

Burns - Anderson v Francis Henry Wheeler

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Practice Group: Professional Negligence

WAIVER AND SERVICE OF CLAIM FORM OUT OF TIME

A note on HHJ Havelock-Allen QC's decision in:

BURNS-ANDERSON INDEPENDENT NETWORK PLC v FRANCIS HENRY WHEELER

HIGH COURT, QBD, BRISTOL MERCANTILE COURT

JUDGMENT DATE: 28th January 2005

Introduction

This was an important decision on:

- (i) the Rules for service out of the jurisdiction
- (ii) time limits for applying to set aside service of a Claim Form out of time;
- (iii) waiver of right to challenge late service out of time.

Background to the Claim

1. The Defendant was an independent financial adviser within the Claimant's network. By the terms of his contract with the Claimant, the Defendant undertook to indemnify the Claimant against payments which the Claimant might be required to make to a third party in consequence of the Defendant's negligence or failure to comply with regulatory rules.
2. Between September 1998 and July 2001 the Claimant made payments totalling in excess of £90,000 to customers who had lost money after following the Defendant's pension investment advice.
3. The Claimant's case was that such losses were due to the negligence/non-compliance with regulatory rules of the Defendant.

Procedural Background

4. The Claim form was issued on 30th December 2003.
5. Prior to that date:
 - (i) On 10.04.2002 the Defendant's solicitors confirmed to the Claimant's solicitors that the last address they had for the Defendant was an address in France;
 - (ii) On 08.07.02 the Claimant's solicitors posted a package containing a letter and draft Particulars of Claim to that address;
 - (iii) In early August 2002 that package was returned to the Claimant's solicitors marked "gone away".
 - (iv) The Claimant's solicitors then discovered that the Defendant was still in fact residing at the French address. Subsequently they sent a duplicate package to that address on 05.08.02.
 - (v) Negotiations ensued between August and November 2002 and then lapsed while the Claimant re-evaluated its position.
6. The Claim Form, which detailed the Defendant's address in France, was endorsed with a statement that the High Court had power under the Civil Jurisdiction and Judgments Act 1982 to hear the claim, as required by CPR 6.19(3) using the form of words in paragraph 1.1 of the Practice Direction supplementing Section III of CPR Part 6.
7. After the Claim Form was issued by the court:
 - (i) On 02.04.04, the Claimant's solicitor wrote to the Defendant's solicitors asking whether they had instructions to accept service on behalf of the Defendants.
 - (ii) The Defendant's solicitors replied on 19.04.04 pointing out that they needed to take instructions from the Defendant in that regard.
 - (iii) Eventually, on 28.04.04 – 2 days before expiry of the Claim Form for service within the jurisdiction

but well within the time for service out of the jurisdiction – the Claim Form was amended and stamped. It was dated 30.04.04 for reasons that never emerged.

(iv) On 28.04.04 the Claimant's solicitors sent – by registered post – the Claim Form and other necessary documents to the Defendant at his address in France. They also sent a duplicate set of documents to the Defendant's solicitors, via DX.

(v) The package sent to France was returned, unopened, a few days later.

(vi) On 11.05.04 the Defendant's solicitors acknowledged that they had received the copy of the documents and confirmed that they had instructions to accept service on behalf of the Defendant. In the letter of acknowledgment they said: "We understand that the proceedings have not yet been received by our client in France, but since he is currently in London...we suggest that the best way forward would be to obtain a further sealed copy [of the Claim Form] ... and serve it on us."

(vii) The copy was sent on 12.05.04, two weeks after the expiry of the Claim Form for service within the jurisdiction.

(viii) The Defendant's solicitors filed an acknowledgment of service on 25.05.04.

(ix) On 12.06.04 the court sealed a consent order extending the time for serving a defence by 3 months.

8. Crucially, when on 28.4.04 the Claimant's solicitors sent the Claim Form to the Defendant in France he had (unbeknownst to both sets of solicitors) ceased living in France and returned to England.

Issues

9. The following issues arose at the hearing:

(i) Was there good service at the Defendant's "last known residence" in France?

(ii) If not, did the Defendant waive the irregularity?

(iii) Did the extension of time in respect of the Defence extend the time for making an application to dispute jurisdiction under CPR 11?

