Case No: SC-2021-APP-000672

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 07/02/2022

Before:

COSTS JUDGE ROWLEY

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Between:

Mr Sean Kelly	**Claimant**
- and -	
Ralli Limited	**Defendant**

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- -

Ian Simpson (instructed by **JG Solicitors**) for the **Claimant**
Martyn Griffiths (instructed by **Kain Knight (North & Midlands) Limited**) for the **Defendant**

Hearing date: **29 November 2021**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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COSTS JUDGE ROWLEY

Costs Judge Rowley:

Introduction

1. On 26 May 2021 the claimant commenced Part 8 proceedings under section 70 Solicitors Act 1974 against his former solicitors for an assessment of their bill of costs which had been delivered to him on 30 April 2021.

2. By a letter dated 16 August 2021 the claimant's solicitors informed the court that the proceedings had been served upon the defendant on 29 July 2021, but no acknowledgement of service had been served upon them. The court was requested to list the matter for a directions hearing. As a result of that request, a hearing took place and I gave directions for the defendant to issue an application notice regarding service of the claim form on the basis of submissions made by the defendant's representative.

3. The defendant issued an application notice on 1 November 2021 and it was heard by me on 29 November 2021 together with a cross application made by the claimant dated 16 November 2021. The defendant sought an order that the claimant's Part 8 Claim be struck out together with costs. The claimant sought an order, if necessary, for service of the claim form to be dispensed with.

Chronology

4. The defendant's application is supported by a witness statement of Gerard Anthony Courtney, a costs draftsman employed by Kain Knight (North and Midlands) Ltd who are the costs lawyers for the defendant. The claimant's application relies upon a witness statement of James Green, the claimant's solicitor. The claimant also relies upon a witness statement from Mr Green in response to the defendant's application itself. Between these witness statements, all of the relevant documents were exhibited. There is really no dispute in relation to the chronology of events.

5. The claimant had instructed the defendant in respect of a personal injury claim. That claim concluded in 2019 and at which point the defendant's registered office was at Jackson House, Sibson Road, Sale M33 7RR. On 25 January 2021, the defendant moved its registered office to Dalton House, Dane Road, Sale M33 7AR.

6. The claimant instructed JG solicitors in respect of the fees of the defendant. JG solicitors wrote to the defendant on 12 April 2021 at the Jackson House address and also sent their letter by email. The letter requested a final statute bill to be produced and that bill was sent by the defendant to the claimant on 30 April 2021.

7. On 26 May 2021 the Part 8 Claim was issued. The defendant's address was stated to be the Jackson House address. On 27 July 2021 the claimant emailed the defendant and copied in Mr Courtney who had been corresponding with Mr Green previously. The email included a copy of the claim form as well as a letter which indicated that papers were being placed in the post for service. The letter was addressed to Farhanah Ismail, the defendant's complaints partner, at the Jackson House address.

8. As I have indicated above, the claimant's solicitors wrote to the court in August 2021 in the absence of any acknowledgement of service from the defendant. There appears to have been no communication between the parties until a copy of the notice of the

directions hearing was received by the defendant. It is not clear to me from Mr Courtney's witness statement whether the defendant received a copy of the hearing notice from the court as well as the one contained in an email from the claimant's solicitors on 29 September 2021.

9. Mr Courtney wrote an email to the claimant's solicitors on 30 September 2021, on behalf of the defendant, to say that service had not taken place and at that point set out the Dalton House address. The claimant's solicitors attempted to serve an amended claim form on 5 October 2021 at that address. Mr Courtney wrote again on 6 October 2021 to advise that the defendant could not accept service of the amended claim form given that the time for service had expired on 26 September 2021.

The Rules

10. In this case, the defendant had no notice of the proceedings prior to them being commenced. As such, although they are a firm of solicitors, they do not come within rule 6.7 regarding service on the solicitors of the defendant: (see Thorne v Lass Salt Garvin [2009] EWHC 100 (QB).) Nor did the defendant give an address for service at which it might be served and consequently the relevant rule is the general rule at 6.9 which provides for the relevant place of service, depending on the nature of the defendant to be served. For a company registered in England and Wales the place of service is

> "the principal office of the company; or any place of business of the company within the jurisdiction which has a real connection with the claim."

11. Rule 6.9 deals with service of a paper copy of the Claim Form. Where the claimant wishes to serve it electronically, regard is to be had to paragraph 4 of PD6A. Prior to this method of service being allowed, the putative recipient needs to confirm that it is willing to accept service in this way.

