Courts deal with pitfalls at either end of litigation journey

Sometimes, when preparing to write an article a nagging feeling arises - what of interest has happened to write about? On this occasion there is no such problem – two recent decisions have been delivered which consider issues at either end of the litigation spectrum; service of proceedings and making an offer of resolution.

Service of proceedings - Barton v Wright Hassall

The facts

Given the changes to availability of legal aid, increasing numbers of litigants are representing themselves in person. Mr Barton was such an individual.

Mr Barton had been embroiled in litigation for 12 years, defending a claim for payment of fees and pursuing professional negligence claims against two firms of solicitors, the second of which gives rise to this matter.

Having issued a Claim Form, Mr Barton had four months in which to serve this upon Wright Hassall ("WH"). Typically, the Court would serve proceedings per CPR 6.4(1). However, Mr Barton elected to effect service himself per CPR 6.4.(1)(b).

On 26 March 2013 Mr Barton received an email from solicitors, BLM (acting for WH), informing him they had been instructed. A further email was sent by BLM to Mr Barton to advise they had also been appointed by WH's PI insurers. That second email concluded "I will await service of the Claim Form and Particulars of Claim".

On 24 June 2013, the last day before expiry of the Claim Form, Mr Barton emailed BLM purporting to effect service of both Claim Form and Particulars.

On 4 July 2013, BLM responded that they had not indicated they would accept service by email, the Claim Form had expired and the claim was now statute-barred.

The Law

A claimant can apply under CPR 7.6 for an extension to the period of validity of a Claim Form. An extension may be granted if the court itself has failed to serve proceedings or if the claimant has taken all reasonable steps to effect service in compliance with CPR 7.5.

Alternatively, a claimant is also able to apply under CPR 6.15 for an Order that the step (s)he has taken shall stand as good service notwithstanding that it does not otherwise comply with the Rules. It was this latter aspect that Mr Barton pursued to the Supreme Court.

The Court contrasted the application of CPR 3.9 where it exercises its discretion as to whether to provide a litigant with relief from sanctions for failure to comply with a court rule, order or practice direction on the one hand and CPR 6.15(2) which is directed at the rules governing service of a Claim Form and bringing proceedings to the attention of a prospective defendant, on the other.

In *Abela v Baadarani* the Court distilled several principles for assessing whether to validate service. These comprised whether:-

(i) in all the circumstances there is good reason to order that steps taken to bring the claim form to the attention of the defendant is good service;
(ii) the defendant has ensured that the contents of the document are brought to the attention of the person to be served [noted as being a 'critical' factor]. The mere fact the defendant learned of proceedings, without more, does not amount to a good reason to make an order; and
(iii) there is good reason to validate the method used, not whether the claimant had good reason to use such method.

A further factor was having regard for whether the defendant would suffer prejudice if the court effected retrospective validation even if it knew of the proceedings.

Mr Barton argued the following:

(a) he was entitled to assume that BLM did accept service by email (though he admitted in evidence he knew some firms did not operate in that manner),
(b) the rules as to service were 'inaccessible' to him as a litigant in person and/or
(c) BLM had played "technical games" by failing to inform him of the deficiency in service until after the Claim Form had expired.

The Court found against Mr Barton. They concluded that this was not a matter where there was a problem about service, rather Mr Barton had simply not made an attempt to effect service in accordance with the Rules. They noted that "*it has never been enough that the defendant should be aware of the content of an originating document such as a Claim Form, otherwise any unauthorised mode of service would be acceptable notwithstanding that it fulfilled none of the other purposes of deserving originating process*".

In reaching its conclusion, the Court recognised the need to balance the interests of both sides, noting that the CPR does not distinguish between represented and unrepresentative parties. Critically the Court found that *"unless the Rules are particularly inaccessible or obscure it is reasonable to expect a litigant to familiarise himself with the rules"*. The Court did not consider the rules to be such in this instance.

CPB Comment:

By a majority (3:2) the Supreme Court resisted the Appeal to retrospectively validate the purported service of the proceedings. The Court highlighted (again) the dangers associated with leaving (the attempt at) service to the last moment. Mr Barton could have served proceedings via the Court or at any time in the intervening four months. By not doing so, he faced the real risk that a last minute method of service may not be compliant and deprive him of the opportunity to pursue his claim.

As for BLM, the Court recognised that they were not obliged to proffer advice to Mr Barton upon receipt of proceedings and to do so would sound against the interests of their own client(s). It was highly unlikely that WH (or their insurers) would have instructed BLM to inform Mr Barton to correct the error before primary limitation expired.

As a reminder, those receiving legal process should be careful to review whether proceedings have been validly served upon them or whether a service / limitation point arises which could dispose of the intended action.

Part 36 Offer – JMX v Norfolk & Norwich Hospitals

In several previous decisions, the courts had recognised that Part 36 offers were being made not to encourage settlement but rather to place undue pressure upon defendants to settle or otherwise face the prospect of paying indemnity costs if they failed to do so.

Such 'abuse' led to the introduction of CPR Part 36.5(e) in April 2015 whereby the court, in deciding whether to award penalty interest / costs on an indemnity basis, shall have regard to *"whether the offer was a genuine attempt to settle the proceedings".*

In the current case, the Claimant made a Part 36 offer which expired one working day before trial. The offer was to accept 90% of the claimed sum – an offer the Claimant proceeded to 'beat' at trial. The defendant argued the Claimant should not benefit from the costs consequences of 'beating' its Part 36 offer since:

(i) the offer was not a realistic assessment of the risks, and
(ii) contrary to published guidance, the Claimant had not set out an explanation as to how its 10% deduction of value had been arrived at.

The Court rejected the defendant's arguments. They noted that the parties' assessment of merits would always be different but a court should be slow to conduct a mini-trial as to how the case looked to the offering party at the time the offer was communicated. What one side may view as a reasonable assessment of risk may, rightly or wrongly, be seen by the opposing party to amount to an unrealistic under-evaluation of the merits – if so, then no offer could be said to amount to a genuine attempt at resolution.

The judge also rejected the submission that the failure to provide an explanation invalidated the offer. He reasoned that providing an explanation could lead to satellite correspondence which would hamper rather than assist the negotiation / settlement process.

CPB comment

The making of a Part 36 offer remains a useful tool in a client's armoury when conducting litigation. Whilst parties to litigation can be reluctant to make any form of concession, believing their own case to be water-tight and a 'try-on' against them, the latest guidance ought to provide a framework in which meaningful offers can be made whilst allowing for some modest concession of ground in the interests of achieving a resolution.

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