@risk
March 2006

Andrew Nickels
Zurich Professional

Welcome
The Court of Appeal has long emphasised that the rules on service of the claim form are strict. Yet despite the plethora of judicial pronouncements, some solicitors still fail to get to grips with Part 6 of the Civil Procedure Rules and hope that the courts will bail them out when things go wrong. Almost all are disappointed and many then find themselves on the end of a professional negligence claim. Knowing the rules and acting promptly are the keys to avoiding a similar fate!

ZURICH

Service of the claim form – the saga continues…

The Court of Appeal has recently added to the long line of authorities which deal with service of the claim form. All litigators should be heeding the Court's advice. To help you do so we outline some of the major issues below.

Collier v Williams [2006] EWCA Civ 20 and related appeals

This was a judgment on four appeals which addressed issues on CPR Part 6 relating to service and Part 7.6 relating to extending the time for service of the claim form.

Service where nominated solicitors have not themselves notified the serving claimant/solicitor that they are authorised to accept service

In **Collier** the Court of Appeal resolved the uncertainty over service on solicitors under CPR 6.5(4) (i.e. by first class post, leaving at the place of service, DX, or fax or other electronic means). In this case, the claim form was served on solicitors nominated by the defendant's insurer. The insurer argued that because the nominated solicitors did not themselves notify the serving solicitors that they were authorised to accept service, the service was invalid. The Court rejected this argument, holding that no such notification is required by the CPR.

Lower court rulings such as **Knight** v **Alberto-Culver Company Limited** had given rise to some confusion. In that case it was held that even if a defendant nominates his solicitor to accept service, service cannot be validly effected on that solicitor unless he has notified the serving party that he is so authorised. This conclusion had been reached by applying the personal service provision in CPR 6.4(2) (which refers to the nominated solicitor notifying the serving party that they are authorised to accept service) to CPR 6.5. However, in **Collier** Dyson LJ, giving judgment for the court, rejected this reasoning, stating that CPR 6.4 and 6.5 deal with *"fundamentally different methods of service"* and that *"neither rule refers to the other"*.

Practice points

When serving under 6.5(4), if the defendant provides you with his solicitor's address as the address for service, service at that address will be valid even if the solicitor has not notified you that he is authorised to accept service. Indeed, following **Nanglegan v Royal Free Hampstead HNS Trust** [2001] EWCA Civ 127, you **must** serve at that address. Service on the defendant at any other address will be invalid.

Under CPR 6.4(2), even where a defendant has given his solicitor's address as the address for service, you can still effect personal service on the defendant, unless you have received notice from the nominated solicitor stating that he is authorised to accept service.

No solicitor 'acting' for the party to be served

One of the closely related issues in **Marshall and Rankine** v **Maggs** was the meaning of CPR Parts 6.5(6) (a) and (b) which provide that "where no solicitor is acting for the party to be served and the party has not given an address for service, the document must be sent or transmitted to, or left at, the place" shown in the table in Part 6.5(6), e.g. usual or last known residence or place of business, etc.

The Court rejected an argument that these provisions mean that if any solicitor is acting for the defendant, service has to be effected on that solicitor. It was held that "no solicitor acting" means *"no solicitor acting so that he can be served"*.

Practice points

Where a defendant has a solicitor acting for him, unless the defendant or his solicitor informs you that the solicitor is authorised to accept service, you can still serve the defendant using the methods in the CPR 6.5(6) table.

Don't assume that just because a defendant has a solicitor acting, that solicitor is authorised to accept service. Only serve the solicitor if told by the defendant or the solicitor that the solicitor is authorised.

The meaning of "usual or last known residence"

In **Marshall** there was no solicitor authorised to accept service, so it was open to the claimants to serve the claim form on the defendant using one of the methods provided in the CPR 6.5(6) table. The second ground of appeal related to the meaning of "last known residence" in that table.

The problem for the claimants was that the evidence showed that the defendant had never actually lived at the residence at which the claimants' solicitor served the claim form. Perhaps unsurprisingly, the Court could not see how the phrase "last known residence" could be *"extended to an address at which the individual to be served has never resided"*. It was not reasonable for the claimants to have formed a belief that the defendant resided at a particular residential address just because he had attended a meeting there with the defendant, who had described it as his "new address". Dyson LJ stated that:

> *"it is incumbent on a claimant to take reasonable steps to ascertain a defendant's last known residence. What this involves must depend on the circumstances of the case. In many cases, the claimant will know the address for certain. Where the position is less clear, a direct request of the defendant, or his legal representatives (if they do not have instructions to accept service) may yield an answer. Other enquiries may have to be made."*

As the defendant was a director of a number of companies, one enquiry suggested was an online Companies House search.

