Does a solicitor need to point out their opponent’s mistakes?

Court considers whether a defendant can take advantage of a claimant’s error.

In a surprising judgment in *Woodward v Phoenix Healthcare* earlier this year, Master Bowles concluded that the “overriding objective” in the CPR required a solicitor to tell their opponent of their error in defectively serving proceedings to enable the Claimant to re-serve in time. Two days before the 4-month expiry of the Claim Form, the Claimant’s solicitors had attempted to serve proceedings on the Defendant’s solicitors, who had not confirmed they were authorised to accept service. The Defendant’s solicitors only informed the Claimant’s solicitors of this after the 4-month time period had expired and, crucially, after limitation had also expired.

The Master held that the Defendant’s solicitors had played “technical games” in breach of the CPR overriding objective. The Master therefore found there was “good reason” under CPR 6.15 to retrospectively validate service.

The decision was surprising against a series of prior decisions which suggested solicitors did not need to point out their opponent’s mistakes. Last year the High Court found there was no such obligation and the Defendant’s solicitors would be failing in their duty to their clients if they “failed to take all steps legitimately available to them to enhance their client’s chances of succeeding in such a defence” in *Higgins v ERC Accountants & Business Advisers Ltd* [2017] EWHC 2190 (Ch) - a case in Beale & Company acted for the successful Defendant striking out the claim, see our article [here](#).

Since then, the Supreme Court in *Barton v Wright Hassall LLP* [2018] UKSC12 also found that the Defendant’s solicitor had no duty to advise a litigant in person of his mistake in service. The Master in *Woodward v Phoenix Healthcare* had in fact added an Addendum to his judgment seeking to distinguish the case from *Barton* on the grounds that a breach of the overriding duty had not been raised in the Supreme Court.

So, in light of the overriding duty, does a solicitor have a duty to point out their opponent’s mistakes?
The answer now appears to be, generally, no. In his decision last week on the appeal in *Woodward v Phoenix*, HHJ Hodge QC overturned the Master’s decision. The Judge found that the overriding objective did *not* require a solicitor, who did not contribute to their opponent’s mistake, to draw their opponent’s attention to that mistake. That did not amount to playing technical games and the Claimant’s claim was therefore struck out.

The decision suggests that a solicitor does need to point out mistakes or misunderstandings that they have, perhaps inadvertently, contributed to. However, if an opponent makes a mistake alone, the decision provides strong support for the position that a defendant can effectively “keep quiet” about an opponent’s error until limitation or any other time period has expired in order to take full advantage.

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“For further information please contact:

Andrew Jones
Solicitor
T: +44 (0) 20 7469 0420
E: ag.jones@beale-law.com”