Tips for Good Service: Part 2

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Service of an Unsealed Claim Form

Ideal Shopping Direct Limited & Ors v Mastercard Inc & Ors [2022] 1 WLR 1541

The sealing of court documents is governed by CPR 2:

> *2.6 (1) The court must seal the following documents on issue –*
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> *(a) the claim form; and*
> *(b) any other document which a rule or practice direction requires it to seal.*
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> *(2) The court may place the seal on the document*
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> *(a) by hand; or*
> *(b) by printing a facsimile of the seal on the document whether electronically or otherwise.*
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> *(3) A document purporting to bear the court's seal shall be admissible in evidence without further proof.*

For claims issued via the High Court's Electronic Working Pilot Scheme, PD51O states:

> *Electronic sealing*
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> *7.1 When the Court issues a claim form, appeal notice or other originating application which has been submitted using Electronic Working and accepted by the Court, the Court will electronically seal the claim form, appeal notice or originating application with the date on which the relevant Court fee was paid and this shall be the issue date, as per the provisions of paragraph 5.4.*
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> *7.2 The electronic seal may differ in appearance to the seal used on paper.*
>
> *Service*
>
> *8.1 The Court will electronically return the sealed and issued claim form, appeal notice or originating application to the party's Electronic Working online account and notify the party that it is ready for service.*
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> *8.2 Unless the Court orders otherwise, any document filed by any party or issued by the Court using Electronic Working in the Rolls Building Jurisdictions, B&PC District Registry, the Central Office of the Queen's Bench Division QB DRs, the Costs Office, or the Court of Appeal (Civil Division), which is required to be served shall be served by the parties and not the Court.*
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> *8.3 The CPR and IR 2016 as to filing evidence of service apply.*

The 16 conjoined applications in Ideal Shopping [2022] EWCA Civ 14 concerned claims purportedly issued electronically pursuant to PD51O. The claimants' solicitor, who had previously issued the proceedings and had sealed claim forms returned to her, had filed draft amended claim forms electronically and then served unsealed copies on the Defendants.

In response to the defendants' applications disputing jurisdiction, the claimants contended that service of the unsealed claim forms had been good service and, in the alternative, made an application pursuant to CPR 3.10, 6.15 and 6.16 to regularise the situation. The claimants argued that there was a lacuna in the Pilot because it did not envisage a situation where there would be a lag between submission of a claim electronically and 'Acceptance' of the claim by the court.

At first instance, Morgan J formed the view that the draft amended claim forms served on the Defendants were not claim

forms:

> *56. In this case, the form of the document which has been referred to as the amended claim form is a document prepared by the solicitors for the purpose of filing under PD51O and which does not bear a court seal. I do not see how, consistently with the general rule, such a document can be regarded as a claim form.*

In considering the application under Rule 6.15, Morgan J concluded that the claimants did not take reasonable steps to effect service in accordance with the rules and the Defendants would be prejudiced by the making of an order declaring that the steps taken by the claimants constituted good service. Notwithstanding that the Defendants knew of the contents of the claim forms, Morgan J concluded that there was not a good reason to treat the service of the unsealed claim form as good service.

Morgan J extended the above reasoning to his consideration of the application under CPR 6.16 which allows the court to dispense with service in "exceptional circumstances", concluding that no exceptional circumstance existed which would justify dispensing with service.

The application under CPR 3.10 was also rejected. Having considered Vinos and the other authorities on the application of Rule 3.10, Morgan J concluded that the general provision set out therein does not prevail over the specific rules as to the time for, and the manner of, service of a claim form.

The claimants appealed to the Court of Appeal on the basis that Morgan J had been wrong to find that the draft amended claim forms were not claim forms for the purposes of the CPR, and that he had erred in his interpretation of CPR 3.10. The appeal was dismissed and the reasoning of Morgan J approved. In considering whether there was a lacuna in the Pilot which caused injustice to the claimants, the Court of Appeal outlined five things which the claimants and their solicitors could and should have done in order to avoid the problem which they encountered:

a) Firstly, they should not have waited until the last day to submit the proceedings to the court;

b) Secondly, they could have sought an extension of time for service from the Defendants;

c) Thirdly, in the absence of any agreement, the original sealed claim forms could have been served and amended later;

d) Fourthly, they could have asked the court to expedite acceptance of the claim forms given the tight deadline;

e) Finally, they could have issued an application for an extension of time to serve pursuant to CPR7.6(2).