Extending the time for service of the claim form

The **Marshall, Leeson** v **Marsden,** and **Glass** v **Surrendran** appeals all considered CPR 7.6(2) on extending the time for service of the claim form and whether, in exercising their discretion, the lower courts had correctly applied the guidance given in the earlier Court of Appeal decision of **Hashtroodi** v **Hancock** [2004] EWCA Civ 652 (see @risk June 2004). The starting point in each case was to determine and evaluate the reason why the claimant did not serve the claim form within the specified period.

Marshall

The claimants' solicitors did not start trying to effect service until 8 days before the expiry of the 4-month period for doing so. While concluding that it was not appropriate to extend the time for service of the claim form, Dyson LJ noted that if the solicitors *"had started the process earlier, they would have had time to take the necessary steps"* to establish the defendant's address.

Leeson

In this case the claimant's solicitor applied for an extension of time before the 4-month service period expired. She also attempted to serve claim forms on the two defendants but did not place these in the DX or post until the day before the service period was to expire. They were therefore deemed to have been served one day out of time. Also on the day before the expiry of the service deadline, the extension application was rejected. On a without notice application, the claimant's solicitor convinced a different district judge to extend the period for service. However, the Court of Appeal held that he should not have granted this further application on the basis that *"if a judge dismisses an application under CPR 3.3.(5), whether on paper or at a hearing, any further application under CPR 3.3(5) should usually be struck as an abuse of process, unless it is based on substantially different material than the earlier application"*. It was held that the same also applies to CPR 3.1(7), which *"cannot be used simply as an equivalent to an appeal against an order with which the applicant is dissatisfied"*.

In view of that conclusion the question of discretion under CPR 7.6(2) did not arise. However, the Court, aware of misunderstandings over the guidance in **Hashtroodi**, thought it helpful to express its view that **Leeson** was not a case where it would have been appropriate to extend the time for serving the claim form – there was no good reason for the claimant's solicitor not serving in time and her failure to do so was a *"serious error of judgment"*.

Glass

In this case the time limit for service of the claim form was due to expire on 3 January 2005. On 21 December 2004 the claimant's solicitors issued an application for an extension. The court assured them that the application would be dealt with promptly. This was not the case: the application wasn't dealt with until 4 January 2005, one day after the expiry of the period for service, and the application was refused. Then the litigation really began: first, the claimant's solicitors successfully applied for the refusal to be set aside and for an extension of time to be granted. Then the defendant got in on the act by applying for that decision to be reversed, but this was unsuccessful. A subsequent appeal against this decision also failed. However, the defendant didn't give up: he applied to the Court of Appeal where his appeal was granted.

In the earlier hearings, in the quest for an extension, the claimant had relied on matters such as an accountant's report not being available until 29 November 2004, the claimant's approval to the report not being obtained until 15 December, the particulars of claim drafted by counsel not being received until 23 December, and the fact that the defendant had admitted liability and suffered no prejudice. While these arguments swayed the lower courts, the Court of Appeal was unimpressed. Dyson LJ noted that although received later than the claimant's solicitors had hoped, the accountant's report was received more than a month before the expiry of the 4-month period for service, and that the particulars had been drafted by counsel two weeks before this. After expressing the view that the matters relied upon by the claimant would not even have justified an extension of time for service of the particulars of claim, let alone the claim form, Dyson LJ stated that:

> *"there was no basis upon which a competent litigation solicitor, had he thought about the matter properly, could have justified delaying service of the claim form beyond the date by which it should have been served pursuant to CPR 7.5(2)".*

Even the fact that the original court wrongly led the claimant's solicitors to believe that their extension application would be disposed of before the expiry of the 4-month service period did not elicit any sympathy from the Court of Appeal. Dyson LJ stated that:

> *"the claimant's solicitors were well aware at the time that they originally made the application for an extension of time that time for service of the claim form would expire on 3 January 2005, and that they could, at any time up to that date, have served the claim form. The fact that there was an outstanding application for an extension of time is, therefore, irrelevant… the fact that the court indicated that it would deal with the application promptly is also irrelevant".*

Practice points

Unforeseen problems over service of the claim form do arise. Don't leave service until it's too late to resolve these.

Don't place all your hope in an application for an extension of time. You will find it extremely difficult to persuade a court to grant you one.

If possible, always serve the claim form within the four-month period for doing so, even if you have an application for an extension of time outstanding.

Where you are the applicant and are dissatisfied with an order made, unless there is a material change in the circumstances or new evidence, you can't use CPR 3.1(7) or 3.3(5) to get the same level of judge to revisit the matter. The correct route is to appeal.