12. Where proceedings have not been served within four months of the claim form being issued, a party may seek an extension of time for serving the claim form under rule 7.6. The general rule is that an application to extend the time needs to be made prior to the expiry of the original period. If an application is made after the end of that period, the court may only make an order extending time if either the court has failed to serve the claim form, or the claimant has taken all reasonable steps to comply with the requirements for service. In either event, a prompt application is required.

13. A party who cannot retrospectively extend time for service of the claim form under rule 7.6 may apply to the court for it to dispense with service of the claim form in exceptional circumstances under rule 6.16. The application must be supported by evidence. This is the provision under which the claimant has made an application rather than under rule 7.6.

The case law

14. The cases referred to by the parties concerned claimants who had either sought to serve proceedings at the very end of the primary limitation period or who had received extensions of time for service and still sought to serve the documents at the end of those

extended periods. If the defendants were successful in those cases, then that would be the end of the claim and no further proceedings could be brought. That is not the case here because further proceedings could be brought in respect of the final statute bill served by the defendant. Nevertheless, it seems to me that the decisions of the Court of Appeal referred to by the parties are sufficiently wide that the presence or absence of a knockout blow in terms of limitation is not determinative. I refer in particular to the case of Kuenyehia & Ors v International Hospitals Group Limited [2006] EWCA Civ 21 where, for example, at paragraph 14, the Court contrasted the circumstances of that case with previous decisions and said that "such fine distinctions should not, in our view, be drawn in this area, where simplicity, clarity and certainty are particularly desirable."

15. In Kuenyehia, the claimants sought to serve solicitors acting on behalf of the defendant even though they had not indicated that they were instructed to accept service. At the same time, the claimants sought to serve the defendant directly by faxing it a copy of the claim form. Both methods of attempted service took place on the last day of an extended period of time for service of the claim form.

16. Neuberger LJ (as he then was), giving the judgment of the court, stated at paragraph 26 that the Court's exercise of its discretion to dispense with service should only be exercised in an exceptional case. If an exceptional case was identified, then the power was only likely to be exercised if the claimant had either made an ineffective attempt in time to serve by one of the permitted methods or had served in time in a manner which involved a minor departure from one of those permitted methods of service. An exhaustive guide to the circumstances in which it would be right to dispense with service of the claim form was not possible.

17. The phrase "minor departure" was exemplified by the use of second class post, rather than first class post, as prescribed by the rules. The Court in Kuenyehia did not consider that service by fax where the defendant had not expressed a willingness to accept service by that electronic method was a similarly minor departure.

18. Nor did the Court consider the facts to be exceptional in any event. The claimant's counsel referred to the repeated communication by fax as being some indication that the defendant could be assumed to accept service by fax. However, the Court took the opposite view, namely that those faxes presented an easy opportunity to ask specifically whether the defendant would accept service by that method.

19. The fact that the defendant had a faxed copy of the claim form within the limitation period was not something which swayed the court. It did not make it an exceptional case as otherwise many cases would become exceptional. Similar comments applied as to whether the defendant had been prejudiced in any way. Prejudice was something which might assist the defendant in an appropriate case, but its apparent absence could not assist the claimant.

Submissions

20. Martyn Griffiths of counsel, who appeared on behalf of the defendant on these applications, was able to rely upon the plain wording of the rules and the Court of Appeal's dicta in Kuenyehia in support of the defendant's application. The claim form had not been served at the defendant's principal place of business, since that was clearly

Dalton House, within the four months required by the rules. It had been sent to the wrong address by post and it had been served by email without any request for consent to do so. The claim form could not be said to have been validly served.

21. There was no application to extend the time for service because that was doomed to fail. The claimant could not say that he had taken all reasonable steps to comply with the rules having not ascertained the registered office of a limited company for postal service nor made the requisite request regarding email service.

22. Consequently, in Mr Griffiths' submission, the claimant was forced to seek the court's indulgence in dispensing with service. The test in Kuenyehia was not satisfied in that this was not an exceptional case. Matters such as the knowledge on the part of the defendant of the existence of the claim form did not assist the claimant. There was no requirement for the defendant to point out any shortcomings as to service to the claimant. In any event, the defendant had communicated solely by email prior to the commencement of proceedings and the question of the change of address had simply not arisen.

23. Ian Simpson of counsel, for the claimant, set out his primary case that there had been effective service of the proceedings at the Jackson House address. He indicated that there had been no documentation put forward by the defendant to establish that the defendant had actually moved from one address to the other on 25 January 2021 in order to support Mr Courtney's assertion that this had occurred. He relied upon a Companies House document produced in (and exhibited to) Mr Green's first witness statement headed "RALLI LIMITED" which referred to "RALLI SOLICITORS LLP". It referred to a correspondence address being the Jackson House address.

