Neutral Citation Number: [2018] EWCA Civ 2865

Case No: A1/2017/1687

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
Mr Justice Coulson

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2018

Before:

LORD JUSTICE DAVIS
LORD JUSTICE MCCOMBE
and
LORD JUSTICE PETER JACKSON

- -

Between:

NDOLE ASSETS LIMITED	**Respondent /Claimant**
- and –	
DESIGNER M&E SERVICES UK LIMITED	**Appellant/ Defendant**

- -
- -

Paul Darling QC and **William Webb** (instructed by **Clyde & Co LLP**) for the **Appellant**
Fiona Sinclair QC and **Gideon Shirazi** (instructed by **Nicholas & Co**) for the **Respondent**

Hearing date: 27 November 2018

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Approved Judgment

Lord Justice Davis:

Introduction

1. The issue raised on this appeal is essentially one of civil procedure, albeit involving issues of statutory interpretation. It comes to this. Is service of a claim form a reserved legal activity for the purposes of the Legal Services Act 2007 (the 2007 Act)? And if it is, does service of a claim form where carried out by a person who is not an authorised or exempt person for the purposes of the 2007 Act have the consequence that service is invalid and that the claim should be struck out?

2. Coulson J, in his judgment on the application of the defendant in these proceedings, found that service in this case was lawful and refused to strike out the proceedings. The defendant now appeals, by leave granted on the papers by Rupert Jackson LJ. A feature of this case is that if service is set aside and the claim struck out there may be a limitation bar on any fresh claim.

3. The appellant defendant was represented before us by Mr Paul Darling QC and Mr William Webb. The respondent claimant was represented before us by Ms Fiona Sinclair QC and Mr Gideon Shirazi. I would like to acknowledge the careful and skilful arguments, both written and oral, presented to us.

Background facts

4. The background is, in summary, this.

5. A company called Sheldon Construction SRVC (London) Limited (Sheldon) was in 2010 engaged as main contractor for the design and construction of a mixed residential and commercial development in Hackney, East London. By written Subcontract dated 9 September 2010 Sheldon engaged the defendant to design, supply and install the mechanical and electrical elements of the development. The contract price was £1,320,000.

6. Disputes arose, primarily, it seems, because of certain variations. At all events, on 24 January 2011 Sheldon terminated the Subcontract on the grounds of alleged repudiatory breaches by the defendant. The matter was referred to adjudication. On 11 July 2011 the adjudicator decided that Sheldon had properly terminated the contract. However, the adjudicator made no adjudication in favour of Sheldon as to the payment of any sum by the defendant to Sheldon. There matters rested at that time.

7. In the course of 2015 and 2016 there was a series of transactions and deeds of assignments, the upshot (or purported upshot) of which was to vest Sheldon's cause of action against the defendant in the claimant, Ndole Assets limited.

8. The claimant is a company incorporated in the British Virgin Islands (BVI). It appears that its sole beneficial owner is a Mr Laznik, although he is not a named director.

9. In due course, the claimant, as assignee, issued proceedings in the High Court, in the Technology and Construction Court, on 17 October 2016. It claimed payment

of sums said to be due from the defendant for repudiation of the Subcontract and/or damages for breach of contract. In subsequent detailed Particulars of Claim (settled by Ms Sinclair) dated 24 January 2017 the sums claimed were £602,379, alternatively £555,236, together with interest pursuant to statute.

The initiation of the proceedings

10. Three copies of the claim form, and a £10,000 issuing fee, were sent to the Technology and Construction court under cover of a letter dated 17 October 2016 on the notepaper of the claimant, giving its address in the BVI. The letter among other things said "we will duly effect service on the defendant" and requested the court not to serve the claim form itself. The claim form was signed by a Mr Strauss as a director of the claimant. Its address was given on the claim form as an address in Great Portland Street, London W1. The claim form was duly issued on that date.

11. On 22 December 2016 a company called CSD Legal Limited (CSD), with an address in Bristol, wrote to the defendant at its address in Watford, Hertfordshire. The letter started with the words: "We act for Ndole Assets Limited". The letter referred to the assignments, of which written notice had been given on 14 October 2016, and enclosed draft Particulars of Claim, 7 bulky appendices and an expert report. It stated also that it was considered not incumbent on the parties to follow any specific process prior to service of the claim form and particulars of claim: and asked for the defendant's confirmation of agreement to that position.

12. CSD are not solicitors. They are what are sometimes called claims consultants. They specialise in the field of construction disputes. The sole director of the company is Mr Alexander Dain and Mr Dain and his wife own the shares in CSD.

13. In his witness statement filed in these proceedings and dated 20 April 2017, Mr Dain describes CSD as a company which "offers construction contract management and dispute resolution services", their work primarily being contentious work. Mr Dain states that "CSD is not a firm of solicitors and has never held itself out as a firm of solicitors."

