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LITIGATION & DISPUTE RESOLUTION | Effecting service: English High Court finds that demonstrating mere technical compliance with rules on service may be insufficient during 'lockdown'

Introduction

The service provisions under the Civil Procedure Rules of England & Wales ("CPR") are, as most practitioners will be aware, very detailed and prescriptive. The advantage of having such detailed rules is that provided they are followed, parties to litigation can definitively determine whether service is "good", and when it was effected.

However, the recent case of *Melanie Stanley v London Borough of Tower Hamlets*[1] has shown that in the present "lockdown" environment, demonstrating technical compliance with the rules on service is not necessarily enough. By analogy, caution should be exercised in seeking to rely on technical compliance with contractual notice provisions unless it can be shown that it was reasonable to suppose the steps taken would have drawn the relevant communication to the attention of the counterparty.

Background

The proceedings concerned a claim for damages relating to an admitted data breach and alleged psychological distress which it was claimed had arisen as a consequence of that data breach.

The Claimant sent a letter of claim to the Defendant on 23 January 2020, to which the Defendant did not respond. A follow up letter on 6 February 2020 from the Claimant also went unanswered.

On 13 February 2020, the Claimant's solicitor asked the Defendant to confirm whether service of proceedings by email would be acceptable, but was told that it would not be.

In the absence of a response to the letter of claim (and given the Defendant had previously refused to accept service by email), the Claimant served the Claim Form and Particulars of Claim by post on 25 March 2020 (two days after "lockdown" had commenced on 23 March 2020). The deemed date of service of the Claim Form was therefore 27 March 2020.

By 10 April 2020, the Defendant had failed to file an Acknowledgment of Service and the Claimant therefore applied for default judgment – which was granted on 17 April 2020.

Application for the default judgment to be set aside

The Defendant argued that the Claimant's solicitor had served the claim on an office which he knew or ought reasonably to have known was closed during "lockdown". The Defendant therefore asked the Court to use its discretion to set aside the default judgment, pursuant to CPR r.13.3.

Mr Justice Knowles agreed with the Defendant and held:

"I am satisfied that there is a good reason to set aside the default judgment. That reason is the unprecedented national health emergency which was unfolding at precisely the time Mr McConville posted his documents to the Council. From 23 March 2020 onwards the country was grinding to a halt and every employer and business in the UK – and indeed across the world – was suddenly having to develop new ways of working and to find ways of coping with employees not being able to travel into work. There were myriad problems and challenges to be faced, including, for example, establishing technological links and putting in place new systems of working".

In particular, Knowles J. was critical of the Claimant's solicitor for *"not checking whether service by post was still possible and feasible"*, noting that *"this was an obvious step which he should have taken"*. The judge, however, expressly made it clear that in his view, the Claimant's solicitor had not "*unscrupulously*" taken advantage of the situation, although he had shown poor judgment in his actions.

The default judgment was therefore set aside and the Defendant was given permission to serve an Acknowledgment of Service.

Comment

Although it is common for a Claimant to take additional steps (beyond formal service) to bring served proceedings to the attention of the Defendant, there is no formal or procedural obligation to do so under the CPR, provided compliance with the relevant CPR service provisions can be shown.

This decision is therefore a useful illustration of the way in which the English courts are currently exercising their discretion in order to accommodate parties which may have inadvertently suffered prejudice as a result of measures introduced in response the coronavirus pandemic.

It is clear from this judgment that in the present climate, technical compliance with a particular rule or provision is not necessarily sufficient and the courts may require parties to take additional steps in

order to bring certain facts or matters to the other side's attention. Where parties fail to take such additional steps, they risk the possibility that the court may (where it can) exercise its discretion in favour of the opposing side.

Although the present case concerned a rule in the CPR, it seems likely that the same approach would be followed in a contractual context – for example, in relation to a contractual notice provision, particularly as this would be consistent with the Government's "*Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency*" (dated 7 May 2020, as amended).

Parties to disputes in this current climate should therefore be mindful that it may be necessary to show something more than mere technical compliance in both procedural and contractual contexts. It is likely that if a party wishes to rely on a default remedy in similar circumstances it will need to show that it took reasonable steps to bring the relevant Claim Form or other notice to the attention of the counterparty. Technical compliance, scrupulous or otherwise is unlikely to be sufficient.

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[1] [2020] EWHC 166 (QB