**JUDGMENT : HIS HONOUR JUDGE GILLILAND QC.** Salford District Registry TCC. 26th April 2006

1. There are two applications before the court; first is a summary judgment application by the claimant on the claim for payment under two interim certificates under a building contract. The second application is again an application by the claimant in respect of the counterclaim; effectively, the claimant seeks to have the whole of the counterclaim dismissed.

2. The matter arises out of work which was carried out by the claimant in connection with the refurbishment of some premises in Macclesfield formerly known as the George Hotel. The work involved the conversion of the former hotel into flats, and also some new build and some ancillary works. The new build was for construction of some additional flats. The contract is a JCT contract. It was in the intermediate form of Building Contract 1998 edition with a number of amendments, and the contract provided for sectional completion. There is no dispute, it seems to me, that so far as completion of the sections were concerned there was some delay, which has not been fully covered by extensions of time granted pursuant to the contract. Accordingly, it is possible that the defendant may have a claim for liquidated and ascertained damages provided the appropriate procedures under the contract have been complied with.

3. The claim, perhaps I should say, is for payment under two interim certificates. Although it was initially opposed in the pleadings on the basis that there was a valid set off, that has not been pursued and it is now conceded by the defendant that the claimant is entitled to judgment on the claim and that accordingly the claimant is entitled to payment under certificates 15 and 16. The position is that under the contractual provisions in relation to the claim there was a sum of £27,114.94 due under certificate 15, and that became due and payable on the 9th December 2005, and that is not in dispute. There is accordingly a claim for interest from that date. In relation to certificate 16, the amount certified was £36,463.25, and that became due on the 10th January. Both years, of course, are 2006. The actual certificates were issued a little late, but the dates of payment specified in the certificates were the correct dates and no issue has been taken on that.

4. The position is that the defendant failed to pay in accordance with the certificates. It made a partial payment in respect of certificate number 15, but failed to pay any more. It seems from the correspondence before the court that the defendant may have had some difficulty in obtaining the money from its financiers. Whatever the reason was, payment was not made and accordingly these proceedings were commenced by the claimant seeking payment. As I say, the claimant is entitled to payment of the monies.

5. In addition to claiming payment, the claimant has also claimed to determine the contract because of breach. On the 23rd December 2005 the claimant sent a letter by fax and also by post; that, as I understand it, was by ordinary post; it does not appear whether it was first or second class post. The letter provides as follows: *"I refer to interim valuation certificate number 15. You have only paid £15,000 of the amount due. Pursuant to clause 4.4(A) of the contract conditions we hereby give you notice that if failure to pay continues for seven days after provision of this notice to you and the architect, it will be our intention to suspend performance of obligations under the contract."*

   Nothing turns in respect of that aspect, and it is in relation to the next part that the matter has arisen which is referred to in the counterclaim: *"Further, we give you notice that under clause 7.9.1 we consider you are in default of your obligation to pay the sum of £27,114.94 in respect of interim certificate number 15. In any event, you are liable to pay interest at five percent above base rate, currently 4.5 percent, a total of 9.5 percent on the existing balance until payment."*

6. Clearly, the letter that went out on the 23rd December purported to give notice under clause 7.9.1 of the contract. Under 7.9.1 of the contract it is provided that: *"If the employer shall make default in any one or more of the following respects: a) he does not pay by the final date for payment the amount properly due to the contractor in respect of any certificate for payment and/or any VAT due on that amount, pursuant to supplementary condition (a) …"* then there are three other conditions. There is no dispute that in relation to certificate 15 the employer had not paid by the final date the amount properly due to the contractor.

7. Under clause 7.9.1 it then provides that the contractor may give to the employer a notice specifying a default or defaults; that is referred to as the specified default or defaults. Then there are further provisions for one further notice to be given which would enable the contractor to determine the contract. The claimant has sought to exercise its right to determine the contract.

8. In the defence and counterclaim, it is pleaded that on the 17th January the claimant purported to determine the contract pursuant to clause 7.9.3, and copies of the letter of the 23rd December and of the 17th January are then annexed to the defence and counterclaim. Paragraph 13 provides that: *"Such purported determination was invalid and unlawful by reason of the failure of the purported notice dated the 23rd December 2005 to comply with the notice requirements at clause 7.1."*

   *14: "In the premises, the claimant's unlawful purported determination constituted a repudiatory breach of the contract that the defendant had no option but to accept and did so accept."*

   Then it is specifically pleaded: *"The contract was accordingly determined as of the 17th January 2006."*

9. It is clear from the defence that the defendant's case is that there was a wrongful purported determination by the claimant which amounted to a repudiation by the claimant of his obligations under the contract, and that the defendant has accordingly accepted that. It is the defendant's case that the contract was determined by breach by the claimant on the 17th January.