14. Mr Dain further states that he is an "unregistered barrister" (in that he does not hold a practising certificate). He is a member of the Chartered Institute of Arbitrators. He had been involved, as an employee of various companies, in construction dispute resolution cases for over 11 years, before setting up CSD in 2015. For a number of years he has been a holder of a licence issued by the Bar Standards Board permitting him to instruct counsel directly – something he has very regularly done. With regard to the provision of services to clients he states that no court has ever decided that he has carried out reserved legal activities.

15. Following their letter of 16 December 2016, CSD sent a chasing letter to the defendant on 12 January 2017. This was followed by a further letter dated 17 January 2017, which had been preceded by a telephone conversation between Mr Dain and a representative of the defendant.

16. On 20 January 2017 Clarke Willmott LLP, solicitors then instructed on behalf of the defendant, wrote to CSD. They requested time to familiarise themselves with the matter, suggesting a period of 8 weeks.

17. On 27 January 2017 CSD wrote to Clarke Willmott. The letter referred to the letter of 20 January 2017 and asked: "Please confirm for the purposes of CPR 6.7 (1) (b) whether you are authorised to accept service of a claim form on Designer's behalf." A chasing letter to like effect was sent on 31 January 2017. No such confirmation being given, CSD then wrote later that day to the effect that, in the absence of such confirmation, "such service will now be effected at Designer's registered office."

18. On that day (31 January 2017) CSD then sent a letter to the defendant at its registered office (copied to Clarke Willmott). The letter stated: "Enclosed by way of service on you are the following documents in the above proceedings…" Those documents were the sealed claim form, the Particulars of Claim and the 7 appendices to the Particulars of Claim. The Statement of Truth contained in the Particulars of Claim was signed by Mr Strauss as a director of the claimant. The address for service of documents was given as the address in Great Portland Street, London W1.

19. By letter dated 31 January 2017 from Clarke Willmott to CSD, Clarke Willmott stated that they were instructed to accept service on behalf of the defendant. They also stated that, because the dispute related to events going back some years, it was reasonable to request 8 weeks to make investigations. On 31 January 2017 CSD then responded as follows:

> "Thank you for your above-referenced letter dated 31 January 2017.
>
> In relation to place of service, not having received any response to our two earlier requests that you confirm your authorisation to accept service, service has been arranged at your client's registered office. We confirmed this to you in writing and had issued the documents to the courier office prior to receiving your letter."

20. This was followed by a letter to Clarke Willmott from CSD dated 1 February 2017 which read as follows:

> "Further to our above-referenced letter (no 3) dated 31 January 2017, service of the claim form and particulars of claim plus appendices has now taken place at the Defendant's registered office.
>
> To accompany those documents, and now sent to you rather than onto the Defendant as you have confirmed that you are authorised to accept service, please find enclosed as required by CPR 7.8 (1) forms N9, N9A and N9B.

> In relation to other matters addressed by our recent correspondence, we will write to you separately."

21. Yet further, on 2 February 2017 CSD wrote a lengthy letter to Clarke Willmott. They pointed out that an 8 week extension would have taken time beyond the prescribed period of service of the claim form in accordance with the rules. They made various proposals for progressing the proceedings, including the prompt filing of an acknowledgment of service. On 9 February 2017 Clarke Willmott wrote to say that they were taking instructions.

22. In the meantime CSD had by email of 27 January 2017 (in which they described themselves as "assisting the claimant in this matter") enquired of the court office in the Technology and Construction Court as to whether the 7 (bulky) appendices needed to be filed at that stage. By letter of 2 February 2017 CSD then wrote to the court, enclosing a completed form of Certificate of Service and Particulars of Claim (without appendices). The statement of truth to the attached Certificate of Service was signed by Mr Dain, describing his position held as "Consultant". Service was described in the form as being "on limited company by courier delivery at its registered office."

23. Finally, for present purposes, there was a long letter from CSD to Clarke Willmott of 16 February 2017. It set out the correspondence background and protested at the lack of substantive response and the lack of an acknowledgment of service. CSD also took the precaution of enclosing by way of service a further claim form and Particulars of Claim. A response was then received on 20 February 2017 from Clarke Willmott, enclosing an Acknowledgment of Service. That included an indicated intention to contest the court's jurisdiction. In this letter, it was said that the conduct of litigation was a reserved legal activity; and enquiry was made as to how CSD considered themselves entitled to carry on a reserved legal activity. Ms Sinclair suggested to us in argument that the lack of substantive response beforehand, and the raising of this argument for the first time after the four-month period for service under CPR Pt. 7.5 had elapsed, had been a ploy designed to take advantage of a potential limitation defence if the present proceedings were invalidated.

Legislative scheme

24. To set the context for the defendant's argument that there here has been engagement in an unlawful reserved legal activity it is necessary to set out some of the applicable statutory provisions.