Deemed Date of Service in France

10. HHJ Havelock-Allen QC reviewed the Court of Appeal cases of *Godwin v Swindon Borough Council* [2002] 1 WLR 997 and *Anderton v Clwyd County Council* [2002] 1 WLR 3174. He found that these cases decided that CPR 6.7(1) deemed the date of service only if the Claim Form had in fact been served. In other words, the deeming provision does not deem the fact of service if the Claim Form had never been served.

11. Further, he found it was a precondition that the method of service used was one specified in the left hand column of the table in CPR 7.6(1).

12. In this case, however, the Claim Form was sent by registered post. Registered post is not a specified method of service in CPR 7.6(1) even though it is a valid method of service under French law. Therefore CPR 7.6(1) does not apply to service by post out of the jurisdiction even though Part I of CPR Part 6 applies to service out of the jurisdiction under Part II of CPR Part 6. [see footnote 1]

13. So, there was no deemed service and no service in fact in France.

14. However, there was service out of time within the jurisdiction on the Defendant's solicitors.

CPR 11

15. The Claimant argued that the Defendant should have made an application under CPR 11 for the claim form to be set aside, rather than applying under CPR 3.4 for a strike-out of the action: See CPR 11(6).

16. The notes at paragraph 6.21.13 of the White Book direct a party who wishes to set aside service on him outside the jurisdiction to Part 11. The judge found that this note was equally applicable where the party objects to the adequacy of service within the jurisdiction.

17. CPR 11 was therefore the appropriate vehicle for disputing service. The question arose whether the Defendant's right to make such an application had expired.

18. HHJ Havelock-Allen QC compared the old RSC Order 12 with CPR Part 11. He pointed out that under the old Order 12, an extension of time for serving a defence had been found to have the effect of extending the time available for making an application to dispute jurisdiction [see footnote 2]

19. The new regime is less generous to Defendants. The learned judge concluded that an application to contest the jurisdiction had to be made within 14 days after filing an acknowledgment of service (see CPR 11(4)(a)). A request for an extension of time for service of a defence cannot be construed as also being a request for an extension of time for making an application to contest the jurisdiction.

20. In failing to make an application under CPR 11 within 14 days of his acknowledgment of service the Defendant was treated as having waived his right to challenge the court's jurisdiction: see CPR 11(5).

Waiver

21. The Claimant argued that regardless of CPR Part 11 the Defendant waived any irregularities in service by the way it conducted itself after receiving the Claim Form, for example, by filing an acknowledgment of service and agreeing a Consent Order to extend time for service of the Defence and requesting disclosure for the purpose of "enabling us to prepare a defence."

22. The Defendant argued that at the time of the conduct to which the Claimant drew the court's attention

(i) it had not noticed the date on the claim form;

(ii) it did not know that it was served late, and consequently;

(iii) it did not know that it had any rights to dispute the validity of the service of the claim form.

23. His Honour found assistance in the judgment of Stephenson LJ in *Peyman v Lanjani* [1985] Ch 457 at 488D: "In fact and in law men's intentions must be judged by their actions, and a man's acts may convey to any reasonable person standing in the shoes of the other party to a contract, as clearly as any words, an intention to repudiate or to affirm the contract. If the other party, relying on acts having the latter effect, suffers detriment or prejudice, there is unequivocal, and irrevocable affirmation".

24. These dicta were found to support the proposition that a waiver can be founded in imputed rather than actual knowledge. In the circumstances, the Defendant had conveyed to the Defendant an intention to defend the claim and as such had waived his right to dispute the court's jurisdiction.

Conclusion

25. The important lessons from the case are:

(i) If a Claim Form has been served out of time then an application to set aside service under CPR 11 should be made within 14 days of filing the acknowledgment of service and any step in the action may be taken as a waiver of a right to set aside service.

(ii) A Claimant serving a Claim Form out of the jurisdiction by post cannot rely on the deeming provisions in CPR 6.7(1).

Daniel Crowley acted for the successful Claimant instructed by CMS Cameron McKenna. Daniel Crowley is a member of 2TG's Professional Negligence and International Practice Groups

[1] On this latter point see *Knauf UK GmbH v. British Gypsum Limited* [2002] 1 WLR 907 at paras. 35-37 per Rix LJ.

[2] *Eg. Lawson v Midland Travellers Ltd* [1993] 1 WLR 735 (CA)