*10.* In the defence and counterclaim, the defendant has raised three points. First, it has pleaded the repudiation of the contract, to which I have referred; secondly, it has pleaded at paragraph 15 that some of the work carried out by the claimant was defective and/or incomplete, and in paragraph 16 it says: *"By reason of the claimant's breach of the contract the defendant has suffered loss and/or damage."*

Under particulars of loss or damage it is pleaded specifically that the total cost of rectifying the defects and completing the outstanding works is £25,852.

11. Thirdly, a claim is raised for liquidated and ascertained damages. Reliance is placed on a letter of the 16th January purporting to be in accordance with clause 2.7 of the contract, and it is pleaded that the defendant was entitled to withhold or deduct the following liquidated and ascertained damages by reason of the claimant's failure to complete the sections. This was a sectional contract; in relation to section one the extended completion date is said to be the 4th August, and that is said to have been 25 weeks late, so 25 weeks of liquidated damages, at £720 a week, totalling £18,000 or so in relation to section one. Section two, the extended date is said to be the 10th October 2005, the date of termination of the contract is put as the 17th January 2006, and what it says is that as at that date the claimant was 14 weeks late and the defendant is entitled to damages at £1,260 a week for 14 weeks, totalling £17,640. The total amount of deductions is said to be £35,640.

12. What is then pleaded is that following the unlawful termination of the contract, there has been a valuation of the works by the defendant's quantity surveyor as at the date of termination, that is as at the 17th January, in a total sum of £734,084.33. A copy of that is annexed. The defendant has also assessed the claimant's entitlement to loss and expense in respect of the extensions of time at £29,000, which is a credit to the claimant, and then one has an account. The defendant's assessment of the claimant's account is as follows: it gives the gross figure of £734,000 I have referred to, to which is added the £29,000 extension of time, giving a total sum payable to the claimant of £763,084.33, less sums paid to date of some £733,000, and then two further deductions, cost of rectifying the defects £25,000, liquidated damages £34,000, the sums I have mentioned, showing a net balance due to the defendant in the sum of £30,842.58. In the premises that sum is due to the defendant from the claimant.

13. There is a claim for interest, and then the form of the counterclaim is for the sum of £30,842.58 pursuant to paragraphs 19 to 20 above.

14. The claimant's application is to strike out the whole of the defence and counterclaim. There are, it is clear, two elements in the defence and counterclaim. There is the liquidated damages claim and there is the defects claim. The question is whether the defendant has any reasonable prospect of success in establishing either of those claims. In fact, if the claim for liquidated damages fails, the position is, because that claim is in excess of the total amount claimed of just over £30,000, it would follow that there are no monies owing from the claimant to the defendant and therefore, as Mr Mort has submitted, although there may be a claim for defects, nevertheless on the claimant's own figures, nothing is payable by the claimant to the defendant. The claimant is entitled to more monies, even though that element is taken into account and accordingly, for that reason, although there may be issues and disputes as to whether there are such defects, it does not matter so far as this particular counterclaim is concerned.

*15.* As far as liquidated and ascertained damages are concerned, the position is that in relation to section one of the works there has been proper service of a notice of failure to complete the works by the appropriate date. The relevant provisions are to be found in clauses 2.6 and 2.7 of the provisions in relation to sectional completion. 2.6 provides that: *"If the contractor fails to complete any section by the date for completion, or within any extended time fixed under clause 2.3, then the architect/contract administrator shall issue a certificate to that effect. In the event of an extension of time being made after the issue of such certificate such making shall cancel that certificate and the architect/contract administrator shall issue such further certificate under this clause as may be necessary."*

That certificate is called a certificate of non-completion. As I say, one was issued in relation to section one some time, I understand, in October 2005. There is no issue as to that.

16. In relation to completion of section two, again there is no dispute. The architect has not, in fact, issued any certificate of non-completion. The issue, therefore, in relation to the liquidated and ascertained damages claim is whether, in fact, the defendant has any reasonable prospect of succeeding in either of the claims.