25. We were referred, for this purpose, to the evolution of some of the statutory provisions in this context. Section 1 of the Solicitors Act 1974 provides as follows:

> "1. Qualifications for practising as solicitor.
>
> No person shall be qualified to act as a solicitor unless—
>
> (a)he has been admitted as a solicitor, and

(b)his name is on the roll, and

(c) he has in force a certificate issued by the Society in accordance with the provisions of this Part authorising him to practise as a solicitor (in this Act referred to as a "practising certificate")."

26. Section 20 of the 1974 Act provided as follows:

"(1) No unqualified person shall –

(a) act as a solicitor, or as such issue any writ or process, or commence, prosecute or defend any action, suit or other proceeding, in his own name or in the name of any other person, in any court of civil or criminal jurisdiction; or

(b) act as a solicitor in any cause or matter, civil or criminal, to be heard or determined before any justice or justices or any commissioners of Her Majesty's revenue.

(2) Any person who contravenes the provisions of subsection (1) –

(a) shall be guilty of an offence and liable on conviction on indictment to imprisonment for not more than two years or to a fine or to both; and"

(b) shall be guilty of contempt of the court in which the action, suit, cause, matter or proceeding in relation to which he so acts is brought or taken and may be punished accordingly; and

(c) in addition to any other penalty or forfeiture and any disability to which he may be subject, shall be liable to a penalty of £50 to be recovered, with the full costs of the action, by an action brought by the Society with consent of the Attorney General in the High Court or in any county court, and to be applied to the use of Her Majesty."

27. Section 27 of the Courts and Legal Services Act 1990 (the 1990 Act) contained specific restrictions on the right of audience before a court (s. 27) and on the right of conduct of litigation (s. 28). Thus s. 28 (2) (d) provided:

"(2) A person shall have a right to conduct litigation in relation to any proceedings only in the following cases –

. . .

(d) where he is a party to those proceedings and would have had a right to conduct the litigation, in his capacity as such a party, if this Act had not been passed."

For these purposes the conduct of litigation was defined (in s. 119) as meaning the right:

> "(a) to exercise all or any of the functions of issuing a writ or otherwise commencing proceedings before any court; and
>
> (b) to perform any ancillary functions in relation to proceedings (such as entering appearances to actions)."

28. The applicable statute for present purposes is the 2007 Act, which replaced the 1990 Act in the relevant respects. The 2007 Act sets out in s. 1 the important regulatory objectives underpinning the statutory scheme.

29. Part 3 of the 2007 Act relates to reserved legal activities. Those are defined to mean the six specified activities set out in s. 12. The first of those is the exercise of a right of audience. The second is the conduct of litigation.

30. By s. 13 the entitlement of a person to carry on a reserved legal activity arises where the person is authorised in relation to the relevant activity or where the person is exempt in relation to that activity. Section 14 then provides that it is an offence for a person to carry on a relevant activity which is a reserved legal activity unless the person is entitled to carry on the relevant activity. Available sanctions for a person convicted of such an offence include a sentence of imprisonment or a fine (to a stated maximum, depending on whether proceedings are summary or on indictment) and also include a liability for contempt of court.

31. Section 18 relates to authorised persons. Suffice it to say that it was common ground before us that CSD were not an authorised person. Section 19 relates to exempt persons. Who is an exempt person is, for present purposes, then to be determined by reference to Schedule 3 to the 2007 Act.

32. Schedule 2 contains a definition in paragraph 4 with regards to the conduct of litigation. That is defined in this way:

> "Conduct of litigation
>
> 4. (1) The "conduct of litigation" means-
> (a) the issuing of proceedings before any court in England and Wales,
> (b) the commencement, prosecution and defence of such proceedings, and
> (c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions).
>
> (2) But the "conduct of litigation" does not include any activity within paragraphs (a) to (c) of sub-paragraph (1), in relation to any particular court or in relation to any particular proceedings, if immediately before the appointed day no restriction was placed on the persons entitled to carry on that activity."

33. Paragraph 1 of Schedule 3 then deals with exemption in relation to rights of audience. Paragraph 2 of Schedule 3 deals with exemption in relation to conduct

of litigation. For present purposes, the key part of that paragraph is sub-paragraph (4):

> "(4) The person is exempt if the person:
>
> (a) is a party to those proceedings, and
>
> (b) would have a right to conduct the litigation, in the person's capacity as such a party, if this Act had not been passed."

This therefore, as is agreed, would cover litigants in person. It was also agreed before us, however, that CSD themselves were not an exempt person.

34. Finally, for present purposes, CPR Pt 7.5 designates the steps which "the claimant must complete" in order to effect service of a claim form within the jurisdiction. (This is also to be read, in the case of service on companies, in conjunction with s. 1139 of the Companies Act 2006.)

