Collyer Bristow

Service – Ace or Foot Fault?

The clauses in a contract which deal with administrative matters may be interpreted as mere formalities. However, recent case law shows that this approach is erroneous and, infact, that the detail of the contract is all important.

The importance of the correct approach is heightened at a time when many projects, entered into during more thriving economic times, have become unprofitable. To avoid further loss parties may exploit administrative errors as an opportunity to get out of the contract.

This article will examine the weight given to contractual provisions for the service of notices, and in particular how, when, and by whom they should be served.

The courts' approach – lenient or strict?

In *Yates Building Company Ltd v R J Pulleyn & Sons (York) Ltd [1976] 1 EGLR 157* the Court of Appeal adopted a relaxed interpretation of service provisions. The dispute revolved around an option granted to the claimant to purchase building plots owned by the defendant. The option was to be exercised "by notice in writing" to be sent "by registered or recorded delivery post".

The notice was sent by ordinary post and subsequently acknowledged by the defendant. The defendant then refused to complete the sale on the ground that that notice had not been properly given.

In his judgment, Lord Denning favoured what he considered a commonsense view. The notice had actually been received, regardless of the fact that the specific contractual provisions relating to service had not been followed.

The 1981 case from the Singapore Court of Appeal *Central Provident Fund Board v Ho Bock Kee (t/a Ho Bock Kee General Contractor) 17 BLR 21* represents a harder line. Although not binding in the UK, it is a useful case as it deals with a dispute concerning both the method of service and the identity of the individual who had served the notice.

The contractual provisions specified that any notice of determination was to be sent by registered post. A notice of determination was delivered by hand. Whilst the legal issues in this case were similar to those in Yates, the result was effectively the opposite. The judge concluded that registered post was the only method of service provided for in the clause and that any service would be invalid unless this specific requirement was met.

The contract further specified that the power to determine was reserved to the Chairman of Employers. The notice of determination was served by the superintending officer. The Singapore Court found that the notice was invalid because it had been served by the wrong person.

This stricter approach was echoed in the judgment of the Scottish case of *Muir Construction Limited v Hambly Limited 1990 SLT 830.* Here, the contractors Muir Construction served a notice of determination by hand on Hambly. The contract specified that service was to be by registered post or recorded delivery.

Citing the case of Central Provident Fund Board, the judge took the view that the notice was rendered invalid by the failure to send it by the methods specified. He remarked that he saw nothing that prevented this from being a commonsense business like approach in that such provisions are agreed between two parties in order to avoid confusion and to ensure a precise effect.

The Singapore case will be of particular interest where professional consultants serve notices on a client's behalf, for example in the context of a construction contract. Unless served by the entity specified in the contract, such notices may be invalid.

Contractual Interpretation

Any clauses dealing with the service of notices must be considered very carefully.

In *Construction Partnership UK Limited v Leek Developments Limited [2006] CILL 2357 QBD (TCC)* the clause dealing with notice requirements specified that any notice shall be "given by actual delivery or by special delivery or by recorded delivery". The contractor's notice of determination was served by fax and by post. The question for the court was whether service by fax constituted 'actual delivery'.

The judge determined that actual delivery is the transmission of the document by an appropriate means so that it is actually delivered. Whether or not the fax is read is a matter for the recipient and not for the party serving the notice. It does not require a physical handing over. Service by fax therefore did constitute actual delivery.

The case of *Primus Build Ltd. V Pompey Centre Ltd [2009] EWHC 1487 (TCC)* found the same result from different wording. The contract provided for the service of notice to be delivered personally or by fax. The notice was issued by post and received by the recipient.

The judge concluded that "delivered personally" must mean something different from the established concept of "personal service". As such, the method of delivery was not important here. Instead the crucial issue was that of actual delivery to an appropriate person.

Time Limits

It is equally important that any timetable for service is not considered to be a mere guideline, but is followed absolutely.

Historically, to be a condition precedent, a notice provision had to assert a specific time limit for the successful serving of the notice. The provision also had to make it clear that the notice would not be valid unless it was given in accordance with this timescale.[1]

However, the case of *Steria Ltd v Sigma Wireless Communications Ltd 2007 WL 4736283* has reduced the threshold. In this case, the provision was found to be a condition precedent as notice was stated to be valid "provided" the notice was given "within a reasonable period". The slight ambiguity in the phrase "reasonable period" did not deter the judge from concluding that the word "provided" was sufficient to ensure the clause was a condition precedent.

The judge also concluded that "an extension of time provision confers benefits on both parties." This reinforces the view that judges are keener than perhaps they once were to see that all the terms of the mutually agreed contracts are adhered to.

<u>Exercising Caution</u>

The general principles governing clauses dealing with the service of notices under a contract will be largely the same regardless of to whom, when or how the notice is to be served. The crucial element in each case is the drafting of the relevant clause.

The decision of Lord Denning in Yates may appear to be an eminently sensible conclusion as the chief intentions of the parties had been satisfied. However, it left room for uncertainty.

The stricter interpretation ensures that there is no uncertainty as to what constitutes service. Specific requirements for service can be strictly construed as they are present to benefit both parties in understanding their respective obligations.

This transparent approach is mirrored in relation to the time of service. It is a question of whether the relevant clause has language that clearly intends the contracted party to adhere the deadline.

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[1] Bremer Handelsgesellschaft MBH v Vanden Avenne Izegem PVBA,

It is crucial that any clauses containing requirements dealing with the service of notice are clearly drafted and that the steps required can be easily followed by the parties. This will enable the parties to avoid a breach, or to establish clearly and quickly if there has been a breach.

If a notice needs to be served during the course of a project, it is absolutely paramount that all the formalities are adhered to very closely. These small steps can protect against those parties looking to obtain a commercial advantage from administrative errors.

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