*17.* Clause 2.7 provides that: *"Provided there has been a certificate of non-completion issued, and the employer has informed the contractor in writing before the date of the final certificate, that he may require payment of or may withhold or deduct liquidated and ascertained damages, the employer may, not later than five days before the final date for payment of the debt due under the final certificate, either – 2.7.1 – require in writing the contractor to pay to the employer liquidated and ascertained damages at the rate stated in the appendix in relation thereto for a period during which any section shall remain or have remained incomplete, and may recover the same as a debt. Or, give a notice pursuant to clause 4.2.3(B) or clause 4.6.1(3) that he will deduct liquidated damages at the rate stated in the appendix in relation thereto for the period during which any section shall remain or have remained incomplete."*

18. The position is that provided there has been a certificate of non-completion, then the employer effectively has to satisfy two hurdles. There must first of all be a notice before the date of the final certificate informing the contractor that he may require payment of or may withhold or deduct liquidated and ascertained damages, and providing that has been complied with, then the employer has an option. He may either give a notice which effectively is a withholding notice under clause 4.2.3(B) in relation to an interim certificate, or clause 4.6.1(3) in

relation to a final certificate, that he will deduct liquidated damages at the rate specified; or, he may require the employer to pay liquidated damages. Obviously he cannot do both, he cannot both deduct and require payment of the same monies, so there is a clear choice which the employer has to make, provided he has got through the first hurdle of clause 2.7 itself.

19. There is no certificate of non-completion in relation to section two. The provisions of clause 2.7 are quite clear; it makes, it seems to me, the giving of a notice of non-completion a condition precedent to serving any notice under clause 2.7, and if that has not been served then you cannot serve further notice under 2.7.1 or 2.7.2

20. Miss Stephens has sought to overcome that hurdle by submitting that in relation to section two, the reason why no notice of certificate of non-completion was served was because the claimant has wrongfully determined the contract and that the failure of the architect to act under clause 2.6 was caused by this breach. She has applied, informally for permission to amend to raise that point, and she has also been given leave to admit some further evidence in relation to that point.

21. The evidence in relation to the absence of any certificate of non-completion in relation to section two is to be found in paragraphs six, seven and eight of the witness statement of Mr Ankers. In paragraph six he says, effectively, that following receipt of the claimant's letter of the 16th January he intended to issue a certificate of non-completion in relation to section two, and says: *"I would not have granted a further extension of time."*

However, following the defendant's receipt of the claimant's letter of the 17th January, that is the letter of termination: *"I believe that whether the contract had been rightly determined or not, I was no longer in a position to issue a certificate as to the non-completion of section two of the works."*

I am bound to say that that simply fails to show any proper causal or legal connection between any alleged wrongful determination and the failure to issue a certificate.

22. What Mr Ankers says is that following the receipt of the letter of determination, then whether the contract had been rightly determined or not, he could not issue a certificate. He is either right or he is wrong in that. It is a matter of law. He does not appear to have taken any legal advice and the fact of the matter is he has not issued a certificate. It seems to me that one cannot say, even if it were the case that the contract had been wrongfully determined, that that was the cause, in any proper legal sense, of the failure to issue a certificate of non-completion. There was nothing physically to have stopped him from issuing a certificate; he simply took a view, which may have been right or may have been wrong in law, that he could not do so, and he did not do so. That is a positive act in the sense that it is a positive decision by the contract administrator architect not to issue a certificate. It seems to me that in relation to section two, the claim for liquidated damages just does not get off the ground, for that reason.

23. There are also other points which arise in relation to the claim for liquidated damages in relation to section one. As I say, in that case it is accepted that there was a certificate of non-completion duly granted. The question is whether, in fact, the requirements of clause 2.7 and of 2.7.1 or 2 have been satisfied.

24. The letter which is relied on by Miss Stephens as a notice under clause 2.7 is the letter of the 16th January 2006 stating: *"We hereby give notice that we will deduct liquidated and ascertained damages at the rate stated in the appendix for each of the sections of work for the periods during which they shall remain or have remained incomplete."*

It is clear that this is a notice that a deduction will be made. For present purposes I take the view that it is permissible for an employer giving a notice under clause 2.7 to say that he will inform the contractor in writing that he may deduct liquidated and ascertained damages, or that he may require payment of liquidated and ascertained damages. He does not have to say that he may require both; he can say, *"Well, I'm going to deduct,"* and that would be a sufficient notice. It seems to me, for the purposes of this application that the letter of the 16th January is a sufficient compliance with clause 2.7.

