Fenwick Elliott
Solicitors

Dispatch

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Dispatch highlights a selection of the important legal developments during the last month.

Service of Notices

■ Construction Partnership UK Ltd v Leek Developments Ltd

Leek engaged CPUK to carry out refurbishment works in Macclesfield pursuant to a JCT Intermediate Form of Contract, 1998 Edition.The Contract Administrator issued two Certificates, Certificates 15 and 16, which were not paid by Leek. On 23 December 2005, CPUK wrote by fax and post to Leek pursuant to the contract stating that Leek was in default under the contract and on 17 January 2006, CPUK served notice to determine the contract.

Leek refused to pay on the certificates and raised a counterclaim for liquidated damages. One matter which came before HHJ Gilliland QC was whether or not the determination by CPUK of the contract was valid. In other words did the notice given on 23 December 2005 comply with the requirements at Clause 7.1? Clause 7.1 stated:

"Any notice, which includes a notice of determination, shall be in writing and given by actual delivery or by special delivery or recorded delivery. If sent by special delivery or recorded delivery, the notice or further notice shall, subject to proof to the contrary, be deemed to have been received 48 hours after the date of posting, excluding Saturday and Sunday and public holidays."

On 23 December the letter was faxed and posted to the defendant. The fax was received by Leek on 23 December at approximately 8.46 a.m. This was the Friday before the Christmas break and Leek closed that day at 12 noon. No-one saw the letter until the opening of the post on the morning of 3 January 2006. This raised the point as to what was meant by 'actual delivery' in clause 7.1. Notice may be given by special delivery or recorded delivery, and if it is given by either of those latter two methods, there is then a deeming provision that the notice has been received 48 hours after the date of posting, excluding public holidays, bank holidays, and weekends.

Here it was clear that the letter which was sent in the post was not sent by special delivery or recorded delivery.

The question was whether it can be said that the notice was given by actual delivery. Did this mean that, as was suggested in court, somebody must actually go along to the recipient and hand it over? The Judge did not think so, saying that he found found this to be a surprising, quite unrealistic and uncommercial interpretation of the clause. It is commonplace in modern commercial practice for documents to be sent by post, and even more common-place for documents to be sent by fax. A fax is clearly in writing. It also produces, when it is printed out on the recipient's machine, a document, and that it seemed to the Judge was clearly a notice in writing.

The question is, is that actual delivery? The Judge said that if it has actually been received, it has been delivered. Delivery simply means transmission by an appropriate means so that it is received, and the evidence in this case was that the fax had been actually received. There was no dispute as to that. It may not have been read when received. However, that was a different matter. Once it reaches the offices of the recipient, it is then an internal matter for the recipient to organise his affairs so that things are properly dealt with.

Actual delivery means what it says. It means transmission by an appropriate means so that it is actually received. What is important is receipt, actual receipt. Having arrived at a company's offices on its fax machine it was there to be read, and if it was not read by anyone, or if it was read by somebody who did not appreciate its significance, that was a matter for which the defendant was entirely responsible. It was not and could not be the claimant's fault in any way. Accordingly you must ensure that proper procedures are in place to deal with the receipt of faxes. Indeed the same is true in respect of email. (See the *Bernuth* case reported in Issue 68.)

Procurement Advice

■ Plymouth & South West Cooperative Society Ltd v Architecture, Structure & Management Ltd

Plymco wanted to redevelop their main store (including the construction of a number of retail units). Plymco engaged ASM to carry out all necessary architectural, structural engineering and quantity surveying services including procurement services and procurement advice. As it was a priority of Plymco's that the cost of the work should not exceed £5.5 million, ASM produced a budget estimate for the works in the sum of £5.65 million. ASM made it clear that appropriate savings could be made to meet Plymco's budgetary restraints. On the basis of this budget estimate Plymco decided to proceed and started looking for tenants for the retail units. On 10 October 1996 a lease agreement was signed with Argos. This provided for the completion of the Argos works by 21 April 1997. This lead to a tight timetable for the works and design.

As a result of this, ASM proposed a two-stage tendering process for the appointment of the contractor. Delays then occurred to ASM's design with the result that the conclusion of the two-stage tendering process of the preferred contractor appended in the sum of £5,036,061, but of this, some 87% of this proposed contract was provisional relating to work which was described in the contract as 'not detailed save in outline'. The only detailed design undertaken at this stage related to the Argos store.

Prior to letting the contract, Plymco raised concerns about the high percentage of provisional sums but ASM gave Plymco a number of assurances in relation to cost control that convinced Plymco that the development could be completed within budget. For example, ASM reassured Plymco that during the course of the works provisional sums would be monitored against actual expenditure and if it transpired that greater costs were being expended then savings from other allowances would be made. Accordingly Plymco let the contract and the works commenced.

The final cost to complete the works significantly exceeded the contract sum and Plymco alleged that some £2 million of the overspend arose as a result of negligence on the part of ASM in the manner in which they had procured the building contract and the advice it gave to Plymco in that regard. In particular, Plymco alleged that ASM should have advised that the works should have been procured in two distinct phases, one to carry out the building works for Argos and then the other to complete the remainder of the development.

In light of the provisional nature of the design, there was no real prospect of the project being delivered for £5.6 million and ASM should have realised this and warned Plymco. HHJ Thornton QC agreed that the 'Argos first' solution was both a commercial and technical possibility. He also found that had Plymco been offered the correct advice they would, albeit reluctantly, have accepted it and postponed all but the Argos works until such a time as the design was sufficiently advanced. Accordingly the Judge duly found ASM was in breach of duty.

The case then turned to quantum. A party who has suffered a loss must prove that loss. Plymco had considerable difficulty in establishing what levels of additional costs were incurred. However, despite the 'almost complete absence of relevant documentation', the Judge was sympathetic with Plymco's position and noted that:

"Plymco cannot be reasonably blamed for any failure to produce a more detailed case as to its loss since the documents it would need to do so were not available due to ASM's default in undertaking its professional services "

Given the absence of documents the quantum exercise carried out by the quantity surveying experts turned upon the hypothetical evaluation of what cost would, or would not, have occurred had the project been divided. Without the Judge accepting that this was the right approach in these circumstances, it would have been impossible for Plymco to have ascertained what loss it had, in fact, suffered.

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