The decision of the judge

35. Thus it is that the argument before the judge was developed. Put very shortly, it was said on behalf of the defendant that CSD, in engaging in the service of the claim form as they did, engaged in the conduct of litigation within the ambit of the 2007 Act. They thereby, having neither authorisation nor exemption under that Act, engaged in a reserved legal activity and committed an offence. In consequence, it was said, the service of the claim form was effected by unlawful means, was invalid and cannot stand.

36. The judge directed himself that correct service is a pre-requisite for the successful prosecution of an action. He (at paragraph 30 of his judgment) rejected an argument on the part of the claimant that service of a claim form did not come within the ambit of "prosecution" of proceedings for the purposes of Schedule 2 to the 2007 Act. He said: "On the plain meaning of the word "prosecution", the service of proceedings is a reserved activity, because it was part of the prosecution of the proceedings." He further found, at paragraph 31, that in any event service of a claim form is an "ancillary function" in relation to such proceedings.

37. Having so found, he went on to address the claimant's argument that if claim forms could validly be served by, for example, process-servers it would be anomalous if they could not also be validly served by persons such as CSD.

38. The core of the judge's reasoning is contained in paragraphs 34 to 36 of his judgment, which read as follows:

> "34. In my view, the (partial) answer to this is that process-servers are engaged by the relevant solicitors to carry out this particular task. They have the solicitors' delegated authority to serve the documents. In those circumstances, since the solicitors on the record are responsible for the carrying out of all reserved legal activities, the solicitors remain responsible for the service of the documents, even if they have sub-contracted

> the task to professional process-servers. In that way, there is nothing inconsistent in concluding that the service of proceedings by process-servers is a reserved legal activity, for which the solicitors on the record are and remain responsible.
>
> 35. So what happens in a case like this, where there are no solicitors acting, and the claimant is a litigant in person? This was not a point that was addressed fully in submissions, because the principal points taken by Ndole were those which I have set out (and rejected) above. But the short answer must be that, as a litigant in person, the claimant is permitted to serve these documents. That is what the CPR says: r.7.5 refers to 'the claimant'. So if Mr Laznik, the sole beneficial owner of Ndole, had served the documents on Designer on 31 January 2017, there would now be no difficulty.
>
> 36. So the final question is whether, as a litigant in person, Ndole (or Mr Laznik) was entitled to delegate that task to Mr Dain. In my view, it was. It would be nonsensical to conclude that, whilst a solicitor can delegate the carrying out of this task to a third party, a litigant in person cannot do so. There would be no basis for such discrimination. Accordingly, I have reached the view that, whilst a litigant in person can serve a Claim Form and Particulars of Claim himself, he can also ask an agent to do it on his behalf. That is what happened here. I am therefore not prepared to say that service in this case was unlawful."

39. He went on to say, obiter, that even if he had found that service was unlawful "I would have taken some persuading that the consequence of that was that the proceedings should be struck out". He also somewhat reproved Mr Dain and CSD for not making clear at the outset that they were not a firm of solicitors or otherwise not authorised to carry out reserved legal activities. In doing so, he stated that the various letters of CSD, summarised above, were "irrelevant to the service issue in any event". He then went on, at some length, to deal with, and dismiss, a separate application for summary judgment on the part of the defendant based on allegations of maintenance and champerty. That matter is not the subject of appeal before us.

40. It should be noted that Ms Sinclair does not seek to support the judge's reasoning set out in the central paragraph 36 of the judgment. She agreed with Mr Darling that such reasoning cannot stand (and she told us that it was not reasoning which she had herself advanced before the judge). She instead advanced points raised in a Respondent's Notice in order to seek to uphold the decision: a decision which she says was correct, even if some of the reasoning was not.

41. Both the Bar Council and the Law Society have been informed of this appeal. The Bar Council has not put in representations. The Law Society has, in the form of a letter dated 19 April 2018 which this court has, with the consent of the parties, taken into account.

Disposition

42. A convenient starting point is, first, that (as agreed before us) the claimant, not having solicitors on the record, is to be regarded as a litigant in person; and, second, that (as also agreed before us) a litigant in person is entitled to conduct litigation on the litigant's own behalf.

43. However, whilst those points are uncontroversial, it seems to me that there is a potential complexity in this case. This is because the claimant is a limited company. As such, on elementary principles, it has a legal status distinct from its directors and shareholders. As a corollary of that, a company can only make decisions or act through the agency of others - for example, its directors or employees. Thus while an individual litigant in person can himself or herself conduct litigation a company cannot in that sense: it has to use human agents for that purpose.

44. However it would, in modern times, be anomalous if a company could never conduct litigation in person (that is, without a legal representative) without necessarily bringing about an infringement of the 2007 Act. Mr Darling accepted as much. Thus he said that if Mr Laznik (the sole beneficial owner) had himself served the claim form there would have been no invalidity. That may well be so, given that the acts and decisions of all the shareholders or of the whole Board of a company may count as the acts and decisions of the company itself. It is, in formal terms, less clear-cut, however, where the activity has been delegated to an individual director or employee.

