Litigants in Person – not exempt from the strict rules on service

The Supreme Court handed down its judgment today on whether litigants in person can be excused from strict compliance with the rules on service. Those who have the pleasure in defending claims by litigants in person can breathe a sigh of relief as the answer is no, albeit only on a majority of 3:2.

Recap of Service Rules

The Claim Form must be served before 12.00 midnight on the calendar day four months after the date of issue of the claim form and be effected by one of the prescribed methods in CPR 7.5. Practice Direction 6A.4.1 states that a Claim Form can only be served by email where the Defendant or their solicitor has consented to this in writing and a statement to this effect on headed notepaper will be sufficient. However, a Claim Form can be served by fax where the recipients headed notepaper simply includes a fax number and no specific statement on service.

Under CPR 6.15 the Court has discretion to validate defective service, the extent of which has been considered once before by the Supreme Court in Abela v Baadarani 2013. In Abela the Claimant had issued proceedings against a Lebanese national and obtained permission to serve proceedings outside the jurisdiction. The Claimant was unable to effect service on the Defendant at his home in Lebanon due to the Defendant's uncooperative attitude (failing to provide his correct home address). Service was instead effected at the office of his Lebanese lawyer. The Supreme Court held that
these steps amounted to good service and made it clear that tactical game playing by one party would count against them.

The facts

In Barton, the Claimant, a Litigant in Person, issued his Claim Form for a professional negligence claim against Wright Hassall LLP on 25 February 2013. Time for service therefore expired on midnight 25 June 2013. On 26 March 2013 the Defendant's solicitors emailed the Claimant to inform him they had been instructed and asked that all correspondence be addressed to them. In this email the Defendant's solicitors also noted that any request for an extension of time for service would be refused. On 17 April 2013 the Defendant's solicitors sent an email saying they awaited service of the Claim Form and Particulars. All communications with the Claimant were therefore only by email.

On 24 June 2013 at 10.50am the Claimant sent an email to a Partner and an assisting solicitor at the Defendant's solicitors serving his Claim Form and Particulars of Claim. The Claimant received an automatic out of office reply from the Partner but not the assisting solicitor. The Claimant sent a further email on 24 June 2013 at 17.22 attaching an omitted document from the Particulars of Claim. No response was received from the Defendant’s solicitors until 4 July 2013 (by which time limitation had expired) when they emailed the Claimant to inform him that they had not consented to service by email and accordingly the Claim Form had expired unserved and his claim was now statute-barred.

The Claimant issued an application to validate his attempted service under CPR 6.15. The District Judge declined to grant such an order. The Court of Appeal upheld the District Judge’s decision and refused to validate service. The Court of Appeal stated that the fact that the Claim Form was brought to the Defendant’s attention is a factor but it is not in itself sufficient to validate defective service. Consideration must also be given to whether there was any reason why the Claimant was not able to serve the Claim Form such that there is “good reason” for the Court to exercise its discretion under CPR 6.15. The Court of Appeal accepted that the Claim Form had been brought to the Defendant’s attention but concluded that the Claimant had simply “failed to take advantage of the generous time period allowed for service, when no obstacles stood in his way”. The Claimant’s status as a Litigant in Person would not exempt him from the rules as they were straightforward and easy to find. The Court also rejected the suggestion that the Defendant’s solicitors
failure to respond to the Claimant’s email of 24 June in time for him to effect personal service before the deadline of 25 June amounted to technical game playing as per *Abela*. The Court of Appeal held the Defendant’s had not done anything to encourage the Claimant to believe he had effected good service and the Supreme Court agreed with that.

**Supreme Court**

The Claimant’s appeal to the Supreme Court was dismissed, albeit surprisingly only by a majority of three to two. In the Leading Judgment from Lord Sumption, the Supreme Court listed the relevant factors in deciding if there is “good reason” for the Court to exercise their discretion and these include whether the Claimant took reasonable steps to serve, whether the contents of the Claim Form had been brought to the Defendant’s attention (a necessary condition for an Order under CPR 6.15 but not sufficient in itself) and any prejudice the Defendant may suffer from validating defective service. However these factors are neither exhaustive nor decisive in themselves.

Here, several factors went against the Claimant: he had issued his Claim Form at the very end of the limitation period and then left it to the end of the period of validity to serve; he had made no attempt to serve by any of the other permitted methods; validation of service would prejudice the Defendant’s limitation defence; the Claimant was an experienced Litigant in Person.

The Supreme Court allowed no indulgences for the Claimant’s Litigant in Person status in circumstances where the relevant rules (CPR 6.3) are not “inaccessible or obscure”. “Bright line” rules on service are necessary in order to determine when time starts running for the taking of further procedural steps and because they have implications on limitation.

The Claimant’s argument that the Court of Appeal’s ruling is incompatible with his right to a fair trial under Article 6 of the ECHR was also rejected on the basis that the relevant rules are clear and sufficiently accessible. *Abela*, said the Supreme Court, was factually very different to Barton due to the Defendant’s uncooperative stance.

In the dissenting judgment, Lord Briggs, whilst agreeing that there should not be special rules for litigants in person, felt the rules were there to ensure the Claim Form came to the attention of the Defendant which it did in this case. Whilst the rules are there to allow solicitors to put steps in place to monitor
emails he felt this is becoming more obsolete with the use of email as a method of communication, particularly where most Courts now insist on online filing.

**Conclusion**

This is good news for Defendants facing claims by Litigants in Person. Having a different set of rules for litigants in person would have been most concerning when the defence of claims by litigants in person is already time consuming, expensive and difficult. However, the factual matrix in this case featured heavily in the ultimate decision which only went the right way by the narrowest of margins. A different set of facts might have resulted in a decision the other way. If you are going to communicate with the litigant in person by email it would be prudent to make it clear in the email communications that service by email will not be acceptable. Whilst it is not a requirement under the rules, it takes the matter beyond doubt and that would have prevented the case getting to the Supreme Court in our view. It remains to be seen however whether the dissenting judgment may now result in a change to the CPR procedural rules. We would not be surprised if we face a rule change where the onus is put on the Defendant to positively say they will not accept service by email. However, the overwhelming majority confirming there should be no different rules for litigants in person is certainly good news and that is here to stay.

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