25. The question then is whether there has been any effective or valid notice under 2.7.1 or 2, because the employer must require the contractor either to pay liquidated and ascertained damages at the rate stated, or give notice under clause 4.2.3(B) or 4.6.1(3). So far as 4.2.3(B) is concerned, that must be a reference to the certificates 15 and 16, and it is clear that no valid notice has been or can be given under 4.2.3(B) because any notice would be out of time. The monies had become due and payable, and a notice cannot be given in those circumstances, and there has been no withholding notice served. So far as the payment of liquidated and ascertained damages is concerned, Miss Stephens relies on a letter of the 24th January 2006 written by Mr Mattin of Leek Developments, addressed to the claimant, and which says: *"We are in receipt of interim certificate number 16(A). On the basis of this certificate and having made a deduction for liquidated and ascertained damages, refer to the attached statement, we clearly have a situation where the monies paid to you to date exceed our liability to you under the terms of the contract. We refer to your letter of the 18th January 2006 and specifically to your last paragraph. There is obviously no longer any debt due to you and therefore you will no doubt reconsider your position. With regard to the overpayment, could you please let us have your remittance within the next seven days, pending mediation of any disputed amounts."*

What one sees there is a statement of account as at the 24th January giving a gross valuation, with is retentions, as interim certificate 16(A) of £745,607.78 less a deduction of £18,000 liquidated and ascertained damages for the new build section at £720 a week for the 25 weeks, and there is a further deduction for liquidated and

ascertained damages of £20,160 for 16 weeks at £1,260 a week in respect of the refurbishment section. There is then a deduction of the amount previously paid £733,000 referred to before, leaving a net balance in favour of the claimant of £25,987.13.

26. There can be no doubt, it seems to me, as a matter of interpretation of the letter of the 24th January that what the defendant has sought to do is to actually make a deduction of liquidated and ascertained damages. Miss Stephens submitted this could be regarded as a requirement to pay liquidated and ascertained damages at the appropriate rate. It seems to me that that is simply an impossible construction or interpretation of that letter. What the letter says on its face is, "*We are deducting as per certificate 16(A) these two sums of damages, and leaving a net balance of £25,987.13 in favour of the defendant.*" Insofar as any monies are being required to be paid, it can only be the £25,000. That is not the liquidated and ascertained damages. The real point is that, as it says in terms, we have made a deduction, and therefore there cannot be any requirement to pay liquidated and ascertained damages at the required rates.

27. Certificate 16(A) is something of a curiosity; it appears to be a revision of certificate 16, but it seems to me that certificate 16 is a valid certificate. It is admitted to be a valid certificate. It is not said that certificate 16(A) is strictly a final certificate, it may be, possibly but I am not asked to deal with that matter. Certainly it seems to me that insofar as it purports to be a deduction from monies paid or payable, the position is that the requirements of clause 2.7.1 have simply not been complied with; even if clause 2.7 has been complied with in relation to the section one works. The position, it seems to me, is that the claimant is entitled to be paid the monies it seeks.

28. The counterclaim, so far as it seeks liquidated and ascertained damages, is not valid because it has not, in fact, given the appropriate notices. The suggestion that this was caused in some way by the breach clearly cannot be right. It seems to be the case that the defendant did not seem to have any difficulty in giving notices on the 24th January, after the purported determination and acceptance of the purported determination by the claimant, and it is simply inexplicable how the architect failed to give any proper certificate of non-completion. The documentation has not been complied with, and therefore the entitlement to liquidated and ascertained damages simply has not been ascertained, it seems to me, in accordance with the provisions of the contract, and therefore those sums are not due at the present time.

29. The second point which was raised was this question of the alleged wrongful determination of the contract by the claimant. This depends upon the proper interpretation of clause 7.1 of the contract, which provides that: *"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."*

The evidence before the court in relation to determination is that on the 23rd December the letter to which I have already referred was a) faxed to the defendant, and b) posted to the defendant. So far as the faxed document is concerned, the evidence is quite clear that the fax was received by the defendant on the 23rd December at approximately 8.46 a.m.; that is to be found in paragraph three of Mr Matton's witness statement, permission for which was given by me earlier in the hearing. Mr Matton then makes the point that this was the Friday before the Christmas break, and that both the defendant and Bar Matton closed that day at 12 noon. Then he says: *"Neither I nor any officer of the defendant company, to the best of my knowledge and belief, saw the claimant's letter of the 23rd December until the opening of the defendant's post on the morning of the 3rd January 2006."*

There is before the court, annexed to the defence and counterclaim, a copy of the letter of the 23rd December; there is a date stamp on it of the 3rd January 2006. Accordingly, in this case, there can be no dispute that the letter was received by fax on the 23rd December, and certainly was received at the latest on the 3rd January 2006. It is unclear whether the letter which was sent by post was delivered prior to the 3rd January; it is possible that it was, but it may not have been.

