

Waiving the right to a Ferrari—contract law revisited (DD Classics Ltd v Chen)

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Dispute Resolutions analysis: The court re-affirmed important principles of contract law relating to waiver and affirmation in the event of a purported election to terminate a contract. In an application for summary judgment, the claimant, DDC, successfully argued that the defendant, Mr Chen, had acted in a way that waived his right to a subsequent attempt to terminate the contract and had in-deed affirmed the sale of his rare Ferrari race car. The judge found that the election of a contractual right to terminate must be exercised within a reasonable time. Delay in exercising that right may be construed as unreasonable, particularly where a decision is straightforward. Additionally, knowledge of the facts of a repudiatory breach and of one's own right to terminate following that repudiatory breach may give rise to affirmation where the innocent party does not exercise its right to terminate in good time. Written by Alice Roberts, senior associate and Jack Beevers, trainee solicitor at PCB Byrne.

DD Classics Ltd v Chen [\[2022\] EWHC 1357 \(Comm\)](#), [\[2022\] EWHC 1404 \(Comm\)](#)

What are the practical implications of this case?

The case provides guidance to practitioners on the law of waiver and affirmation in the context of: (1) the common law right to terminate the contract following repudiatory breach, and (2) the contractual right to terminate the contract.

Regarding the first right, the position stands that the innocent party will only be held to have affirmed the contract if they act in a manner consistent with its continuance when they have knowledge of: (a) the facts constituting the repudiatory breach, and (b) their own right to terminate the contract in consequence of that breach.

Practitioners should also note that for a contract to be regarded as time of the essence, clear wording to that effect will often be required.

Regarding the second right, the operation of the principle of the contractual right could vary based on the construction of the particular contract. Where there is an election to be made by the innocent party, said election must be exercised within a reasonable time. The right to terminate could be lost by an unreasonable delay in exercising the right. In the case of non-payment, it is entirely simple and straightforward for the innocent party to decide to affirm or terminate the contract, therefore a delay in deciding may be considered unreasonable.

However, simply asking a party in default to perform its obligations does not amount in and of itself to a waiver of the right to treat the contract as discharged. The contract could, alternatively, be affirmed by acceptance of a late non-conforming payment.

What was the background?

The claimant, and buyer, ('DDC') entered negotiations with the defendant, and seller, ('Mr Chen') for the purchase of a rare Ferrari race car ('Car') for €3,155,000. By Clause 3 of the contract, DDC had five business days after the contract was agreed to make payment ('Due Date'). Clause 3(5) contained a provision that if the buyer did not meet the payment obligations by the Due Date, the seller would be entitled to withdraw. DDC transferred a €50,000 deposit on 25 March 2021. The remaining sum was due on 1 April 2021.

Following payment of the deposit, DDC informed Mr Chen that the balance would not be paid until Ferrari agreed in writing to release the Car upon Mr Chen receiving payment. Mr Chen agreed, and confirmed that he had sent an email to Ferrari asking for the required confirmation. As a result, DDC

did not pay the balance by the Due Date and Mr Chen did not purport to terminate the contract. Further communications between the parties ensued and on 7 April DDC transferred the balance to Mr Chen's account. By 13 April, DDC had not received confirmation of receipt from Mr Chen. Mr Chen purportedly checked with his bank to see whether the funds had been received. Mr Chen asked for DDC's account details to send the money back, citing 'no more deals'.

On 27 April 2021, DDC obtained an attachment or judicial seizure order in Italy, preventing Ferrari from releasing the Car. Proceedings were commenced in England against Mr Chen and DDC applied for summary judgment. Mr Chen argued his common law entitlement to termination by acceptance of a repudiatory breach on the basis that timing of payment was of the essence in the contract.

What did the court decide?

First judgment

The court held in relation to Mr Chen's common law right to terminate that, on construction, time was not of the essence in the contract and so late payment had not been a repudiatory breach. The requirement for payment within five business days and the contractual provision for withdrawal under Clause 3(5) did not amount to a condition.

In obiter, the court held that, in any event, Mr Chen would have given affirmation as he had knowledge of the facts of the repudiatory breach and of his own right to terminate. This was evidenced by the circumstances in which Mr Chen treated the contract as afoot 'indefinitely' and even encouraged performance after the Due Date.

The court granted Mr Chen the opportunity to produce an application for an amendment to put forward his case on a contractual right to withdraw.

Second judgment

The court held that the present case was akin to the circumstances in *Mardorf Peach & Company Ltd v Attica Sea Carriers Corporation of Liberia (Laconia)* [1977] 1 All ER 545 and applied its ratio. The court decided that, on construction, Mr Chen's exercise of his contractual right to terminate the contract was required within a reasonable time. Exercising his right 13 days after the Due Date was an unreasonable delay and therefore he had waived his contractual right.

The court further held that Mr Chen had affirmed the contract after the right to terminate had arisen by giving DDC ultimatums, pressing for payment, answering questions relating to the Car and agreeing to provide confirmations of sale thus facilitating completion—all of which took place after the elapse of the Due Date.

Case details

- Court: London Circuit Commercial Court (QBD)
- Judges: His Honour Judge Keyser QC (sitting as a Judge of the High Court)
- Date of judgment: 29 March

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