At your service

Paul Lowenstein QC & Andrew Dinsmore outline recent developments in the law on service

IN BRIEF

▶ A consideration of recent cases relating to personal service which suggest that, while they demonstrate the court's willingness to adapt the rules incrementally to new situations, it is time for the Law Commission to undertake a wholescale review of the rules on service in the modern, digital age.

Under English law, proceedings are commenced by the service of the claim form (*Russell v Cayzer*, [1916] 2 AC 298, 302-303, [1916-17] All ER Rep 630). This can be by way of:

- Personal service within the jurisdiction in accordance with CPR r 6.3 & 6.5;
- Service out of the jurisdiction in accordance with CPR r 6.36 & 6.37 and the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 (the Hague Convention) and EU Regulation 1393/2007 (the EU Service Regulation); and/or
- Service by alternative means in accordance with CPR r 6.15.

Where the claim form is being served within the jurisdiction, the claimant has four months in which to serve it before it expires (CPR r 7.5(1)). Where they seek to serve out, they have six months (CPR r 7.5(2)).

Service by alternative means in multi-defendant litigation

Evison v Finvision [2020] EWHC 239 (Comm) concerned service of contempt proceedings on two Russian nationals out of the jurisdiction by alternative means. The first defendant was bound by an English anti-suit injunction yet continued proceedings in Russia. The second and third defendants were said to be the owner/controller of the first and thus said to have caused it to breach the anti-suit injunction. Contempt proceedings were brought against all of the defendants in the English court. The second and third defendants sought to set aside the court's ex parte order that there could be service by alternative means on the basis that, inter alia, the claimant had failed to inform the court of the English law test that 'exceptional circumstances' were required to allow service by alternative means where Russia was a signatory to the Hague Convention but had made a reservation under Art 10 (para [43]).

The court held that the claimant had not only failed to identify the relevant test in its application but also failed to identify matters which showed that the relevant test was satisfied (para [45]). The court noted that the consequences of non-disclosure are discretionary and held that one of the key considerations in allowing service was that the contempt hearing was due to proceed shortly. It was thus desirable that all of the defendants be heard together to reduce costs and avoid inconsistent findings, which would not be possible without an order for service by alternative means.

This is an interesting judgment because the court effectively held—following *Marashen Limited v Kenvett Limited* [2017] EWHC 1706 (Ch) (para [57]), [2017] All ER (D) 107 (Jul) per David Foxton QC, as he then was, and *Avonwick Holdings Limited v Azito Holdings Limited and others* [2019] EWHC 1254 (Comm) (para [33]) per Mrs Justice Moulder—that the rules on service could be disapplied because of 'litigation prejudice' that might otherwise affect the trial timetable that it had already set. The court was thus pulling itself up by its own bootstraps since if service had been properly effected in the first place, the trial timetable would not—indeed could not—have been set; and so could not have been the obstacle it was.

Digital service

In *CMOC Sales & Marketing Limited v Persons Unknown* [2018] EWHC 2230 (Comm), [2018] All ER (D) 20 (Nov) the English court ordered a worldwide freezing injunction and expanded its approach to service by electronic means pursuant to CPR r 6.15.

CPR r 6.3(1)(d) and 6APD provide for service by fax, email and other electronic means where the party, or their solicitor, receiving the documents consents to receiving them in that form.

CPR r 6.15 is concerned with service by an alternative method where there is no such consent. While the courts have previously ordered service by alternative means through Facebook and Facebook Messenger, the court in *CMOC* took the unprecedented step of ordering alternative service via: (a) WhatsApp messenger; and (b) by access to a secure online data room, where defendants were served via previously court-approved methods (eg email or hard copy) with a link to the data room and (by a separate communication) an access code (paras [191-193]). This is a welcome decision in the digital age in three key respects:

- First, it is common in international fraud cases that the only contact details—and so service channels—a claimant has for the defendant is a social media account or a telephone number. It is important that the court facilitate service on those defendants by such limited means as may be available.
- Second, where one is dealing with substantial numbers of defendants it can rapidly become very expensive, impractical or even impossible to serve every document through traditional methods with no obvious advantage to doing so. It is thus welcome that the court is willing to consider alternatives to ensure that litigation proceeds proportionately and this is the position that has now been adopted in Hong Kong (see *Hwang Joon Sang and others v Golden Electronics and others* [2020] HKCFI 1084, [2020] 5 HKC 72)—a jurisdiction where only last week service on potential demonstrators has now been permitted by the use of a QR code on publicly available or posted documents, linking the user of the QR code to the court documents on a website (see *Airport Authority v Persons Unlawfully and Willfully Obstructing or Interfering with the Proper Use of the Hong Kong International Airport* [2020] HKCFI 2734 at paras [13]-[19]).
- Third, one of the main advantages of WhatsApp and—depending on the nature of the permission granted—service by access to an online data room is that, in most cases, the platform and/or the message providing the link and password to the data room inform the sender when the service message has been received and read. While the claimants in *CMOC* gave an undertaking that they would not monitor access to the data room by the served parties after they had been served

with the access link and password, it may nevertheless be useful to have this capacity should the court require this information in due course.

Personal service in the context of close protection

Gorbachev v Guriev [2019] EWHC 2684 (Comm) reconsidered the rules on personal service where the claimant's agent seeks to physically serve the claim form and accompanying documents on a defendant. In this case, the process server was prevented from directly reaching the defendant, who was in a public place in London, by his close protection team. As a result, the process server could only leave the documents beside the defendant's car before the defendant was driven off in it.

