Caught in the middle

Game playing should be avoided if civil litigators learn of opponents' mistakes while trying to serve clients' interests. Benjamin Amunwa reports.

IN BRIEF

- The High Court has held that parties to a litigation may be under a duty to correct their opponent's mistakes or misunderstandings if doing so furthers the overriding objective.

Woodward and Addison v Phoenix Healthcare Distribution Ltd [2018] EWHC 334 (Ch) was a contractual claim worth over £5m, brought by the assignees of two insolvent companies.

The contract was made on 20 June 2011 for the purchase of a drug. The claimants alleged that Phoenix had sold them the product as a generic drug, in breach of an existing patent to Pfizer.

As the alleged breach and/or misrepresentation had occurred at the time the contract was entered into, the claim was due to be time barred on 20 June 2017. The claimants issued the claim form on the eve of limitation (19 June 2017) and the usual rule (CPR 7.5(1)) required them to serve the claim form on the defendant within four months of that date, using one of the methods set out in CPR 6.3.

After some correspondence seeking to resolve the dispute, the claimant's solicitors (Collyer Bristow) sent the defendant's solicitors (Mills & Reeve) the claim form and related documents by first class post and email on 17 October 2017, ie shortly before the expiry of the four-month deadline for service. Mills & Reeve had received both the email and the posted documents.

On 20 October 2017, Mills & Reeve emailed Collyer Bristow to explain that service of the claim form on them was defective as the claimants had served the wrong person according to the rules. Mills & Reeve had never been instructed to accept service and the defendant had not confirmed in writing that Mills & Reeve was authorised to accept service. The claim was therefore time barred as of midnight on 18 October 2017.

Collyer Bristow applied to the court for an order that the steps it had taken constituted good service. Mills & Reeve applied for an application to set aside the claim form and an order that the court had no jurisdiction to hear the claim.

The High Court's findings

The court concluded as follows.

- First, there was nothing in the pre-action correspondence that amounted to Mills & Reeve accepting service on them. Responding to allegations and threatened proceedings does not amount to an instruction to accept service.
- Second, Mills & Reeve's silence when told that Collyer Bristow was instructed to serve the claim form on them did not prevent them from relying on defective service. Collyer Bristow had not specifically asked Mills & Reeve to confirm whether it was instructed to accept service. There was no duty on Mills & Reeve to point out that Collyer Bristow was mistaken in its belief that Mills & Reeve was instructed to accept service.
- Third, parties have a duty under the overriding objective to cooperate and avoid unnecessary satellite litigation. Lawyers should not take advantage of the mistakes of their opponents where to do so amounts to playing 'technical games', even if they are acting in their client's interests.

As Mills & Reeve was made aware of the claim form and its contents which were served on them to commence proceedings, the underlying purpose of the rules on service were satisfied. Courts should adopt a relatively flexible approach to discourage parties from game playing with service (as with other aspects of the CPR).

The court ordered that the claimants had taken sufficient steps to bring the claim form to the attention of the defendant within the four-month window and that this amounted to valid service. Service was retrospectively validated under CPR r.6.15 and the claim had been brought in time.

Comment

For those interested in how this judgment relates with the UK Supreme Court case of *Barton v Wright Hassall LLP* [2018] UKSC 12, [2018] All ER (D) 109 (Feb) where Lord Sumption's judgment may be seen as suggesting that there is no duty to advise mistaken opponents, the High Court produced an addendum explaining why *Barton* did not affect its conclusions. However, given the existence of conflicting authority on this important point, Master Bowles granted permission to appeal to the Court of Appeal.

Inevitably, solicitors may find themselves caught between their duty to the court (which may require them to point out their opponent's error) and their duty to act on the instructions of their client (who is unlikely to want them to assist an opponent). As yet, there is no easy answer to resolving such a conflict. In light of *Woodward*, courts will expect the right balance to be struck on the facts of each case. NLJ

Ben Amunwa is a barrister at 36 Civil, part of the 36 Group Barristers Chambers, specialising in contract, employment & civil law. He blogs at *www.lawmostly.com*.