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Three for the Price of One:

A Case Note on Diriye v Bojaj

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Introduction

1. *Diriye v Bojaj* [2020] EWCA Civ 1400, handed down on 4 November 2020, was a procedural appeal in a credit hire case. It raised a point about pleading allegations of impecuniosity in such cases alongside two points of wider application: whether the Royal Mail *"Signed For 1st Class"* service is covered by the description *"First class post (or other service which provides for delivery on the next business day)"* in CPR 6.26; and the proper approach to applications for relief from sanctions under CPR 3.9.

2. This decision is relevant to credit hire practitioners in that the Court of Appeal has emphasised that claimants and their advisors must engage with the need to properly plead and prove impecuniosity in support of a claim for credit hire charges. More widely, it is relevant to all civil practitioners insofar as it (i) holds that Royal Mail *"Signed For 1st Class"* post is caught by the deeming provision in CPR 6.26 and (ii) suggests that the bar for opportunism by respondents to applications for relief from sanctions is a relatively high one.

The Facts

3. On 30 May 2014, the claimant/appellant – a minicab driver – was involved in a road traffic accident. He commenced proceedings against the other driver and her insurer claiming damages for personal injury and special damages in the sum of £15,728.28, of which £12,048.29 comprised credit hire charges. In his Particulars of Claim, he expressly asserted that he was impecunious. No further information or elaboration was provided.

4. In due course, the claim was allocated to the Fast Track and directions were given to trial. As regards impecuniosity, an unless order ("the Unless Order") was made in the following terms:

> *"The claimant shall be debarred from relying upon the facts of impecuniosity for the purposes of determining the appropriate rate of hire unless … By 4:00pm on the 4th April 2018, the claimant files and serves a reply to the defence setting out all facts in support of any assertion that the claimant was impecunious at the commencement of and during the hire of the vehicle in question".*

5. A Certificate of Posting recorded that the Reply had been posted at 5:36 pm on 4 April 2018, using the Royal Mail's "*Signed For 1st Class*" service, and stated: "*Delivery aim: next working day*".

6. The Reply was not signed for (and therefore not actually received by) the respondents' solicitors until 9 April 2018. In a letter dated 17 April 2018 the appellant's solicitors appeared to accept that they were in breach of the Unless Order and that an application for relief from sanctions would be required, but that application was not made until 31 May 2018. It was it was conceded by the appellant that, pursuant to CPR 6.26, even if the Reply had been by "*First class post (or other service which provides for delivery on the next business day)*", the deemed date for service would be the second day after it was posted, i.e. 6 April 2018. Thus, on any view of CPR 6.26, there had been a failure to comply with the Unless Order.

7. The application for relief from sanctions was heard by DDJ Goodman on 21 August 2018. She found that service effected by "*Signed For 1st Class*" post was not the equivalent of first-class post because the mechanism required that the document be signed for before it was delivered and was therefore outside the deemed service regime. She therefore found that service of the Reply did not occur until 9 April 2018.

8. As to the three-stage test in *Denton v TH White Ltd* [2014] 1 WLR 3926, DDJ Goodman held: (i) that the breach of the Unless Order was serious; (ii) that there was no explanation for the breach; and (iii), as to all the circumstances of the breach, that the application had not been made promptly, that the Reply provided no details of the appellant's income and there was no reason why information relating to impecuniosity could not have been collated considering that the accident occurred in 2014.

9. On first appeal, HHJ Lethem upheld DDJ Goodman's decision. He considered that her decision in relation to CPR 6.26 and deemed service to be correct, and that she was entitled to exercise her discretion under CPR 3.9 in the way that she did.

10. The second appeal was heard by the Court of Appeal on 15 October 2020.

Issue (a): Pleading Impecuniosity in Credit Hire Cases

11. Dealing first with the Unless Order, at [7] Coulson LJ opined:

> *"In my view, the appellant ought to have provided the necessary pleading in respect of impecuniosity at the outset of the proceedings so that, in the absence of that information, the Unless Order was entirely proper. If, as [counsel for the appellant] indicated, such orders are not uncommon, then that can only be because*

claimants in these sorts of cases are taking too lax an approach to the obligation to plead and prove impecuniosity so clearly spelt out in [Zurich Insurance plc v Umerji [2014] EWCA Civ 357]."