The most interesting aspect of the judgment is the court's conclusion that there was a plausible evidential basis that the papers were left sufficiently near to the defendant to be in his possession (paras [60-68]). The court held that part of the purpose of his close protection personnel was to prevent personal service (para [61]) and that the video footage made clear that they were acting in a concerted way to protect against physical contact (para [62-63]). The court concluded that the process server left the papers as near to the defendant as was reasonably practicable at the time he let go of them, but the argument as to whether that would be sufficient to allow a finding of personal service if the documents were not dropped in the eyesight of the person to be served was left for another day (para [66]).

This is a welcome relaxation of the strict rules in relation to service in the modern world of close protection. It is also informative in the COVID-19 context because it may provide a foundation for further relaxation of the requirement to leave documents in the defendant's possession where it is not safe to be within their close proximity.

Anonymisation of the claim form

A further problem in the digital age is that defendants can easily check the court register and, if a claim form has been issued but not served, they can require the claimant to serve the claim form within 14 days pursuant to CPR r 7.7.

This is problematic where the claimant has been forced to issue the claim form to protect its position on limitation (owing, for example, to concealment of the fraud by the defendants) but requires further time to pursue pre-action relief in relation to a number of the defendants: if forced to serve before the end of the four months by one of the defendants, the claimant's ability to obtain or to ensure effective important pre-action relief against other defendants (eg a freezing injunction or *Norwich Pharmacal* relief) could be lost. In this regard, the court in *Public Institution for Social Security v Amouzegar* [2020] EWHC 1220 (Comm), (paras [125-138]) held that one of the reasons it was willing to extend time for service of a claim form was the utility of serving all defendants at the same time.

As a result, claimants often have to make an application for anonymisation of the claim form pursuant to s 11 of the Contempt of Court Act 1981, s 6 of the Human Rights Act 1998 and CPR r 5A-5D, 16.2 and 39.2(4); recent cases include *CWD v Nevitt* [2020] EWHC 1289 (QB) and *AAA v Rakoff* [2019] EWHC 2525 (QB), [2019] All ER (D) 01 (Oct). Such early *ex parte* applications (a) will often require a hearing (b) can be expensive (c) require the claimant to file substantial evidence to comply with its duties of full and frank disclosure and (d) run the substantial risk that if unsuccessful the claimant—unless the court orders otherwise—will be required to inform the defendant in accordance with the requirements of CPR 23.9.

The commentary in the CPR states at r 7.7.1 that, 'The usefulness of the provision can be questioned… The provision was more useful in the days when writs were valid for 12 months and readily extended for further periods' yet *AAA v Rakoff* [2019] EWHC 2525 (QB), [2019] All ER (D) 01 (Oct) indicates that a clear justification is required to anonymise the claimants. In that case, anonymisation of the claimants from official court documents was requested but not restrictions on reporting the proceedings such that the identity of the claimants would become known in any event. The court noted (para [41]) that: 'Either there is a justification for withholding the Claimants' names from the public in these proceedings or there is not. If there is not, the Court should not artificially place obstacles in the way of reporting of the case by adopting measures that simply make it more difficult for the media to report information upon which the Court has placed no restriction.'

In our view, a clear justification in fraud cases is that the claimants will be unjustifiably rushed seeking and/or ensuring the effectiveness of pre-action relief in, often complex and international, claims where there is a limitation issue because their discovery of the fraud has been hampered due to concealment by the defendants.

In our view, again, this is an area where further flexibility is required. A better approach would be an amendment to rules governing service of the claim form and associated documents so as to allow a claimant to tick a box to automatically ensure anonymisation—including, importantly, on the court CE-File system—until service of the claim form, at least for the initial four or six month period of validity. The net result would be that claimants are permitted the full four or six months to which they are otherwise entitled without the threat of an application under CPR r 7.7.

As noted above, the commentary in the CPR makes clear that the initial justification for the rule was that writs would be valid for 12 months and regularly extended. As a result, defendants could have an action hanging over their head for a substantial period of time and one can see a justification for requiring the claimant to decide whether it is progressing with its claim or not. It is for this reason that we propose that the anonymisation only persists during the initial period of validity and that any further anonymisation would have to be justified in an application along with the application to extend the period of validity of the claim form.

It is time to review the rules on service

Taken together, these cases showcase the court's willingness to innovate to ensure that service of proceedings is conducted fairly and proportionately. While one of the great advantages of the common law is its ability to incrementally develop, we suggest that service is an area that would benefit from a wholescale review of the traditional rules by the Law Commission. This is especially so given that the transition period for the UK's exit from the EU is fast-approaching, at which time the UK will have to consider its treaty obligations in relation to service. As a starting point, we would suggest that updates could include:

- Clearer rules allowing ordinary service by social media/messenger accounts and by affording access to online data rooms as accepted methods of service within CPR r 6.3 and 6.5, such that expensive applications for alternative service are avoided.
- An update to the rules on what constitutes effective personal service in the close protection era and during the COVID-19 pandemic.
- The rules governing service of the claim form be updated to allow anonymisation up to the end of the period of initial validity, ie four or six months depending on whether within or without the jurisdiction. Any extension of that anonymisation would have to be justified in an application along with the application to extend the validity of the claim form. **NLJ**

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