Conditions of Tendering Creating a Contract

Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council [1990] 1 WLR 1195

In this case, the Court of Appeal in England held that the council was liable for breach of contract to an unsuccessful tenderer whose tender was passed over because, mistakenly, the council thought that it was a late tender. The tender was for the concession to operate pleasure flights from the local airport owned by the council. The invitation to tender stated the usual provision that the council did not bind itself to accept any tender and that late tenders would not be considered.

The claimant lodged a tender within time but, due to an error by the council staff, it was stamped as received the day after tenders closed. This was not a public tender, but a case of an invitation to a number of possible tenderers. The court held that the tenderer had a contractual right to have the tender considered. Bingham LJ said "I think it plain that the council's invitation to tender was, to this limited extent, an offer, and the club's submission of a timely and conforming tender an acceptance".

Bingham J did not have to make a decision on the club's alternative argument that, if there was no contract, the council owed the club a duty of care in tort to take reasonable care not to cause economic loss to the club. He expressed the tentative opinion that the club could not succeed on that argument. The court did not have to assess damages.

- Philip Davenport.

Contract - Service of Notices Concurrent Common Law and Contractual Rights of Termination

Kennedy v Collings Construction Company Limited, Supreme Court of NSW, Giles J, 29.9.89, unreported.

In *Kennedy v Collings Construction Company Limited*, Clause 13 of General Conditions BC3 was considered. It provides that the proprietor may in certain circumstances:

> "... by notice by registered mail determine the employment (of the Builder)."

A notice purporting to determine the employment of the builder was sent by the proprietor and received by the builder who acknowledged receipt in writing. The builder argued that since there was no evidence that the notice had been sent by registered mail, it was not valid. Giles J rejected this argument and said:

> "In my view the provision for registered mail should be seen as facultative, permitting notice of determination of the builder's employment by registered mail rather than by the perhaps more onerous course of personal service, but not obligatory."

Giles J held that it was sufficient if the notice was given by any means which is shown to have resulted in receipt of the notice by the builder. He distinguished the previous NSW Supreme Court decision by Collins J in *Eriksson v Whalley* (1971) 1NSWLR 397. Collins J was considering a contractual provision that if the builder:

> "... shall continue such default for fourteen days after a notice by registered post specifying the default has been given to him by the architect ... the proprietor may ... determine the employment of the builder." (Underlining added for emphasis.)

The architect in the *Ericksson* case had handed a notice to the builder's foreman. Collins J was of the opinion that 'receipt of a registered notice imports a certain solemnity or importance to the giving of the notice which a more informal method of service may not convey'. He held that the service of the notice was invalid. Giles J distinguished the *Ericksson* case on the basis that, in that case, the parties had agreed that service by registered post was 'imperative' not merely 'directory'.

The contract in the *Ericksson* case was a predecessor of E5b and JCC 1985 (which provide respectively in Clauses 22(a) and 12.01 for the architect to send to the builder by certified mail a notice specifying the default). It may well be that a court interpreting those clauses would follow the decision in *Ericksson* rather than in *Kennedy*. An architect under E5b or JCC would be well advised to use certified mail.

In this age of electronic mail this is antiquated and often inconvenient. Service of notices by fax is valid service unless the contract requires another form of service (see *Molodysky v Vema Australia Pty Ltd*, noted in Issue # 9 of the Newsletter at p 24 and *Hastie & Jenkerson v McMahon* 1990 Court of Appeal in England). The Standards Association's forms of contract AS2124-1986, AS2545-1987, AS2987-1987 and AS3556-1987 leave no room for doubt that service by electronic mail is permitted. They all provide in clause 7:

> "A notice shall be deemed to have been given when it is received by the person to whom it is addressed or is delivered to the address of the person last communicated to the person giving the notice, whichever is the earlier."