

Reports from the courts

Our regular round up of court decisions of most interest to construction from [Andrew Croft](#) and [Ben Spannuth](#) of [Beale & Company Solicitors LLP](#), analysing a judgment that highlights the importance of serving termination notices strictly in accordance with contractual requirements; and another that underlines the fundamental importance of proper service of a Notice of Adjudication.

Thomas Barnes & Sons plc (in administration) v Blackburn with Darwen Borough Council
[2022] EWHC 2598 (TCC); HHJ Davies

Blackburn with Darwen Borough Council (BDBC) appointed Thomas Barnes & Sons plc (Barnes) to construct a bus station in Blackburn pursuant to an amended JCT Standard Form of Building Contract with Quantities 2011 edition (the Contract).

Clause 1.7.4 of the Contract required notices to be served at Barnes' registered office either by hand or by recorded or special delivery post and that, where sent by post, notices were to "be deemed to have been received on the second Business Day after the date of posting". The Contract further provided that, in the event of termination of the Contract, BDBC was entitled to appoint another contractor to complete the works and to seek reimbursement of the same from Barnes.

The works were subject to significant cost increases and delay overruns.

On 4 June 2015, BDBC's in-house solicitor handed a termination letter to Barnes' representatives on site and not at Barnes' registered office in accordance with clause 1.7.4 of the Contract. The termination letter stated however that it was to be sent by recorded delivery post to Barnes' registered office, as well as email. BDBC proceeded to have the works completed by another contractor.

Barnes claimed, *inter alia*, damages for wrongful termination representing Barnes' loss of profit on the remaining works and alleged that this had caused Barnes to enter into administration later in 2015. Barnes contended that BDBC's ineffective termination of the Contract was repudiatory. Barnes' overall claim was stated to be in the sum of c.£1.7m.

BDBC argued that: (i) it was entitled to and did validly terminate the Contract for repudiatory breach by Barnes; (ii) it was entitled to have the

works completed by another contractor; and (iii) it was entitled to recover its net loss of c.£1.865m under the termination provisions of the Contract or the general law.

Decision

HHJ Davies held that BDBC was entitled to recover the costs of a replacement contractor of c.£1.865m.

HHJ Davies found that BDBC failed to terminate the Contract in accordance with the contractual termination provisions. HHJ Davies noted that "nothing less or different [from the position under clause 1.7.4 of the Contract] would suffice". HHJ Davies dismissed BDBC's argument that it was sufficient for the notice to be delivered to the site as a known address where Barnes was based or that it was sufficient that the notice was brought to the attention of Barnes even if not in the contractually mandated manner. HHJ Davies referred to 11-003 in Keating, which states: "The courts will construe a termination clause in accordance with its commercial purpose, but may require strict compliance with any condition precedent to its exercise". HHJ Davies was therefore satisfied that departure from the contractual termination provisions should invalidate the notice.

Nevertheless, HHJ Davies observed that it was clear that "as at 4 June 2015 [Barnes] was in such serious and significant breach of contract as entitled [BDBC] to terminate the contract or to accept that breach as repudiatory so as to discharge itself from any continuing obligation to perform the contract from that date". HHJ Davies noted that Barnes had ceased all meaningful activity on site. HHJ Davies therefore found that BDBC was entitled both to terminate the Contract under the contractual termination provisions for delay-related default by Barnes and to accept Barnes' delay-related breaches as repudiatory and thus to treat the Contract as discharged and to remove Barnes from the site and engage a replacement

contractor to complete the works. In the absence of evidence to the contrary, it was assumed that the termination letter was received at Barnes' registered office two business days later. HHJ Davies therefore concluded that Barnes' removal from site in such circumstances and two working days earlier than it could validly have been removed, and which did not adversely impact Barnes, was not repudiatory.

Comment

This judgment emphasises the importance of serving termination notices strictly in accordance with the contractual termination provisions – departure from the contract is likely to render a termination notice invalid and may give rise to a claim for damages for wrongful termination. That said, the effect of wrongful termination is fact-dependent – where it is of limited consequence, wrongful termination may not have a significant impact.

AM Construction Limited v The Darul Amaan Trust

[2022] EWHC 1478 (TCC); Mr Roger Ter Haar KC

The Darul Amaan Trust (DAT), a charitable trust, appointed AM Construction Limited (AMC) on or around 7 July 2015 to construct a mosque (the Contract). The Contract Sum was £2.3m plus VAT and the Date for Completion was 14 October 2016.

It was common ground that the Contract was a 'construction contract' under the *Housing Grants, Construction and Regeneration Act 1996* (the Act) such that it included payment provisions for interim payments, specific provisions regarding service of notices, and the right to adjudicate.

Clause 1.7.3 of the Contract provided that "any notice, communication or document may be given or served by any effective means and shall be duly given or served if delivered by hand or sent by pre-paid post".

Payment notices were issued throughout the Contract. However, a dispute arose in relation to payment of the notified sums. DAT therefore commenced adjudication proceedings to seek payment.

On 4 October 2021 at 4:22pm, a process server pushed an envelope through the letterbox at AMC's registered office. There was a dispute as to whether the envelope contained a copy of the Notice of Adjudication. AMC's case was that it therefore

followed that DAT's request for the appointment of an adjudicator, which was sent to the RICS at 4:52pm on the same day, was invalid because it had not been preceded by valid service of the Notice of Adjudication.

The adjudicator found it had jurisdiction and decided that AMC had been overpaid by DAT (the Award).

AMC commenced proceedings to seek declarations to the effect that the Award was unenforceable because it was made without jurisdiction and/or in breach of public policy and/or natural justice. DAT sought to enforce payment of the sums due under the Award.

Decision

Ter Haar KC held that the Notice of Adjudication was not served such that the request to the RICS for nomination of the adjudicator was ineffective. The adjudicator was held to have no jurisdiction and AMC was entitled to declaratory relief to that effect.

Ter Haar KC noted the position confirmed by the TCC that, unless a Notice of Adjudication has been properly served by the referring party on the responding party, there is no jurisdiction and the adjudication process is a nullity. In addition, as per *Lane End Developments Construction v Kingtone Civil Engineering [2020] EWHC 2338 (TCC)*, if a referring party approaches the nominating body before a Notice of Adjudication is validly served, there is no jurisdiction and the adjudication is a nullity.

In considering the factual evidence, Ter Haar KC concluded it was likely that the Notice of Adjudication was not in fact placed in the envelope due to errors on the part of the process server. Ter Haar KC also dismissed DAT's argument that providing the Notice of Adjudication to the process server for delivery was "equivalent to putting the documents in a Royal Mail post box". Ter Haar KC concluded that delivery by the process server was not valid under the Contract – it was neither delivery by hand or pre-paid post.

Comment

This judgment is a reminder of the fundamental importance of proper service of a Notice of Adjudication – the courts will not seek to rescue a party that fails to effect proper service. Parties are reminded to check the service provisions in their contracts and to ensure that notices are served in accordance with the contractual requirements. **CL**