their attorneys between the service of the "fit-out" notice and 31 December 2009, he went on:

> "55. If it is right that clause 6.6 was not engaged prior to January 1, 2010 at all, it is impossible to infer from the [Assignee's] leaving open the possibility of completing by December 31, 2009 as unequivocally waiving its right to terminate after that date had passed. The construction the [Tenant] places upon the written communications and the [Assignee's] conduct during this period reflects a view of the relevant facts looked at through the lens of wishful thinking rather than any objective analysis.
>
> 56 Evidential support for the [Tenant's] case on waiver is even weaker after December 31, 2009 when the [Assignee] was first obliged to formally consider whether or not to waive its termination rights. During this period, from January 1, 2010 until the *coup de grace* was eventually delivered on January 13, 2010 when the Condition Date actually occurred, the most that the [Tenant] can point to are holding communications. . . .
>
> 57. It is impossible to conclude, based on these neutral communications entirely consistent with a reservation of rights over the comparatively short time which elapsed between the earliest date when the Termination Notice could have been served and the date when it was served, that the [Assignee] must be deemed by its conduct to have waived its termination rights. . ."

24. The Court of Appeal agreed with the trial judge. At paragraph 43 in the judgment of Ward JA, the Court referred to a passage from *Spencer Bower and Turner: Estoppel by Representation*, (3rd Edition) at page 39, cited by Bingham J in

*Tradax Export SA v Dorada Compania Naviera SA (The "Lutetian")* [1982] 2 Lloyd's Rep 140, 157; and went on to say this:

> "44. We do not think that this principle of law imposed upon MS Frontier an obligation to warn Lancashire that if the delay continued in fitting out Floors 5 and 6 of Power House it would have to consider invoking the provision provided in Clause 6.6 of the Agreement. The language of Clause 6.6 spoke for itself. There could have been no mistake as to its meaning.
>
> 45. We agree with the learned judge that MS Frontier did not unambiguously represent by its conduct that it intended to complete the transaction. There was no clear and unambiguous representation such as is required in the doctrine of estoppel. . . .
>
> . . .
>
> 47 In the instant case, judged by an objective standard, although MS Frontier had not served its Notice of termination by 31st December 2009, it cannot be said that by continuing to treat the contract as subsisting, it had therefore waived its right to serve Notice of termination on of before any future date for termination."

25. The Board sees no reason to differ from the conclusion reached by both the trial judge and the Court of Appeal on this issue.

26. The Board was referred to the observations of Lord Goff of Chieveley in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga")* [1990] 1 Lloyd's Rep 391, 397-8:

> "It is a commonplace that the expression 'waiver' is one which may, in law, bear different meanings. In particular, it may refer to a forbearance from exercising a right or to an abandonment of a right. Here we are concerned with waiver in the sense of abandonment of a right which arises by virtue of a party making an election. 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. . . ."

Lord Goff went on to explain (i*bid*) that:

> " . . . 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, . . . But of course an election need not be made in this way. It 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 (see *Scarf v Jardine*, (1882) 7 App CAs 345 at p 361, per Lord Blackburn and *China National Foreign Trade Transportation Corporation v Evlogia Shipping Co SA of Panama (The Mihalios Xilas)* [1979] 2 Lloyd's Rep 303 at p 307; [1979] 1 WLR 1018 at p 1024, per Lord Diplock)."

27. In the present case, the Assignee did not become entitled, under the terms of clause 6.6 of the Agreement, to exercise the right to serve a termination notice until 1 January 2010. It was not until then that the Assignee needed to decide whether or not to exercise that right. On the material which was before the trial judge it was impossible to contend that, in the period from 31 December 2009 until 13 January 2010, the Assignee acted in a manner which was consistent only with it having chosen not to exercise that right. Nor could it be said that, either during that period or at any time during the period from 18 December 2009 to 31 December 2009, the assignee communicated to the Tenant, in clear and unequivocal terms, an election not to exercise its right to serve a termination notice under clause 6.6.

***Conclusion***

28. For those reasons the Board will humbly advise Her Majesty that the appeal from the Court of Appeal for Bermuda should be dismissed. Subject to representations to the contrary, to be submitted in writing within 28 days, the costs of the appeal are to be paid by the appellant.