45. The Civil Procedure Rules are not specific on this. CPR Pt 39.6 (read with Practice Direction 39A) permits representation at trial of companies by employees, with the court's permission. It is to be assumed that such authorisation impliedly extends to directors, although the rule does not so state, nor is there any reference to hearings other than trial: see the discussion in the White Book, Volume 2 at paragraph 13-7. I note that in *RH Tomlinsson*s (*Trowbridge*) *Ltd.* v *Secretary of State for the Environment* [1999] 2 BCLC 7760, Mummery LJ (with whom Henry LJ agreed) stated that it was implicit in the Civil Procedure Rules that a corporation may act without a legal representative. However, in view of the parties' agreement on this aspect for the purposes of this appeal it is not necessary to engage in further discussion on this point.

46. Reverting to the present case, it at all events highlights the possibility of two extreme positions: neither of which, as Mr Darling submitted and I agree, can be correct.

    (1) It surely cannot be correct that no statutorily unauthorised person can assist *at all* in the performance of a reserved legal activity. Thus if, as the judge found, service of a claim form was a reserved legal activity it would be an unacceptable absurdity that a person such as a process server (or, indeed, a courier or Royal Mail employee) could not lawfully engage in the performance of an activity such as delivering the claim form.

(2) Conversely, it surely cannot be correct that *anyone* could undertake a reserved legal activity simply by reason of being an agent of a litigant in person. If that were right, then prohibition of all six of the reserved legal activities set out in the 2007 Act could potentially be circumvented simply on the footing that the person in question (albeit otherwise having no authorisation or exemption under the terms of the 2007 Act) was acting as the agent of the litigant in person.

47. The judge nevertheless had, by paragraph 36 of his judgment, in effect adopted the second position. Although he spoke only in terms of service of the claim form it is, however, difficult to see – given the definition of "conduct of litigation" - how his approach could not and would not potentially apply to all types of conduct of litigation. Moreover, it is difficult to see why such approach then prospectively should not apply to rights of audience as well.

48. That this reasoning is not right is, in my opinion, demonstrated by the decision of the Court of Appeal in *Gregory* v *Turner* [2003] 1 WLR 1149 (a case not cited to the judge by counsel, doubtless because they had not anticipated that the judge would adopt this particular line of reasoning). In that case, an individual, M, who was not a lawyer, held an enduring power of attorney from a claimant involved in litigation. M argued that, as such an attorney, he had the right to conduct litigation on behalf of that claimant and had the right to represent her in court.

49. It was held by the Court of Appeal that M had no right to do so, the court applying the relevant provisions of the 1990 Act (which for these particular purposes are not materially different, as to conduct of litigation, from the corresponding provisions in paragraph 2 (4) of Schedule 3 to the 2007 Act).

50. The court held that the purpose of the statute was to impose effective controls on rights of audience and conduct of litigation: and to extend the entitlement of a litigant person to an agent would "drive a coach and horses" through the statutory purpose "which is to impose effective control on rights of audience and conduct of litigation…" (paragraph 75). The permitted exception was to enable a litigant to appear in his own case. There was:

> "…nothing to suggest that, before the 1990 Act, that right could be exercised by an agent, other than one properly qualified for the purpose. In our view, this was a personal right which cannot be delegated. Were it otherwise, there would be no purpose in the careful restrictions imposed in the public interest on those who can appear as advocates in proceedings."

The court went on to hold (in paragraph 78) that s.28 of the 1990 Act:

> "... authorises conduct of the litigation by the party, but not by an agent other than one who is properly authorised under one of the other categories."

It followed that M was not entitled to conduct litigation or to appear in court as of right.

51. I should add that we were very briefly referred to the decision on costs of Jefford J in *Octoesse LLP* v *TRAK Special Projects Ltd*. [2017] BLR 81; and this court itself referred counsel to the costs case of *Crane* v *Cannons Leisure Centre Ltd*. [2008] 1WLR 2549. But neither counsel before us sought to rely on those cases for present purposes.

52. The decision in *Gregory v Turner,* in my judgment, means that the reasoning of the judge in paragraph 36 of his judgment cannot stand (as counsel before us were agreed). So what then is the solution to the conundrum? How is one to avoid the nonsense of process-servers or Post Office staff being said to be potentially illegally engaged in reserved legal activities?

53. The solution advocated before us by Ms Sinclair was the one rejected by the judge at paragraphs 30 and 31 of the judgment. Her submission was that service of a claim form simply was not within the ambit of "conduct of litigation", as set out in paragraph 4 of Schedule 2 to the 2007 Act, at all. If that is right, the difficulty falls away. But is it right?

