LITIGATION BULLETIN

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Strict Compliance With Contractual Service

HOE International Ltd v Andersen [2017] CSIH 9
Barker & Cutts v TXM Plant Holdings Ltd [2016] EWHC unreported

Like London buses, decisions on related legal topics often seem to come in pairs. There have been two recent, wholly unconnected decisions on the strict compliance with contractual provisions as to service: *Barker & Cutts v TXM Plant Holdings Ltd* was a decision of the High Court in England and *HOE International Ltd v Andersen* was an opinion of the Inner House of the Court of Session in Scotland.

In TXM, the company was required to service a notice on its shareholders either personally, by post or by fax; it purported to do so by email. In HOE, notice of breach of warranty was to be served personally or by post on the sellers' solicitors marked for the attention of "MH"; it was sent by DX marked for the attention of "SC". In both cases, the recipients argued that the notices had not been properly served for failure to comply with the contractual requirements as to service.

In both of the above cases, the court found in favour of the giver of the notices finding that notice *had* been properly given notwithstanding the fact that in neither case had the contractually specified procedure been followed. In TXM, the court fixed on the word "*may*" in the service provision finding that this meant that the service provisions were was merely permissive and not obligatory. The judge found that it was all a question of risk; if the notice giver followed precisely the service provisions in the contract he would be absolutely certain that his notice would be validly served and he would also know *when* it would be deemed to have been served (because that was set out in the clause). If, however, the notice giver chose to serve a notice by some other method he would not be able to rely upon any deeming provision but would take on the risk of proving actual receipt of the notice by the intended recipient.

In HOE, the recipient had actually won at first instance, the court finding the failure precisely to adhere to the contractual service provisions to be fatal. On appeal, the Inner House relied on a slightly different reasoning to that TXM, and held that the service provisions needed to be construed purposively and taking account of 'commercial considerations' (whatever that means). It found that the purpose of the notice was to notify the sellers of the buyers' claims which had been achieved and so the notice was deemed validly served.

In both TXM and HOE, it was clear that the intended recipients of the notices had, in fact, received them but they sought subsequently to claim that service had been in valid (in TXM, that was some considerable time after the event). Whilst the court in both cases found that the recipients had suffered no prejudice by the notices' being served differently, one wonders whether that is in fact the point. As with the exercise of options, it has always been understood that contractual provisions relating to matters such as service of notices have to be strictly complied with in order to be valid; parties to contracts agree to these provisions in order introduce absolute certainty for the future. The courts' desire to be commercial and purposive is understandable but, in fact, makes the whole issue much more uncertain.

AMB Law acted for the claimants in Barker & Cutts v TXM Plant Holdings Ltd.

If you have any queries in relation to this, or any other, matter, please do not hesitate to contact us – *office@amblaw.co.uk* or 020 3651 5646.

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