Kuenyehia and others v International Hospitals Group Ltd [2006] EWCA Civ 21

Service by fax

On the same day as **Collier**, the Court of Appeal handed down judgment in **Kuenyehia** which was an appeal by a defendant against an order to dispense with service of the claim form. Correspondence had been entered into between the claimants' solicitor and the defendant, much of it by fax. On the day before the last day for service, after having received no reply to their enquires as to whether the defendant's solicitors had instructions to accept service (which in fact they didn't), the claimants' solicitor sent a copy of the claim form to the defendant's solicitors by courier, and faxed a copy to the defendant's legal department at the fax number shown in the defendant's letters.

Service on the defendant's solicitors was invalid as the solicitors were not authorised to accept service. It was also contended that the service on the defendant was invalid as the defendant had not given advance written consent to service by fax, as required by paragraph 3.1(1) of the Practice Direction to CPR Part 6.

This prompted an application by the claimants. At first instance, the Master made an order dispensing with service. The defendant appealed. Although the judge concluded that the claim form had not been served in accordance with CPR 6 and that the claimants' solicitors had brought the problems on themselves by leaving service to the eleventh hour, he upheld the Master's decision,

deciding the failure to comply with paragraph 3.1(1) was a *"comparatively minor departure"* from the rules. The Court of Appeal disagreed. They repeated the often enunciated requirement that for service to be dispensed with where the time limit for service has expired, an exceptional case is required. The Court did not regard this case as exceptional.

Unlike the judge below, the Court of Appeal were not swayed by the fact that a faxed copy of the claim form was received by the defendant within the four-month service period, that the claimants' solicitors had had prior communications with the defendant by fax, or that no prejudice had been caused to the defendant. The absence of prejudice could not usually, if ever, be a reason for dispensing with service. Neuberger LJ, giving judgment for the Court, noted that as the claimants' solicitors were in contact with the defendant, it would have been easy for them to have asked for consent to service by fax or to have asked the defendant to nominate its solicitor's address as the address for service.

Practice points

If serving by fax or email, make sure that the party to be served or his solicitor has indicated in writing his willingness to accept service by electronic means – a fax number on the notepaper of a solicitor is sufficient written indication, but a fax number on the letter of the party to be served is not.

If the party or his solicitor agrees to service by fax or email, check whether there are any limitations to that agreement, including the format and maximum size of attachments.

Fairmays v Palmer [2006] EWHC 96 (Ch)

Service out of the jurisdiction

Not a Court of Appeal decision, but in this High Court case a firm of solicitors was suing a former partner who had moved to Ethiopia but who owned an English property. Prior to issue of the claim form, the defendant informed the claimant that he was working abroad and was no longer resident at his English property. Shortly afterwards, the claim form was issued giving the English property as the address for service; it was not issued for service outside the jurisdiction.
The claimant's solicitor purported to serve the claim form at the English property. The defendant was not within the jurisdiction at the date of deemed service. The claimant succeeded in obtaining a default judgment. The defendant applied to have the default judgment set aside, but was unsuccessful. However, he had better luck in the High Court where it was held that the Civil Procedure Rules do not sweep away the earlier authorities such as the House of Lords decision in Barclays Bank Swaziland v Hahn [1989] 1 WLR 506, and that proceedings issued for service within the jurisdiction can only be served effectively when the defendant is physically present within the jurisdiction.

Practice point

The Court acknowledged the difficulties faced by claimants when serving proceedings on defendants for whom they do not have an address for service, but whom they suspect may be abroad. However, Evans-Long J suggested that this difficulty could be overcome by the issue of concurrent proceedings for service abroad, in respect of which an order for alternative service on the last known address of the defendant within the jurisdiction can be obtained.

@risk is available via email or in hard copy. Please let us know of anyone else in your firm who would like to receive a copy and their preferred method of receipt.

Further information

Access the Civil Procedure Rules at: **www.dca.gov.uk/civil/procrules_fin/index.htm**

For a discussion on service cases including Nangelgan v Royal Free Hampstead NHS Trust, Anderton v Clwyd County Council, and Cranfield v Bridgegrove, see @risk November 2004.

Contact Zurich Professional

@risk
Editor Andrew Nickels
Telephone 0207 264 3912
Contributor Lindsay Kerr
Telephone 0207 264 2478
Email riskman@zurichprofessional.co.uk

General Enquiries and Sales
Telephone 0845 606 3322
Emailsolicitors@zurichprofessional.co.uk

Claims Helpline 0207 264 3919
Claims Fax 0207 481 3559

Zurich Professional
90 Fenchurch Street
London
EC3M 4JX
www.zurichprofessional.co.uk

PP111668A27 (2/06) TSW