54. In agreement with the judge, I cannot accept that it is right.

55. Mr Dain in his witness statement had argued (as, rather faintly, did Ms Sinclair) that there was legal authority to support his case that service of a claim form was not the conduct of litigation. That authority was said to lie in the decision of the Court of Appeal in *Agassi* v *S. Robinson* (*HM Inspector of Taxes*) [2006] 1 WLR 2126. That was a case (decided by reference to the 1990 Act) about costs incurred in the course of litigation by a firm of specialist tax advisers who were not solicitors. It was recorded as being common ground that "purely clerical or mechanical activities such as photocopying documents, preparing bundles, delivering documents to opposing parties and the court and so on" were not within the reach of the statutory prohibitions, which were to be given a "restricted ambit" (paragraph 43): a point of common ground with which I myself agree. But the particular point that Mr Dain had emphasised is that, by reference to a list of eight activities advanced by leading counsel for the Bar Council as recorded in paragraph 43 of the judgment, it had been submitted that "service of a claim form or other documents" was amongst those activities which were not in breach of the statutory prohibitions when done by an unqualified person. In the event, at paragraph 56 of the judgment the court said this:

> "The word "ancillary" indicates that it is not all functions in relation to proceedings that are comprised in the "right to conduct litigation". The usual meaning of "ancillary" is "subordinate". A clue to what was intended lies in the words in brackets "(such as entering appearances to actions)". These words show that it must have been intended that the ancillary functions would be formal steps required in the conduct of litigation. These would include drawing or preparing instruments within the meaning of section 22 of the 1974 Act and other formal steps. It is not necessary for the purposes of this case to decide the precise parameters of the definition of "the right to conduct litigation". It is unfortunate that this important definition is so unclear. But because there are

> potential penal implications, its very obscurity means that the words should be construed narrowly."

56. It is correct that in *Agassi* leading counsel (in what the court described as a "difficult area") had submitted that service of a claim form was not a restricted activity. But the problem for this argument is that the court whilst not rejecting that submission did not endorse it either with regard to service of a claim form. In fact, at paragraph 56 the court in terms had said that it was not necessary for the purposes of the case to decide the precise parameters of the definition of "the right to conduct litigation". So that particular point was left open. To the extent that in a subsequent County Court decision in *MSJ Associates Ltd* v *Brett Halliday* (unrep., 11 March 2013) Judge Grant had (obiter) accepted that *Agassi* had decided that service of any documents would not be the conduct of litigation (at paragraph 46 of his decision) that, with respect, is too open a reading of the decision.

57. There being no authoritative guidance on this, as the judge below rightly found, one then is left with the definition of "conduct of litigation" contained in paragraph 4 of Schedule 2 to the 2007 Act. And on this aspect I am in no real doubt that the judge was correct to find that service of the claim form was within the ambit of "conduct of litigation."

58. I am prepared to accept that "commencement" of proceedings as identified in paragraph 4(1)(b) of Schedule 2 is not to be taken as coextensive with "issue" of proceedings as identified in paragraph 4 (1)(a). Quite what the intended difference was is not altogether clear: but it may be that it was to mark the fact that some forms of proceedings are not formally commenced by "issue". But be that as it may, I consider that service of the claim form is indeed an aspect of "prosecution… of such proceedings" and at all events that service of the claim form is "an ancillary function in relation to such proceedings."

59. As stated by the Court of Appeal in paragraph 56 of *Agassi*, it must have been intended that "ancillary functions" would be formal steps required in the conduct of litigation. Service of the claim form is unquestionably, in my opinion, of such a kind. There are rules of court relating to it. A legal action cannot be progressed, cannot be prosecuted, unless and until the claim form is properly served, as the judge had noted. Service is the essential means by which a defendant is notified of the content of the court process which has been initiated against him and in respect of which he is ordinarily required to acknowledge service. Thus service of the claim form falls within the ambit of the statutory language, naturally read.

60. Indeed that, I note, was the view taken, albeit on much more restricted arguments, by a constitution of this court in its decision (delivered on 12 June 2018 but in a judgment only formally approved and published after the hearing before us) in the case of *Ellis* v *Ministry of Justice* [2018] EWCA Civ 2686: see paragraph 42 of the judgment of Moylan LJ. But I reach the same conclusion irrespective of that decision.

61. Ms Sinclair, with respect, had great difficulty in formulating a coherent response to a conclusion that service of a claim form is an aspect of prosecution of proceedings or an ancillary function thereto.

62. She sought to mount an elaborate argument, by reference to certain authorities and to former Rules of the Supreme Court and to the current Civil Procedure Rules, to the effect that service generally takes place on receipt or deemed receipt. But this led nowhere. Service of process is not an act of a defendant: it is an act - an essential act – of the claimant, the person prosecuting the proceedings. As Christopher Clarke J said in *Asia Pacific (HK) Ltd*. v *Hanjin Shipping Co. Ltd*. [2005] 2 CLC 747 at paragraph 20 of his judgment:

> "The common thread is that the party serving the document delivers it into the possession or control of the recipient or takes steps to cause it to be so delivered."

