The Court of Appeal in Woodward & Anor v Phoenix Healthcare Distribution Ltd [2019] EWCA Civ 985 has upheld the High Court appeal judge’s decision that a party does not have duty to point out their opponent’s mistakes in litigation.

Napoleon Bonaparte once said “Never interrupt your enemy when he is making a mistake”. Parties in litigation can now take further comfort that they do not need to highlight their opponent’s errors, provided they did not contribute to them.

Background

Woodward v Phoenix Healthcare involved a £5m contractual dispute relating to a patent of a drug. The contract was entered into on 20 June 2011, meaning that limitation would expire on 20 June 2017. The Claimants issued a Claim Form on 19 June 2017, a day before limitation expired. The Claim Form would therefore expire four months later on 19 October 2017; the Claimants’ solicitors attempted to serve this Claim Form on the Defendant’s solicitors just two days before expiry, on 17 October 2017. The problem, however, was that the Defendant’s solicitors had not confirmed they were authorised to accept service. It was accepted that this was not valid service. The Defendant’s solicitors did not inform the Claimant’s solicitors of this problem and the Claim Form therefore expired without valid service a couple of days later. Given that limitation had also now expired, this potentially afforded the Defendant a complete defence to the claim.

The surprising first instance decision

The Claimants attempted to get around this by three different arguments: (i) Service was good because the Defendant’s solicitors’ correspondence amounted to notification they would accept service, (ii) The Defendant was estopped from denying good service, and/or (iii) Service should be retrospectively validated under CPR 6.15 because there was a “good reason” for doing so.

The Master found on the facts that there was nothing that amounted to notification the Defendant’s would accept service nor grounds for estoppel. However, the Master decided to retrospectively validate the defective service under CPR 6.15. He did so on the grounds that the Defendant’s failure to inform the Claimants of their mistake amounted to “technical game playing” and a breach of the parties’ Overriding Objective under the CPR of enabling the Court to deal with cases justly and at proportionate cost.

The decision was surprising against a series of recent decisions which suggested parties did not need to point out their opponent’s mistakes, such as Higgins v ERC Accountants & Business Advisers Ltd [2017] EWHC 2190 (Ch) - a case in Beale & Co acted for the successful defendant striking out the claim, see our article here.

It was all the more surprising given that, between the Master settling his draft judgment and handing it down, the Supreme Court in Barton v Wright Hassall LLP [2018] UKSC 12 held that a defendant, in very similar circumstances, had no duty to advise a the claimant (and, even when a litigant in person, unlike in Woodward) of his mistake in service. The Master in Woodward added an Addendum to his judgment seeking to distinguish the case from Barton on the grounds that the “Overriding Objective” argument had not been raised in the Supreme Court in Barton.

High Court overturns the Master on appeal

The Defendant appealed the Master’s decision and, last year, the High Court judge overturned the retrospective validation of service and struck out the case. Our previous article on this is here.

The Judge found that the Overriding Objective under the CPR did not mean there is a duty to point out the other side's
Court of Appeal confirms a party has no duty to point out their opponent’s mistakes

mistrusts, and did not amount to “technical game playing”, unless there is a genuine misunderstanding between the parties regarding a significant matter to which that party had contributed. The Claimant appealed.

Appeal to the Court of Appeal

In a unanimous judgment, the Court of Appeal upheld the Judge’s decision. The Court found that Barton was “all but indistinguishable” from the case and that, whilst the “Overriding Objective” argument was not explicity addressed in Barton, it was inconceivable that the Court would have come to the decision it did if they considered the defendant had acted in breach of the Overriding Objective.

The Court of Appeal also re-emphasised that a defendant losing a potential limitation defence is relevant to the question of whether to grant retrospective validation of defective service, which the Master had ignored, and again repeated the oft-made warning that claimants “court disaster” if they leave service to the last moment.

Implications for insurers and their insureds

The Court of Appeal decision reaffirms the Court’s strict approach to service of proceedings and the wider point that a party does not need to alert their opponent to mistakes they make in litigation.

The proviso to this, as mentioned, is that the party do not contribute to some misunderstanding with their opponent. A case where the opponent did succeed in establishing this is OOO Abbott v Econowall UK Ltd [2016] EWHC 660 (IPEC).

In that case, the Claim Form was due for service on 3 November and the claimant’s solicitor requested an extension of time of one month (therefore until 3 December). On 15 October, the defendant’s solicitor agreed to an extension of time of one month “from now” (therefore until 15 November). The claimant’s solicitor misread this as agreeing his original request of an extension of time until 3 December, replied to thank him for agreeing an extension of time of “one month”, and then served the Claim Form out of time on 25 November. The Court held that the claimant’s solicitor’s reply revealed he was labouring under a misunderstanding and, indeed, the defendant’s solicitor acknowledged he had a suspicion of this but it was decided to do nothing. The High Court found that the Overriding Objective required parties to take reasonable steps to ensure there is a clear common understanding between them as to the identity of issues in the litigation and related matters such as procedural arrangements. Therefore, a party should take reasonable steps to clear up any genuine misunderstandings that have arisen between the parties regarding a significant matter, and the Court granted retrospective validation of the late service.

A similar set of facts might therefore lead to a Court still granting relief to a claimant who makes an error in service. One could say there was more “involvement” by the defendant’s solicitor leading to the error in OOO Abbott compared to Woodward, Barton and Higgins detailed above. Nonetheless, the Court of Appeal in Woodward even cast doubt on whether a similar outcome would arise now, saying it did not agree that OOO Abbott was a case where the defendant “contributed to a misunderstanding” and on a “fair reading” of the facts the claimant’s solicitor had simply misread the defendant’s offer of an extension of time. The Court of Appeal nonetheless said OOO Abbott could be distinguished from Woodward on the grounds that there was no potential limitation defence in OOO Abbott. Accordingly, if there is a potential limitation defence, a defendant may even succeed in striking out a claim in similar circumstances.

In conclusion, insurers and their insureds should therefore carefully check service of proceedings or any other documents, given that this is still fertile ground for striking out what may appear otherwise valid claims on what can appear technical grounds.

Insurers and their insureds should be careful not to file any “Acknowledgement of Service” form indicating an intention to defend a claim before being satisfied that there is no such service defence, however, as this can lead to the insured being deemed to have accepted service. Instead, an intention to contest jurisdiction should be indicated whilst the position is investigated.

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