In those circumstances, any apparent disadvantage caused by the potential lag between submission of the claim and 'Acceptance' by the court could be easily and straightforwardly mitigated.

Disputing Service

Hoddinott v Persimmon Homes (Wessex) Limited [2008] 1 WLR 806

Notwithstanding the misfortunes outlined above which may befall a claimant seeking to effect service, a defendant who wishes to dispute that service has been effective risks inadvertently submitting the court's jurisdiction to try with the claim unless it carefully follows the procedure set out in CPR 11:

> *11 (1) A defendant who wishes to –*
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> *(a) dispute the court's jurisdiction to try the claim; or*
>
> *(b) argue that the court should not exercise its jurisdiction*
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> *may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.*

(2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.

(3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.

(4) An application under this rule must –

(a) be made within 14 days after filing an acknowledgment of service; and

(b) be supported by evidence.

(5) If the defendant –

(a) files an acknowledgment of service; and

(b) does not make such an application within the period specified in paragraph (4),

he is to be treated as having accepted that the court has jurisdiction to try the claim.

(6) An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including –

(a) setting aside the claim form;

(b) setting aside service of the claim form;

(c) discharging any order made before the claim was commenced or before the claim form was served; and

(d) staying(GL) the proceedings.

(7) If on an application under this rule the court does not make a declaration –

(a) the acknowledgment of service shall cease to have effect;

(b) the defendant may file a further acknowledgment of service within 14 days or such other period as the court may direct; and

(c) the court shall give directions as to the filing and service of the defence in a claim under Part 7 or the filing of evidence in a claim under Part 8 in the event that a further acknowledgment of service is filed.

(8) If the defendant files a further acknowledgment of service in accordance with paragraph (7)(b) he shall be treated as having accepted that the court has jurisdiction to try the claim.

(9) If a defendant makes an application under this rule, he must file and serve his written evidence in support with the application notice, but he need not before the hearing of the application file –

(a) in a Part 7 claim, a defence; or

(b) in a Part 8 claim, any other written evidence.

In *Hoddinott*, the claimant made a without notice application under CPR 7.6(2) for an extension of time to serve proceedings. Having received the court's order extending time for service, the Defendant applied to set it aside. In the meantime, proceedings were served and the Defendant filed an acknowledgment of service, Rather than tick the box stating "I intend to contest jurisdiction", the Defendant ticked the box stating "I intend to defend all of the claim". At first instance, the District Judge hearing the Defendant's application set aside the order extending time for service and formed the view that, in circumstances where that application had been made, there was no further requirement for the Defendant to apply pursuant to CPR 11(4).

The claimant appealed. The primary argument advanced by the Defendant on appeal was that the District Judge had been wrong to find that CPR 11 applied at all. Allowing the appeal, the Court of Appeal took the view that CPR 11 was indeed engaged. Per Dyson LJ:

> *22. In our judgment, CPR 11 is engaged in the present context. The definition of "jurisdiction" is not exhaustive. The word "jurisdiction" is used in two different senses in the CPR. One meaning is territorial jurisdiction. This is the sense in which the word is used in the definition in CPR 2.3 and in the provisions which govern service of the claim form out of the jurisdiction: see CPR 6.20 et seq.*
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> *23. But in CPR 11(1) the word does not denote territorial jurisdiction. Here it is a reference to the court's power or authority to try a claim. There may be a number of reasons why it is said that a court has no jurisdiction to try a claim (CPR 11(1)(a)) or that the court should not exercise its jurisdiction to try a claim (CPR 11(1)(b)). Even if Mr Exall is right in submitting that the court has jurisdiction to try a claim where the claim form has not been served in time, it is undoubtedly open to a defendant to argue that the court should not exercise its jurisdiction to do so in such circumstances. In our judgment, CPR 11(1)(b) is engaged in such a case. It is no answer to say that service of a claim form out of time does not of itself deprive the court of its jurisdiction, and that it is no more than a breach of a rule of procedure, namely CPR 7.5(2). It is the breach of this rule which provides the basis for the argument by the defendant that the court should not exercise its jurisdiction to try the claim.*

The Court of Appeal went on to find the Defendant had acceded to the Court's jurisdiction pursuant to CPR 11(5) and that, in any event, the District Judge had been wrong to set aside the order extending time for service.