12. Coulson LJ went on to find at [47]-[48] that "*there was a more fundamental breach of the Unless Order than the delay in service*" because the Reply "*did not comply in substance with the Unless Order.*" His Lordship's reason for so holding was that the Unless Order required the Reply to set out "*all the facts*" relied upon in support of the appellant's assertion of impecuniosity. Coulson LJ explained this requirement at [48]:

> *"[T]he Reply needed to set out what his income was and what his expenditure was, and how those figures meant that he could not afford to hire a replacement vehicle. Yet all the Reply said on this topic was at paragraph 5, which stated simply that "As he earned cash as a minicab driver, he expended the same on bills and daily living allowances for his family". Nothing else of relevance was provided. No figures for income were pleaded at all."*

13. As noted at [49], "*this position was not improved by the appellant's subsequent witness statement for the trial*".

14. Rejecting the appellant's submission that there was a distinction between a pleading and evidence in this context, at [52]-[53] Coulson LJ explained:

> *"I consider that there are a number of fundamental errors in that submission. The first is that it seeks to get around the clear wording of the Unless Order, which required the pleading of "all facts in support of any assertion" of impecuniosity. On this issue, therefore, there was no room for any gap between the pleading and the statement. Secondly, the submission seemed to be based on the incorrect notion that a claimant was entitled to advance a rubbishy case in stages, from pleading to witness statement to trial, presumably in the hope that, by the time the trial came on, there was a commercial imperative on the part of the respondents to settle the case.*
>
> *"Thirdly, [the appellant's] approach ignored the respondents' position. They are entitled to know the case they have to meet. They should not be expected to have to prepare for a trial where the critical item of claim depends on a one line assertion, and hoping that, as a result of the cross-examination of the appellant, the judge will reject the claim. That is not how civil litigation is supposed to work post-CPR. And fourthly, the argument was unsupported on the facts. I have already set out the one line assertion in the Reply (paragraph*

48 above) and the equally unrevealing evidence in the witness statement (paragraph 49 above). So the Reply did not in fact herald a witness statement with more detailed support for the impecuniosity claim."

Issue (b): Royal Mail's "*Signed For 1st Class*" Service and CPR 6.26

15. The Court of Appeal had before it the Royal Mail United Kingdom Post Scheme ("the Scheme"), which had not been before either DDJ Goodman or HHJ Lethem. At paragraphs 9.3 and 9.4, it provides: "*We aim to deliver … a First Class item the next working day after it has been posted*" and "*We aim to deliver … a Royal Mail Signed For 1st Class item the next working day after it has been posted.*"

16. At [33], Coulson LJ held that, without sight of the Scheme, the judges below had reached the incorrect conclusion that Royal Mail "*Signed For 1st Class*" was neither first-class post nor another service which provides for delivery on the next business day. His Lordship's reasons were as follows (see [34]-[41]):

    (a) "*Signed For 1st Class*" is simply a version of first-class post that is signed for. In every other way, both services are described in the Scheme using the same words.

    (b) Even if it is not first-class post, it is another service "*which provides for delivery on the next business day*" within the meaning of CPR 6.26. That is the delivery date on which the Royal Mail aims to deliver both first-class post and *Signed For 1st Class*" post according to the Scheme.

    (c) Any attempted distinction between first-class post and "*Signed For 1st Class*" based on actual delivery would be wrong in principle because the purpose of the deeming provision in CPR 6.26 is to provide certainty and make the actual circumstances of delivery or receipt irrelevant.

    (d) There is nothing in CPR 6.26 that refers to items being "*signed for*". The rules work on the basis that an item is served either by way of first-class post (or a similar service) or by actual delivery (meaning personal delivery).

    (e) Solicitors serving documents need to know that, when they put something in the first-class post, the deemed service provisions of CPR 6.26 have been triggered. It makes no sense to suggest that, by using the "*Signed For 1st Class*" service, a solicitor is in a worse position than if they had used the ordinary first-class post.