In fact, as it seems to me, a perfectly adequate general definition of "service" is given in the Glossary at Section E of the White Book as follows:

> "Steps required by rules of court to bring documents used in court proceedings to a person's attention."

63. Ms Sinclair's alternative argument – although perhaps it became her principal argument – then was to seek to rely on the exclusion from "conduct of litigation" as set out in paragraph 4 (2) of Schedule 2 to the 2007 Act. But in my opinion that does not assist her either.

64. The "appointed day", for the purposes of paragraph 4 of schedule 2, was agreed before us to be 1 January 2010. But for the period immediately before that day there was no evidence to show that no restriction had been placed on persons in the like position of CSD in relation to any particular court or any particular proceedings. If one then is to view the matter more broadly, *Gregory* v *Turner* (cited above) then is authority for the proposition that, before the 1990 Act, there was nothing to suggest that the right of a litigant in person to conduct litigation could be exercised by an agent who was not qualified for that purpose. That position did not change between 1990 and 2010. Although Ms Sinclair took us to a number of procedural rules (which in any event cannot be used to alter the meaning of primary legislation) those did not seem to me in any way to lead to the conclusion which she sought to draw. I would also add that, as noted above, the "right to conduct litigation" was initially defined in the 1990 Act (subsequently amended) to mean "the right (a) to exercise all or any functions of issuing a writ or otherwise commencing proceedings before any court; and (b) to perform any ancillary functions in relation to proceedings (such as entering appearances to actions)". I would have no difficulty at all in concluding that service of a writ or claim form would have fallen within such a definition.

65. The overall conclusion therefore has to be that formal service of a claim form on a defendant falls within the "conduct of litigation" for the purpose of the 2007 Act. It is therefore a reserved legal activity which can only be performed by a statutorily authorised person or by an exempt person. And CSD were neither.

66. How, then, does one get over the apparent problem that the same might be said (and as the judge seems to have thought) of process - servers or postal employees? And what if the litigant in person, if an individual, asks a family member to deliver the claim form or, if a company, asks an employee to do so: is the conclusion compelled that such a family member or employee is to be adjudged to have committed an offence? Such a conclusion is, as is agreed all round, unacceptable.

67. In my view this is where substance has to prevail over form. I acknowledge that it is not always appropriate to talk in terms of degrees of agency. But it all depends. In my view the pragmatic solution here, which is the one proffered by Mr Darling, is the correct solution. That distinguishes between those who merely perform an administrative or mechanical function in connection with service of documents and those who undertake, or who have assumed, legal responsibility with regard to service as prescribed by the rules. This in fact, I consider, accords with the acceptance by the court in *Agassi* in paragraph 43 of the judgment that the statutory prohibition does not extend to "what might be termed purely clerical or mechanical activities." Thus the solution is to be found not so much in focusing on the issue of agency or sub-agency but in focusing on the actual role of, and the actual activity undertaken by, the person in question. That is why process-servers and the like are not within the statutory prohibition: they are simply engaged in the "mechanical" activity of actually delivering the claim form. Delivery, for *these* purposes, is not to be equated with service of a claim form as prescribed by the rules.

68. The question thus becomes one of fact and degree in each case. Ms Sinclair submitted that would lead to uncertainty. But as to that I strongly suspect that issues of the present kind with regard to service of a claim form are likely to be rare; and in the more general context of the right to conduct litigation, an approach permitting individual assessment of the activity undertaken in an individual case is, by reason of its very adaptability to the circumstances of the particular case, much more likely to achieve justice than a rigid application of an agency-based approach.

69. Finally, then, on the evidence were CSD themselves performing merely an administrative function or mechanical activity in serving the claim form as they did?

70. It is plain that CSD believed that they were acting entirely properly and lawfully. Care had been taken to ensure that it was the claimant (not CSD) who actually issued the proceedings; and so far as service was concerned, it is clear from Mr Dain's witness statement that he thought that he was indeed acting in accordance with *Agassi* (on his reading of it) and in accordance with the view expressed in *MSJ Associates*. But while Mr Darling fairly accepted that Mr Dain and CSD acted in good faith, the conclusion cannot be decided by reference to their own, as it were, self-certification on this point.

71. In my judgment, the course of events, as illustrated by the correspondence, shows that CSD were acting in a way that went significantly beyond performing simply an administrative function or a mechanical activity and shows that they were taking the responsibility for service of the claim form under the rules.