As such, rather than applying for strike out or some other remedy, a defendant who wishes to challenge service must:

a) File an acknowledgement of service ticking the box which states "I intend to dispute the court's jurisdiction";

b) Within 14 days of filing the acknowledgment of service, make a formal application for a declaration that the court has no jurisdiction to try the claim/should not exercise any jurisdiction it may have and to set aside the claim form.

A defendant who fails to follow the above procedure will be treated as acceding to the court's jurisdiction irrespective of whether service was, in fact, validly effected.

The position is, or may be, different if the defendant is not aware that it has been served at all and has therefore not acknowledged service. In *Hand Held Products v Zebra Technologies Europe Ltd* [2022] EWHC 640 (Ch) the Second Defendant was a company domiciled in the USA. Knowing a claim had been issued against it, the Second Defendant served a notice on the claimants pursuant to CPR 7.7(1) requiring them to serve the proceedings or discontinue the claim within a specified period. The claimants purported to serve the Second Defendant at the English office of the First Defendant. The Second Defendant subsequently made an application pursuant to CPR 7.7(3) for the court to dismiss the claim.

In his judgment, Nugee LJ discussed at some length whether or not Hoddinott was authority for the proposition that a defendant wishing to challenge jurisdiction must use the Part 11 procedure even if he has not acknowledged service. He expressed some scepticism about that:

> *74. Mr St Ville said that Hoddinott was authority for the proposition that any challenge to the ability of the Court to try the claim, including a challenge based on the fact that service had not been effective, must be made by way of Part 11. He referred me to Caine v Advertiser and Times Ltd [2019] EWHC 39 (QB) ("Caine") at [30] per Dingemans J where he said that Hoddinott was "clear authority … that an application that the court should not exercise its jurisdiction to try a claim must be made by CPR Part 11."*
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> *75. Caine was another case where the claim form had been served on the defendant, albeit service was both late and defective (in not including a response pack), and the defendant had acknowledged service: see at [7]-[8]. The decision of Dingemans J was that in those circumstances the defendant had to use an application under CPR r 11(4) if it wished to set aside service of the claim form on the grounds of late service, rather than using an application under CPR r 3.4(2)(c) to strike out the claim form for failure to comply with the rules. I agree that that follows from*

the decision in Hoddinott, which is in my judgment authority for the proposition that if a defendant has been served and has acknowledged service, then the defendant must use an application under CPR r 11(4) to set aside the service (either on the ground, as in Hoddinott, that a without notice order extending time for service should be set aside, or on the ground, as in Caine, that service was out of time).

79. It is not obvious to me that Hoddinott stands as authority for the wider proposition that if the claimant claims to have served the defendant and the defendant denies that there has been any effective service, the defendant must still use Part 11 to challenge the effectiveness of the service. It is possible that that follows, but I do not think it necessarily follows. For example suppose a claimant serves not at the defendant's address but at his neighbour's. The defendant may be passed the claim form by his neighbour and may therefore be in a position to invoke Part 11 (although it is to be noted that before applying under CPR r 11(4) a defendant must by CPR r 11(2) first file an acknowledgment of service and it seems a bit odd for a defendant to acknowledge service when his contention is that there has been no service at all). But the neighbour may never tell the defendant, and the first the defendant may know of the proceedings is an attempt by the claimant to enforce a default judgment. Must the defendant then use Part 11 to challenge the default judgment? I do not regard that as obvious. The reasoning of Dyson LJ in Hoddinott is that where a defendant has acknowledged service and has not brought an application under CPR r 11(4) within 14 days thereafter, the consequences in CPR r 11(5) follow. But that does not necessarily apply where a defendant has not acknowledged service. The logic of Dyson LJ's judgment does not compel the conclusion that a defendant who has not acknowledged service can only raise the issue whether service has been effected at all by using Part 11.