24. Mr Simpson also drew a contrast between the speed with which the defendant responded to communications. For example, the defendant, when threatened with an application for delivery of a bill, provided such a bill four days later. Similarly, the response to the directions hearing notice occurred the day after receipt of the claimant solicitors' email. However, when it came to notifying the claimant that the wrong address was on the claim form, it took the defendant fully two months to make that point and during which, not coincidentally in Mr Simpson's submission, the four-month period for serving the claim form had expired.

25. This conduct, he suggested, arguably gave rise to an estoppel against the defendant being able to take the point regarding any problem with the address. There had been no return of any documentation through the post and there was no evidence from the defendant that the post sent to the Jackson House address had not in fact been received by the defendant. Given that none of the post had been returned, there was material on which to conclude the claim form had in fact been served upon the defendant within the four-month period.

26. It was also possible, in Mr Simpson's submission, for me to conclude that consent to service by email had been provided given that the entire communication from the defendant was via email. To the extent that relief was required in the form of dispensing with service of the proceedings, then absence of formal consent for service by email ought to amount to a minor departure.

27. In relation to the application for dispensing with service, Mr Simpson sought to distinguish some of the case law on the basis that it was dealing with claimants who had failed to serve within time by leaving things to the last minute or indeed doing so having obtained extensions on at least one occasion.

28. By contrast in this case the defendant had not referred at any point to the Jackson house address being set out on any of the documentation provided by the claimant. This led to one or other of two unattractive situations. Either the defendant had been alive to the issue from the outset and had not raised it with the claimant so as potentially to take a point later. Or, it had occurred to the claimant at a later point that an opportunistic application might be made. Neither approach put the defendant in an attractive light. The only occasion on which the defendant had put the Dalton House address on any documentation was on the final statute bill where reference to Ms Islam was made as the complaints partner. It said that if correspondence to her was required, then it should be sent to that address. That was no indication of the address being the one that needed to be used in place of the existing address that had been written to throughout.

29. In respect of whether the case was exceptional or not, Mr Simpson made reference to the case of Lonestar Communications Corp LLC v Kaye & Ors [2019] EWHC 3008 (Comm) where Teare J had concluded the defendant had been evading service and consequently dispensed with that service. Here, the claimant did not say that the defendant had actually been evading service but, by delaying any indication that there was a problem with service until the limitation period expired, the defendant was effectively avoiding service and that ought to be bracketed in the same area of exceptionality as in the Lonestar case.

Decision

30. I have set out the conclusions of the Court of Appeal in Kuenyehia at some length because it essentially deals with all of the points raised by the claimant here. The mechanism of requiring consent before electronic service can be used is indistinguishable between 2006 and now even though faxes have been superseded by email in the meantime. The claimant could have asked in any of the emails sent whether service by email could be used but that did not occur. Either the claimant's solicitors did not think it was necessary to do so, or, as seems more likely, did not intend the email version to be formal service. The fact that the defendant had a copy via email is not something which can assist the claimant any more than the defendant's receipt of a fax in Kuenyehia.

31. There is no evidence before me that the claimant's solicitors ever checked the defendant's address before commencing proceedings. The entry found on the Companies House website does not assist the claimant because it is clear that Ralli Ltd is simply a member of Ralli Solicitors LLP. It is the latter which has a correspondence address at Jackson House, but it is the former which is being sued by the claimant.

32. The rules governing service are clear that it is the registered office or principal place of business – which appear to be one and the same in this case – which needs to be used as the postal address for service upon a limited company. I have no doubt that errors such as have occurred here are often dealt with on a practical basis by amendment in the manner attempted by the claimant's solicitors. But there is nothing within the rules

to require one party to assist the other and a practical solution does not alter the legal position. It is one which the defendant is entitled to uphold, should it wish to do so.

33. I think the claimant was right not to seek to extend the time for service of the claim form since the absence of a request for confirmation of service by email and the checking of the correct address of the defendant does not appear to have occurred. It does not seem to me that such failures can support a case of exceptionality and there is considerable daylight between the facts here and those found by Teare J in Lonestar. Consequently, although the claimant can point to an ineffective attempt to serve the proceedings in time by the permitted method of postal service, that is not sufficient to persuade a court to dispense with service.

34. Nor does the general comment about the fact sensitive nature of cases preventing an exhaustive guide assist the claimant. Whilst the claimant has its suspicions as to the reasons for the defendant's approach, the defendant is obviously entitled to rely upon the rules which, fundamentally, is all it has done here. The cause of the problems for the claimant lies elsewhere.

35. Accordingly, I find for the defendant in its application to strike out the Part 8 Claim and I refuse the claimant's application to dispense with service.