72. The correspondence is most revealing in this regard. All the letters that CSD wrote were just the kinds of letters that a firm of solicitors might write in preparation for formal service. Indeed, as the judge noted, to the uninitiated they would have appeared to be letters from solicitors. It is true that CSD were, necessarily, acting on behalf of their client, the claimant, with, no doubt, wide general authority given to them to progress the claim. But that, for the reasons given above, does not of itself provide the answer; and, as I see it, their conduct in serving the claim form in the way that they did, culminating in the certificate of service, clearly did on the evidence amount to conduct of litigation – in the sense either of prosecuting the proceedings as issued or of performing an ancillary function in relation to such proceedings or both – without statutory authorisation or exemption. CSD, in serving the claim form and other documents (Particulars of Claim and appendices) as they did, were (in the language of the court in *Agassi* at paragraph 56) engaging in "formal steps required in the conduct of litigation." For the avoidance of doubt, my conclusion would still have been the same even if CSD had not engaged in so much surrounding correspondence but had simply sent a letter to the defendant saying they acted for the claimant and enclosing the claim form by way of service under the rules. Still that would , in my view, have been prohibited. The remedy would have been for the claimant itself to have sent the letter of service with an enclosed claim form and for the claimant itself to have instructed couriers to effect delivery. That, in effect, corresponds to the position taken by the claimant in actually issuing the proceedings in the first place: it and CSD correctly understanding the legislation at least in that regard.

73. So that leads to a consideration of the consequence of service of the claim form having been unlawfully effected by CSD.

74. It was the submission of Mr Darling that the service of the claim form was accordingly invalid. When pressed as to what he meant by that, he said that the service of the claim form, unlawful means having been used, had been a nullity and of no effect. Alternatively, he submitted that the court should, in its discretion, set service aside.

75. The consequences of a breach of a statutory provision are, in the ordinary way, to be found in the scheme and terms of the statute itself: see, for example, *R* v *Soneji* [2006] 1 AC 340. In the present case, our attention was not drawn to any statutory provision in the 2007 Act stipulating the consequence (in terms of validity) for an act of conduct of litigation being performed by a person neither authorised nor exempted by the statute.

76. In my view, nullity is not to be taken as the statutorily intended consequence. As Ms Sinclair pointed out, there is no reason why so draconian a consequence should be intended to be visited on the client or principal, who ordinarily will have been entirely ignorant of the point. As she also pointed out, there could be grave implications for other reserved legal activities if it were otherwise: for example, probate activities and reserved instrument activities. In argument, we put to Mr Darling the example of a sole solicitor practitioner who, through oversight and pressure of work, omitted to renew his practising certificate in time. Would all proceedings served by him in the ensuing period before the position was rectified thereby become entirely null and of no effect? He acknowledged

that might seem an unduly restrictive and harsh approach: whilst not withdrawing his submission.

77. In my judgment, such a conclusion is not acceptable and is not compelled by the language of the 2007 Act. Moreover, that does not mean that there is no sanction available. On the contrary there are sanctions available in the form, in an appropriate case, of criminal process and sentence and a contempt application. And those sanctions are directed at the right target – that is to say, the person who has actually engaged in the unlawful conduct of litigation.

78. Such a conclusion is also consistent with the approach of Thomas J in *Crescent Oil and Shipping Services Ltd.* v *Importing UEE* [1998] 1 WLR 919: a case on the then RSC Ord.5.r.6(2) in circumstances where the writ in that case had been issued and served other than by a solicitor. The argument was that breach of that Rule meant that the service of the writ was "a nullity or alternatively irregular." Thomas J held that the conduct "should lead the court to considering setting the writ and service aside" and decided that there was an irregularity rather than nullity. I appreciate that the present statutory context is in many ways different; but I see no reason to adopt any different approach in the present case.

79. It follows that service in this present case is to be taken as valid unless the court were to decide to set it aside. I can see no reason whatsoever for so ordering. To do so could appeal to no sense of the merits. The claimant and CSD acted in good faith. They positively thought that they were complying with the law. There was nothing inherently unlawful, of course, in serving legal process: the unlawfulness arose solely from the involvement of CSD for this purpose. The defendant can certainly gain no support from the Supreme Court decision in *Patel* v *Mirza* [2017] AC 467. Moreover, CSD had endeavoured to serve the claim form before the expiry of the limitation date (the claim having been assigned to the claimant late in the day). The proceedings were in fact delivered and came to the attention of the defendant and its solicitors. To set aside the service would be to confer an uncovenanted advantage on the defendant in circumstances of (in the present case) adventitious technicality. I add that I would reach the same conclusion even if one were to view this as an application for relief from sanctions (although I do not consider, as will be gathered, that strictly it should be so viewed). The position, I add, is also very different on the facts from that in *Barton* v *Wright Hassall* [2018] 1WLR 1119.

Conclusion

80. In the result, I would for my part dismiss this appeal. In my opinion, the judge reached the right and just conclusion on this aspect of the case; and I would uphold his conclusion, albeit for reasons rather different from those given by the judge.

Lord Justice McCombe:

81. I agree.

Lord Justice Jackson:

82. I also agree.