However, notwithstanding this obiter discussion, Nugee LJ declined to resolve this general question, focussing instead on whether or not in the circumstances of *Hand Held Products*, the Second Defendant could legitimately seek dismissal of the claim pursuant to CPR 7.7(3). He concluded that it could:

79. But I do not propose to resolve the general question as I do not consider that I need to. The particular question before me is whether it is open to the defendant to challenge the validity of purported service by making an application under CPR r 7.7(3). Whatever the general position may be in the case of a defendant who wishes to raise the issue of the validity of service, in my judgment it must be open to a defendant who claims not to have been served at all to use CPR r 7.7(3). The structure of the rules does not make sense otherwise.

80. Take a simple case, not involving a foreign defendant. The defendant is aware that a claim form has been issued. The defendant has not been served. Under CPR r 7.7(1) he gives the claimant, as he is entitled to, notice requiring the claimant either to serve the claim form or discontinue the claim within 14 days. At the end of 14 days the claimant has neither discontinued nor, as far as the defendant is aware, has served the claim form. The defendant therefore applies under CPR r 7.7(3) to have the claim dismissed. The claimant responds by saying that he has served the claim form within 14 days. That raises an issue as to whether what the claimant has done amounts to effective service or not. That may be a very simple issue – did the claimant post the claim form to the defendant's address at No 10 or to his neighbour's at No 11? It may be a more complex issue such as whether the address at which an individual is served is his usual residence, or his last known residence (see CPR r 6.9(2) case 1); or whether the address at which an LLP is served is its principal place of business (case 4); or, as in this case, whether the address at which a company is served is a place of business of the company (case 6 or 7).

82. But whatever the issue is, it seems to me that it must be open to the Court to resolve it on the hearing of the application under CPR r 7.7(3). The whole question under that rule is whether the claimant has "fail[ed] to comply with the notice", as that is what gives the Court discretion to dismiss the claim. So if there is a dispute whether the claimant has or has not served the defendant within the relevant period, the Court must resolve it. To my mind it follows that the Court must have power to resolve it on that application. It would be absurd if the only way that the defendant in such a case could have the issue determined were by filing an acknowledgment of service and then issuing another application, this time under CPR r 11(4), raising the very same issue. That cannot sensibly be what those responsible for drafting the rules envisaged.

83. And if this is right, I do not think that the ability of the defendant to ask the Court, on an application under CPR r 7.7(3), to determine whether there has been valid and effective service can depend on whether the defendant knows before issuing the application that the claimant is asserting that he has been served, or knows nothing about

the claimant's purported service (which may for example be at an address that he left years before). Either the Court has power to resolve the issue on such an application or it does not. That cannot turn on whether the defendant is, or ought to be, aware of the purported service. He must still in my judgment be able to argue that there has been no service in fact and hence that the claimant has failed to comply with the CPR r 7.7(1) notice.

84. For these reasons I reject the submission that ZTC here had to use the Part 11 procedure to challenge the service at Bourne End. In my judgment it was appropriate for it to raise the issue by bringing its application under CPR r 7.7(3).

It must be borne in mind that *Hand Held Products* is a High Court case and the obiter comments of Nugee LJ as to the extent of the scope of *Hoddinott* (heard by the Court of Appeal) non-binding. This gives rise to a lack of clarity as to whether Part 11 generally applies to defendants served, say, at the wrong address rather than out of time, but who know about the proceedings. Defendants who find themselves in such a situation, and who have not served a CPR 7.7(1) notice, may well form the view that their position is best protected by following the procedure set out in *Hoddinott* until such time as further clarity is provided by the senior courts.

Issuing Fresh Proceedings

Aktas v Adepta [2011] QB 894

It is abundantly clear from the cases discussed above that the courts have little sympathy for a claimant who fails to take important steps in litigation until the eleventh hour and then comes unstuck. Issuing proceedings well in advance of the expiry of limitation, if at all possible, is to be encouraged. If extensions of time are required, they should be sought proactively. If the service deadline is missed, the error will only be capable of rectification in extremely narrow circumstances. If the service deadline is missed due to a misunderstanding of the Rules or an oversight, the damage done will almost certainly be irreparable.

