Falling down at “the most basic step” – do not rely on the Court (or the other side) to save you from your errors!

Claim struck out as the Court maintains its strict approach to defective service of Claim Forms

In the recent decision in Higgins & Others [2017] EWHC 2190 (Ch), it was shown once again that, despite increased leniency for errors of civil procedure during the course of proceedings, the Courts will still take a strict approach to the defective service of Claim Forms at the commencement of proceedings. In this case, the Court struck out the Claimants’ claim for what it called the Claimants’ solicitors failing to take “the most basic step required in civil litigation”.

Beale & Company acted for the successful First Defendant and the full judgement is available [here].

Background

The Claimants intimated a claim against their former accountants and tax advisors for alleged negligence and other breaches of duty relating to a tax mitigation scheme.

The Claimants issued a Claim Form against both Defendants on 19 May 2016. On 20 July 2016, TLT LLP, the Claimants’ solicitors, sent letters to both Defendants’ solicitors, stating: “For reasons of limitation, we issued proceedings against your client and [the other Defendant] on 19 May 2016, as a protective measure. For the avoidance of any doubt on your client’s part, we enclose a copy of the issued Claim Form”. An un-sealed copy of the Claim Form was enclosed.
Subsequent to this, a series of Consent Orders were subsequently agreed between the parties, ultimately extending time for service of the Claim Form to 19 March 2017.

On 17 March 2017, the Claimants’ solicitors served the Particulars of Claim (but not the Claim Form) via email and post on both Defendants’ solicitors. On 31 March 2017, following the 19 March deadline, the Claimant’s solicitors sought to effect service again, this time including the Claim Form.

Both Defendants made applications asserting that the Claim Form had not been validly served within the permitted time and should be struck out.

**Decision**

The Claimants contested the application on a wide range of grounds, including:

- The Claim Form was validly served under cover of the letter of 20 July 2016.
- If not, the Claimants should be relieved from sanctions under CPR 3.9.
- The Court should permit alternative service of the Claim Form or dispense with service, under CPR 6.15 or 6.16.
- Time for service of the Claim Form should be retrospectively extended, under CPR 7.6

In a damning judgement for the Claimants, the Court found in the Defendants’ favour on all points, holding:

- The Claim Form was not validly served on 20 July 2016. Judging the correspondence objectively, the Claim Form was sent by the Claimants’ solicitors for information purposes only and not by way of service, consistent with the subsequently agreed Consent Orders to extend the time for service.
- The failure to serve was the result of negligent or incompetent error by the Claimants’ solicitors and the Defendants’ solicitors were under no obligation to point out apparent errors by the Claimants’ solicitors.
- The Claimants’ breaches were not “trivial” and the Claimants’ solicitors failed to take the most basic step in civil litigation.
There was therefore no “good reason” or “exceptional circumstances” to grant relief and to permit alternative service or dispense with service as required under CPR 6.15 and 6.16.

The Claimants had not taken all reasonable steps to serve the Claim Form within time to permit a retrospective extension of time for service, as is required under CPR 7.6.

Accordingly, the Court struck out the Claimants’ claim and costs of the action were ordered to the Defendants. Although the Judge said that it was not a point for him to decide, he said that he was satisfied that the Defendants will now have a realistically arguable limitation defence if a new Claim Form is served.

Conclusion

Since the seminal case of Mitchell v News Group Newspapers Ltd (2013), which set a high bar for parties obtaining relief for sanctions for non-compliance with Orders and the rules of civil procedure, there has been a rowing back from this strict approach by the Courts against non-compliance by parties in various situations during the course of proceedings, such as cases where relief from sanctions are given for costs budgets not filed in time or witness statements served late.

However, whilst there has been leniency granted since Mitchell for such non-compliance during the course of proceedings, the judgement in Higgins shows that the Courts still take a strict approach to compliance with the rules for commencing proceedings in respect of valid service of Claim Forms, and will not hesitate to strike out a claim if the rules are not complied with, particularly where the reason for such failure is the solicitor’s negligence. At least part of the reason for this strict approach is that, otherwise, defendants may be prejudiced as regards the issue of limitation. Once proceedings are served properly, the Court can be more forgiving of procedural errors.

Defendants should therefore carefully check that all requirements have been complied with…

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