MACFARLANES

A "MISS IS AS GOOD AS A MILE" WHEN IT COMES TO CONTRACTUAL NOTICE PROVISIONS

LITIGATION AND DISPUTE RESOLUTION

This publication considers the recent case of *Ener-G Holdings Plc v Hormell* [2012] EWCA Civ 1059. The key issue in the case was whether the claimant had complied with a requirement, under a share purchase agreement, to issue proceedings for breach of warranty within 12 months of notifying the defendant of its claim. Clauses of this nature are not unusual in commercial contracts and, as this case shows, failure to comply with them is likely to result in a claim being time-barred.

BACKGROUND FACTS

By an agreement dated 2 April 2008 (the Agreement), the defendant sold shares in a company to the claimant. Under the terms of the Agreement, the claimant was required to notify the defendant of any claim for breach of warranty no later than the second anniversary of the date of completion (i.e. by 2 April 2010) and to issue proceedings within 12 months of providing such notice. Failure to comply with this obligation would result in the claim being *"deemed to have been irrevocably withdrawn and lapsed."*

With a view to bringing a claim worth nearly £2m, the claimant sent two identical notices to the defendant on 30 March 2010. The first (the First Notice) was delivered to the defendant's home address by a process server. As the defendant was not in, the process server left the First Notice in the porch and the defendant found it later that day. The second notice (the Second Notice) was sent by recorded delivery to the defendant's home address. On 29 March 2011 a claim form (the Claim Form) was delivered by a process server to the defendant's address. Again, nobody was at home and the process server left the Claim Form in the letter box at the property.

THE DISPUTE

The dates on which the notices and the Claim Form were sent and received were undisputed. The dispute turned on whether the notices had been served in a manner permitted by the Agreement and, if so, when deemed service of the notices and the Claim Form took place; the key issue being whether deemed service of the Claim Form took place within twelve months of the claimant notifying the defendant of its claim.

The Agreement contained the following service provisions:

"13.2 Service

Any… notice may be served by delivering it personally or by sending it by pre-paid recorded delivery post to each party…at or to the address referred in the Agreement….

(emphasis added)

13.3 Deemed service

Any notice delivered personally shall be deemed to be received when delivered…any notice sent by pre-paid recorded delivery post shall be deemed to be received two Business Days after posting…."

Clause 14.2 provided that proceedings could either be served *"in accordance with the terms of this Agreement" or "in any other manner allowed by law".*

"Delivering it personally"

The claimant advanced two alternative explanations as to how it had complied with the service provisions in the Agreement. The first argument turned on the meaning of *"delivering it personally"* in clause 13.2. The claimant argued that both the First Notice and the Claim Form had been served in accordance with clause 13.2 because they had been delivered "personally" (i.e. in person) by a process server. If that argument was correct, deemed service of both documents would have taken place when they were delivered (i.e. on 30 March 2010 in the case of the First Notice and on 29 March 2011 in the case of the Claim Form) and the Claim Form would have been served on time.

The Court of Appeal rejected this argument – finding that the word "personally" must be a reference to the person being served (in this case the defendant, Mr Hormell) rather than the person serving the document. The Master of the Rolls accepted that, although *"in normal social parlance"*, 'delivering' a document 'personally' would often be understood to mean service by the sender personally, this was not the natural meaning in a provision such as clause 13.2. In the context of service of documents, the identity of the server was rarely important; whereas the identity of the recipient was usually *"of central importance"*. If the claimant's interpretation was correct, a notice would be served personally if it was posted because it would be delivered in person by a postman. Furthermore, the concept of "personal service" was well understood to mean service on a recipient, not service by the server (or anyone else) personally. Whilst a different phrase was used in the Agreement, the Master of the Rolls took the view that it was intended to achieve the same thing.

Were the methods of service in clause 13.2 exclusive or permissive?

The claimant's second argument related to the consequences of the finding that neither the First Notice nor the Claim Form had been delivered personally for the purposes of clause 13.2 of the Agreement.

It was common ground that failure to serve the Claim Form in accordance with clause 13.2 did not mean that it had not been served at all. In contrast to the provisions for the service of notices, the Agreement expressly provided that proceedings could be served in accordance with clause 13.2 or *"in any other manner allowed by law"*. The Claim Form had been validly served under Part 6 of the CPR. However, under CPR 6.14, deemed service took place on 31 March 2011 (not 29 March, as would have been the case if it had been served under clause 13.2).

This meant that in order to show that it had complied with the obligation to serve proceedings no more than 12 months after it had notified the defendant of its claim, the claimant had to establish that such notification had taken place on or after 31 March 2010. Taken in isolation, the Second Notice complied with this requirement (it being common ground that deemed service of the Second Notice took place on 1 April 2010).

However, the defendant argued that the First Notice, despite not being delivered personally for the purposes of clause 13.2 was nevertheless valid on the grounds that he had opened and received it on 30 March 2010. If this argument was correct, it would mean that the deadline for service of the claim form expired on 30 March 2011 and the claimant was out of time.

Unusually, therefore, the server of the First Notice was arguing that it was invalid whereas the recipient was arguing that it had been validly served. This issue turned on whether the methods of service described in clause 13.2 were exclusive or permissive. In other words, did clause 13.2 prescribe the only two methods by which valid service could take place or could other methods be used as well?

The Master of the Rolls and Gross LJ agreed with the defendant (Longmore LJ dissenting) and held that the claimant's claim was time barred. In their view, the key consideration was that clause 13.2 provided that documents "may" (as opposed to "shall" or "must") be served by either of the two prescribed methods. The purpose of the clause was to provide two methods of service (personal service and by recorded post) whereby the server of the document could guarantee that the document would be deemed served, irrespective of whether the intended recipient of the document actually received it. The parties were still free to serve documents by other means but in doing so they would take the risk that the documents would never be received by, or come to the attention of, the intended recipient and, therefore, not be treated as having been served.

The majority in the Court of Appeal also took the view that the defendant's interpretation made more commercial sense. This was because, if the service provisions were exclusive, a situation could arise where the defendant had, within two years of completion, received and read a notice informing him of a claim but the claim would nevertheless be time-barred because the notice did not comply with the formal requirements of clause 13.2. Very clear wording would be required before the court would find that a party who actually receives a notice in time should nonetheless be treated as not having received it at all. The wording in this case did not achieve that effect.

CONCLUSION

Quoting Lord Nicholls' comments in *Valentines Properties Limited v Huntco Corporation Limited* [2001] UKPC 14, Gross LJ commented that *"Inherent in a time limit is the notion that the parties are drawing a line. Once the line is crossed, a miss is as good as a mile."* Certainty is important in commercial transactions and strict time-bars are a means of ensuring that the parties know where they stand. It is essential, therefore, that parties comply with contractual dispute resolution mechanisms and a failure to do so is likely to result in the right to bring a claim being lost. In the words of Gross LJ, *"pleas of hardship in this area are untenable"*.

CONTACT DETAILS

If you would like further information or specific advice please contact:

MATT MCCAHEARTY

DD: +44 (0)20 7849 2659

matt.mccahearty@macfarlanes.com

AUGUST 2012

MACFARLANES LLP

20 CURSITOR STREET LONDON EC4A 1LT

T: +44 (0)20 7831 9222 F: +44 (0)20 7831 9607 DX 138 Chancery Lane www.macfarlanes.com