A claimant whose claim is time barred will be left to pursue their own solicitors for negligence or, if acting in person, will simply lose the ability to prosecute their claim. However for those who have sufficient time to reissue prior to expiry of limitation, or for claimants in personal injury/fatal accident claims who can rely upon Section 33 of the Limitation Act 1980, it is likely to be possible to simply issue a fresh set ouf proceedings.

In *Aktas*, the claimant's first claim form was set aside due to a failure to serve in time. Fresh proceedings were issued and the defendant sought to argue that they were an abuse of process. The argument succeeded at first instance and the claim was struck out.

The Court of Appeal considered the authorities on service, with some emphasis on *Vinos*. Per Rix LJ:

58. Thus in Vinos May LJ said that with the failure to serve in time "a new claim will be statute-barred" and in Godwin he said "often…a new claim will be statute-barred". Perhaps he was thinking in Godwin about the exceptional cases in which Walkley had been distinguished. In any event, there is nothing here, in my judgment, any more than in Vinos that goes beyond the effect of the rules themselves, together with the background of Walkley which rendered the section 33 discretion irrelevant. There is certainly nothing here to suggest that failure to serve in time is tantamount to abuse. On the contrary, in Vinos May LJ had said that criticism of Mr Vinos' solicitor may be muted and the single error capable of being represented as small. What he was at pains to point out however was that the consequences could be large.

Rix LJ went on to conclude

69. In my judgment, there is nothing in that line to support the respondents' submission that failure to serve a claim form in time is an abuse of process, or tantamount to one. It is nowhere said to be. What is said is that the rules are strict and will be strictly applied. The negligence of a claimant's solicitor is no excuse. It is not a good reason for an extension, even where the extension is applied for in time. It is a bad reason, a reason for declining an extension… Nevertheless, no authority has ever suggested that such conduct was an abuse of process in itself. Even May LJ was prepared to regard a typical case of negligent oversight of the need to serve in time as capable of giving rise to only

> *"muted" criticism.*
>
> *72. As for second actions where the first has failed due to lack of timely service, these cases say nothing that goes beyond an explicit acceptance that if the claimant, having lost the benefit of his first action, is then out of time to start a second action, he has lost his claim. There is nothing whatsoever in these cases to suggest that, if there is still time to start a new action, it cannot be done. All the background, discussed in Birkett v. James and the Janov line of authority, is to the effect that loss of a first action for reasons otherwise than on the merits is no bar to a second action within time save where there has been conduct which can be described as an abuse of process: whether such conduct is intentional and contumelious, or a want of prosecution, or wholesale disregard of rules of court.*

It follows, therefore, that where a claimant advances a second action having lost the first with no substantive determination, the second set of proceedings shall only be an abuse of the court's process if the conduct which gave rise to the loss of the first set of proceedings also constituted an abuse of the court's process. In the context of a failure to serve, it will only be against a background of wholesale noncompliance with other rules, practice directions and court orders that the court may be persuaded to strike out a second set of proceedings.

A personal injury claimant may also have to persuade the court to exercise its discretion under section 33 of the Limitation Act 1980, taking account of the principles in *Chief Constable of Greater Manchester Police v Carroll* [2017] EWCA Civ 1992.

Conclusion

There are numerous pitfalls for unwary claimants seeking to effect service of proceedings. Those conducting litigation need to ensure a proper understanding of the Rules surrounding service. Latent attempts to rectify issues with service are seldom successful and a claimant whose action is time barred by the time errors are discovered stand to lose their claim in its entirety.

Claimants who leave issue and service of proceedings until the last moment do so at their peril and the courts have expressed little sympathy for those who find themselves in difficulty due to a failure to litigate proactively. It is incumbent upon claimants, including litigants in person, to ensure that they act in accordance with the Rules and, wherever possible, leave sufficient time to rectify errors.