Validating service retrospectively under the CPR – no special rules for litigants in person

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The *Barton v Wright Hassall* decision

1. When a party attempts to effect service of a claim form by a method that is not permitted by the Civil Procedure Rules, his otherwise invalid service can be rescued retrospectively under **CPR r.6.15** by the court permitting service to be effected by that alternative method.

2. The Court will only do so '*if it appears to the court that there is good reason*': **r. 6.15(1)**. No special rules apply to litigants in person when considering that question: Barton v. Wright Hassall LLP [2018] UKSC 12, at [18], [42].

3PB's Analysis

3. **The facts.** The Claimant (**"C"**), acting in person, had purported to effect service by email on the day before expiry of the claim form. That was an impermissible method because the Defendant (**"D"**) had not indicated in advance that it was willing to accept service by electronic means (**CPR r.6.3(1)(d); PD6A, para. 4.1**). Mr Barton received an 'out of office' reply.

4. Some 2 weeks later D responded, and objected to that method of service. By then the claim form had lapsed, and any new claim form would have been limitation-barred. Mr Barton applied for retrospective permission to serve by that alternative method.

5. **The judgments.** The majority of the Justices, agreeing with Lord Sumption, dismissed the appeal (therefore refusing permission). A minority of two (in a judgment given by Lord Briggs) would have allowed the appeal.

6. The two judgments had considerable common ground:

   6.1. The question under **CPR r.6.15** is whether there is good reason *to validate* the method of service used, not whether there was good reason for C *to use* that method (at [9(3)], [27]).

   6.2. What constitutes 'good reason' is essentially a matter of factual evaluation, requiring a consideration of all the circumstances. Previous authority is of limited value (at [9], [27], [32]).

   6.3. The rule presupposes that C has taken some step that is irregular and, therefore, that the power might be exercised to validate service and thereby override a limitation defence (at [9(4)], [27]).

   6.4. It is *necessary* to show that the method of service brought the claim form to the recipient's attention. But that is not *sufficient*; the method of notification must at least also make clear that it was *by way of service* (at [16],[28]).[1]

   6.5. No special rules or policy considerations apply where service is effected by a litigant in person (at [18], [42]).

   6.6. C does not *have* to demonstrate that it was impossible to effect service by an authorised method. But the reasons why he did not use a valid method will be relevant to the overall assessment of the circumstances (at [21], [35]).

7. **The majority reasoning.** Although the rule creates a discretion, that adds nothing to the 'good reason' test. If the Court were satisfied that there was 'good reason' it would be irrational not to grant permission (at [12]).

[1] Applying a dictum of Lord Clarke in Abela v Baadarani [2013] 1 WLR 204.

8. The difference in approach arose in the evaluation of all the circumstances. For Lord Sumption, the main factors that would *usually* need to be considered are:

   8.1. whether C has taken reasonable steps to effect service in accordance with the rules;

   8.2. whether D or his solicitor were aware of the contents of the claim form before it expired; and

   8.3. whether D would suffer any prejudice if service were retrospectively validated (at [10]).

9. The lower courts had been entitled to refuse permission. On the facts, Mr Barton had courted disaster by serving at the last minute, and to extend time would cause prejudice to D who would be "*retrospectively deprived of an accrued limitation defence*". There had been no sharp practice on the part of D (see [22]-[23]).

10. **The minority.** Lord Briggs disagreed that the potential deprivation of a limitation defence was significant. Since D had received notice of the claim form, to take that into account would provide a windfall for D (at [40]).

11. Instead, Lord Briggs identified three central features of service. If the following were answered positively, in most cases that would provide good reason to validate service, absent some other countervailing factor:

   11.1. does the purported service '*ensure that the contents of the claim form (or any other originating document) are brought to the attention of D?*'

   11.2. was that purported service clearly '*by way of service*' such that it '*engages the court's jurisdiction over the recipient*'? and

   11.3. did D have suitable administrative arrangements in place for monitoring and dealing with email service?

12. In Mr Barton's case all of those three purposes of service had been achieved. The Courts below had erred in principle in requiring something more, namely that Mr Barton prove that he had made sufficient effort to serve in accordance with the rules. All that was required was a weighing of all the circumstances to see whether C's culpability was sufficiently large to displace the *prima facie* case to validate service (at [32], [38]).

Impact of the Decision

13. Lord Sumption's judgment sets no new legal proposition but emphasises the exceptional nature of retrospective validation of service. It is hard, however, to disagree with the minority's criticism of the significance placed on a lost limitation defence. It is the *issuing* of the claim that stops limitation, and if D is told during the period of validity that the claim form has been issued, retrospectively validating the claim form does not in any real sense deprive D of a defence. Indeed the validity of the claim form is a matter of procedure, and the CPR envisages that the claim form can be validated in those circumstances (see para. 6.3 above).

14. Lord Briggs did suggest a new framework, but that approach can be criticised for its uncertainty. The second limb tends to allow any party to bypass the rules if his initial, invalid service is given as 'by way of service.' The third limb gives limited weight to the CPR limitations on service by email. The overall balancing process that Lord Briggs' framework suggests, might tend to distort the burden on C of proving adequate service.

15. Two final points are noteworthy.

   15.1. Lord Sumption observed that the assessment under CPR r.6.15 does *not* have the same disciplinary factor that exists in applications for relief from sanction. That suggests that applications under CPR r.6.15 should not be determined by reference to the stringent criteria for relief from sanction (at [8]).

   15.2. Secondly, the merits might be different where one party has been involved in sharp practice. Nevertheless, the decision reaffirms that a litigant generally

has no duty to alert his opponent that his method of service was ineffective (at [22]). A solicitor who believes that service on his client was defective cannot properly advise his opponent of that without taking instructions, and "*it is hardly conceivable that in those circumstances the client would have authorised [the solicitor to alert his opponent]*".

16. This is unlikely to be the last appeal of this kind to reach the Supreme Court. Either a reformulated Briggs test is required or a change to the rules by the rules committee.

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