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SUPREME COURT RE-EXAMINES THE PRINCIPLES FOR RETROSPECTIVE VALIDATION OF SERVICE

Barton v Wright Hassall LLP [2018] UKSC 12

Introduction

By a judgment handed down on 21 February 2018 in *Barton v Wright Hassall LLP* [2018] UKSC 12, the UK Supreme Court dismissed an appeal against a decision refusing to grant an order validating improper service of a claim form. The Supreme Court undertook an important examination of the principles applicable to an application for an order validating the service of improperly served claim forms.

Background

The claimant was a litigant in person who had commenced proceedings against the defendant law firm alleging negligence. The claim form for those proceedings was issued on 25 February 2013. Under the applicable English procedural rules (the Civil Procedure Rules or "CPR"), a claim form to be served within the jurisdiction has a 4-month 'life span' running from the time it is issued within which it must be served on the defendant. Therefore, in this case, the time period for the claim form to be served on the defendant expired on 25 June 2013.

On 24 June 2013 (i.e. the day before the expiry of the time period for the service of the claim form), the claimant purported to serve the claim form by emailing it to the defendant's solicitors. However, as the defendant's solicitors had not expressly communicated that they were prepared to accept service of the claim form by email, the emailing of the claim form did not constitute proper service under the CPR (as was common ground between the parties). The claimant applied for an order under CPR 6.15(2) – which empowers the English courts to validate service which would otherwise not constitute proper service as a matter of English civil procedure. The claimant's application for a CPR 6.15(2) order was rejected by a District Judge and by a County Court Judge. The claimant's appeal was subsequently dismissed by the Court of Appeal.

The claimant appealed to the Supreme Court.

Decision

By a majority of 3:2, the Supreme Court dismissed the appeal.

In a previous decision (*Abela v Baadarani* [2013] UKSC 44), the Supreme Court had established the following principles:

(1) the relevant test for an order under CPR 6.15(2) was whether, in all the circumstances, there was good reason for the court to order that steps taken by a claimant to bring a claim form to the attention of the defendant amounted to proper service;

(2) although there were a number of purposes to legal 'service', the most important of those purposes was to ensure that the contents of the document were brought to the attention of the person who was to be served;

(3) the issue was not whether the claimant had had good reason to choose the particular mode of service that it had;

(4) the purpose of CPR 6.15(2) was to allow for the possibility that there may be appropriate cases where a claimant might be enabled to avoid the consequences related to limitation when a claim form expired without having been properly served.

Although the Supreme Court acknowledged that the above was not a complete statement of the principles for the exercise of the CPR 6.15(2) power, it was felt that there was no reason to alter the existing view on any of those points.

For the majority, Lord Sumption (with whom Lord Wilson and Lord Clarke agreed) held that, in general, the main relevant factors were likely to be:

(1) whether the claimant had taken reasonable steps to effect service in accordance with the CPR;

(2) whether the defendant (or the defendant's solicitors) were aware of the contents of the claim form at the time of its expiry; and

(3) whether any prejudice would be suffered by the defendant as a result of the court's retrospective validation of non-compliant service of the claim form (having in mind the extent of the defendant's knowledge of its contents).

Although it was likely to be considered necessary, for a CPR 6.15(2) order, that the claimant's mode of service had been successful in bringing the claim form to attention of the defendant, that, by itself, was not sufficient for a CPR 6.15(2) order to be granted. The purpose of service was to bring the contents of the claim form to the attention of the defendant, but the manner in which it was done was also important. The CPR needed to identify some formal step capable of being treated as making defendants aware of the claim form's contents because a "bright line rule" was necessary for determining the exact point from which time began to run for the taking of further procedural steps or other matters (such as the entry of judgment in default or the application of a limitation period). In the instant case, such rules were not to be relaxed merely on the basis that the claimant in the instant case did not have legal representation as the rules on service were not inaccessible or obscure.

In the instant case, the claimant had not made any attempt to effect service according to the CPR and had used a mode and manner of service which he ought to have appreciated was not compliant with the CPR. The claim form had been issued towards the very end of the applicable limitation period. The claimant had opted not to have the claim form served by the court – yet the claimant had not then made any attempt to serve it until the very end of its period of validity. In those circumstances, the court's indulgence would not stretch to allow an application for an order under CPR 6.15(2).

Furthermore, there was a palpable risk of prejudice to the defendant because the defendant would be retrospectively deprived of its accrued limitation defence if an order under CPR 6.15(2) was to be granted.

Lord Briggs (with whom Lady Hale agreed) dissented and would have allowed the claimant's appeal. In particular, Lord Briggs did not consider that the fact that a CPR 6.15(2) order would deprive a defendant of a limitation defence was to be regarded as a factor that militated either against or in favour of retrospective validation. Lord Briggs considered that, in the instant case, service should have been validated (despite the claimant's having failed to read or act in compliance with the relevant part of the CPR) because his "modestly non-compliant" service had achieved the objectives that service was intended for.

Concluding Remarks

Issues concerning the proper effecting of service of a claim form (or, for that matter, other documents pertaining to litigation) are often highly significant in litigation. The Supreme Court's judgment highlights the importance of having rules that allow for a clear determination of the point at which service was validly effected – it has knock-on effects for other important aspects of litigation, including the potential for entry of a default judgment and for the application of a limitation defence.

The importance of clarity on such important procedural matters was highlighted by Lord Briggs when he noted at the end of his judgment his concern that, in both *Abela v Baadarani* [2013] UKSC 44 and in the instant case, issues regarding the meaning and effect of CPR 6.15 had caused divisions in the Supreme Court.