30. The point which was taken in the defence and counterclaim was that because the letter of the 23rd December had not been duly served, or notice duly given under clause 7.1, any subsequent determination was thereby invalid. This raises the point what is meant by *'actual delivery'* in clause 7.1, which I have already referred to. Clearly, 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 it is deemed to have been received 48 hours after the date of posting, excluding public holidays and bank holidays, and Saturdays and Sundays. It is clear that the letter which was sent in the post was not sent by special delivery or recorded delivery.

31. The question is whether it can be said that the notice was given by actual delivery, and Miss Stephens makes two points. What she says is it cannot apply to the fax and does not apply to sending by ordinary post, whether first class or second class. It requires, she submits, that somebody must actually go along to the recipient and hand it over; it requires, in other words, a physical delivery in person, it would seem to follow from her submissions, by the person giving the notice, i.e. by someone for and on behalf of the claimant. It clearly involves the proposition that a letter sent by post which actually reaches the recipient cannot be said to be actual delivery. I am bound to say it seems to me that is a surprising and, in my view, quite unrealistic and uncommercial interpretation of clause 7.1. It is commonplace in modern commercial practice for documents to be sent by post, and even more commonplace for documents to be sent by fax these days. A fax, it seems to me, clearly is in writing; it produces, when it is printed out on the recipient's machine, a document, and that seems to me is clearly a notice in writing.

The question is, is that actual delivery? It seems to me, 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 is that the fax has been actually received. There is no dispute as to that. It may not have been read when received, which is a different matter.

32. So far as the letter is concerned, the evidence before the court leaves me in doubt as to whether it was in fact received before the 3rd January. If it was received only on the 3rd January, then it is certainly arguable that the notice of determination was given possibly a day early. The invoice was given on the 17th, which is 14 days, but it is not 14 days from the expiry of the giving of the notice, necessarily. It may be there are issues as to particularly when it was received in the post, when the post was opened, what time and so on, but whatever may be the position, if one had to rely simply on the letter that went through the post, there would be arguable issues properly to be tried and summary judgment would not be appropriate, but in relation to the question of the fax, it seems to me it is wholly unarguable, unless one says that a notice cannot be given by fax at all.

33. Miss Stephens, in support of a broad proposition that there must be a physical handing over, made a number of points. She said these are important notices, they lead to serious consequences, and therefore it is important that they should come to the notice of responsible officials or officers of the recipient company, if it is a company. On the other hand, she accepted that so far as actual delivery is concerned, it would be a sufficient to constitute actual delivery if somebody went along to the offices of the defendant and handed it to the receptionist. Miss Stephens very realistically and practically did not submit that it had to be actually handed to a sufficiently senior officer. 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.

34. Whilst I can see that it would obviously be sensible and desirable that the document comes to the attention of a responsible officer as soon as possible, it seems to me, even if I were to accept that actual delivery meant physically handing over by somebody for and on behalf of the claimant, that that would not necessarily guarantee it would be seen in due time by an appropriate senior person. It seems to me insofar as that is relied on as an aid in the construction of actual delivery, it does not actually meet the point. It seems to me 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, that is what actual delivery means in this clause, and I can see nothing to suggest that a document sent by fax which is actually received, and is not disputed, cannot amount to actual delivery. Accordingly, it seems to me that the notice was validly delivered on the 23rd December by fax at 8.46 a.m. Mr Mattin does not say what happened after that was received at 8.46 a.m. beyond saying that the company and Bower Mattin closed that day at 12 noon for the Christmas holidays.

35. All one can really say is that so far as Mr Mattin is concerned, he has no recollection of seeing anything before the morning of the 3rd January. However, it seems to me that having arrived at the 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 is a matter for which the defendant is entirely responsible; it is not the claimant's fault in any way. I take it as a matter of law that service by fax, which is admitted to have been received, amounts to actual delivery for the purpose of clause 7.1, and if that is right then the notice of determination was validly given and there is no arguable issue on that point.

36. It seems to me that the claimant is entitled to judgment in its favour dismissing the counterclaim in its entirety, because on any view there is money owing to the claimant.

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