(f) Any other result would mean that an unscrupulous intended recipient could evade service altogether by refusing to sign for the document in question.

Issue (c): Relief from Sanctions

17. The conclusion above meant that the Reply had been served two days late rather than five days late as held by the judges below.

18. Against that background, Coulson LJ considered DDJ Goodman's approach to the *Denton* test.

19. As to the first stage, it was accepted that failing to serve the Reply in time was a serious breach of the Unless Order. Moreover, Coulson LJ considered that the first stage of the *Denton* test was the appropriate stage at which to take account of the substantive failure of the Reply to comply with the Unless Order (see above). Thus, at [50], Coulson LJ opined: "*If I am right and the Reply did not comply with the substance of the Unless Order in any event, the significance of the breach could hardly be greater.*" At [54], His Lordship concluded:

> *"Accordingly, I consider that, even if the Reply had been served on time, the document itself failed to comply with the substance of the Unless Order. Even if it is taken together with the witness statement, the Reply created precisely the situation that the Unless Order was designed to avoid: a simple assertion of impecuniosity, with no facts set out to support it. The breach of the Unless Order was therefore serious and significant."*

20. Coulson LJ went on at [59]-[61] to reject the suggestion that a breach must adversely affect the court timetable before it can be called serious or significant:

> *"[T]hat would be uncomfortably and unacceptably close to the pre-CPR regime, where the defaulting party could get away with repeated breaches of court orders simply because the other side could not show that they had suffered specific prejudice as a result. That is not now the law.*
>
> *"Moreover, as a matter of fact, I consider that, in the present case, the failure did have an effect on the course of the litigation. First, if the appellant had properly addressed the question of his impecuniosity before or in accordance with the Unless Order, the trial would have gone ahead as scheduled in November 2018. The breach might therefore be said to have had a calamitous effect on this litigation.*

> *"Even if the breach in this case had been confined to the delay in service, that would not make it insignificant. Parties to civil litigation need to make clear the important elements of their respective cases at an early stage. Gone are the days of ambush and keeping important points up your sleeve. The aim of much civil litigation is to bring about a cost-effective settlement. If a claimant delays in providing critical information, particularly where he has been ordered to provide it by way of an Unless Order, that delay adversely affects the other side's ability to a take a view about the strength or weaknesses of the claim they face. The effect on the ligation in question should not be measured simply by whether or not the trial date can still be met; in properly run litigation, the aim must be to avoid having a trial date altogether."*

21. As to stage two of *Denton*, there was no good reason for the default on the facts: see [63].

22. As to the third stage, Coulson LJ noted at [65] that "*[t]he delay in making the application … militates strongly against granting relief from sanctions*" before concluding as follows at [67]:

> *"Therefore, in considering all the circumstances of this case, I conclude that the appellant and his solicitors have never engaged with the need properly to plead and prove his impecuniosity in support of the claim for credit hire charges. They did not do that at the outset of the claim; they did not do so when the subject of an Unless Order; and they have not done so subsequently. In those circumstances, there was no basis on which the court could grant the appellant relief from sanctions."*

23. Finally, Coulson LJ provided some helpful guidance as to the Lord Dyson MR and Vos LJ's warning against 'opportunism' in *Denton*. At [69], his Lordship opined (*obiter*):

> *"[I]n my view, [counsel for the appellant] considerably over-stated what the court said in Denton about the need for restraint on the part of the innocent party. Lord Dyson MR and Vos LJ were careful to say at [41] that mistakes should not be taken advantage of in circumstances where the failure was neither serious nor significant, where a good reason was demonstrated, or where it is otherwise "obvious that relief from sanctions is appropriate". That is a relatively high bar. It was emphatically not designed to give carte blanche to a defaulting party to blame the other side for the delays caused by its own breach."*

Conclusion

24. The appeal was accordingly dismissed, albeit that the judges below were wrong about the status of Royal Mail's "*Signed For 1st Class*" service.

25. The significance of this decision for practitioners is set out in paragraph 2 above.

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