Editor's Note

Service of the Claim Form[1]

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LT Addresses for service; Claim forms; Extensions of time; Service

Attention was drawn last year to a number of problems regarding service of the claim form that have caused a great deal of difficulty in practice ((2005) 24 C.J.Q. 401). These problems have now been resolved by the Court of Appeal in *Collier v Williams (and conjoined appeals)* [2006] EWCA Civ 20 and *Kuenyehia v International Hospitals Group Ltd* [2006] EWCA Civ 21. These decisions have clarified the law in a number of important respects.

It is particularly important to notice the common thread running through the different decisions: the court's discretion to forgive or remedy failures to comply with the rules of service is now very limited. The message to practitioners is that given the narrow scope for obtaining relief from defective service it is essential to effect service in accordance with the rules and within the time stipulated by the rules. Where proceedings are commenced near the end of the limitation period, it is most unwise to postpone service of the claim form until near the end of the four months' period for service for it may leave the claimant's solicitors insufficient time to overcome any difficulty that may be encountered.

The claim form may be served at the address for service given by the defendant

CPR r.6.5(4) provides that any document to be served may be served at "the address for service given by the party to be served." Where a defendant gives the claimant a solicitor's address for service, the claim form may validly be served at that address by one of the permitted methods of service (*Collier* at [14]).

[1] I am most grateful to Nik Yeo, of Fountain Court Chambers, for his comments.

Where a solicitor has notified the claimant in writing that he is authorised to accept service on behalf of the defendant, service must be on the solicitor (CPR r.6.4(2)). But this provision in no way affects the position where the defendant has given the solicitor's address as the address for service. If the defendant has given his solicitor's address, the claimant is entitled to serve the claim form on the solicitor regardless of whether the solicitor has indicated in writing that he is authorised to accept service, regardless of whether the solicitor has authority to accept service, and, presumably, regardless of whether the solicitor has any knowledge of the defendant's request or, indeed, existence. As long as the claimant served at the address nominated by the defendant, the service will be good.

"No solicitor acting for the party to be served": CPR r.6.5(6)

CPR r.6.5(6) provides that where no solicitor is acting for the defendant, and the defendant has not given an address for service, the claim form must be sent or transmitted to, or left at, the place shown in the table appended to the rule. The table indicates, amongst others, usual or last known residence or place of business or last known place of business. The Court of Appeal held that the phrase "no solicitor acting" means "no solicitor acting so that he can be served" (*Collier* at [19]). The fact that the claimant has communicated with the defendant through the defendant's solicitor is not enough to take the case out of CPR r.6.5(6) and does not entitle the claimant to serve on the solicitor. Service may be made on the defendant's solicitor only where the defendant has given his solicitor's address as the address for service, as explained above, or where the defendant's solicitor has indicated to the claimant that he is authorised to accept service on behalf of the defendant. This removes a doubt introduced in *Marshall & Rankine v Maggs* [2005] EWHC 200, which appears to have caused some concern within the profession.

"Usual or last known residence" CPR r.6.5(6)

(i)The position where the defendant never resided at the address at which the claim form was served

The meaning of these words has been a cause of considerable dispute in the past. In last year's note on service ((2005) 24 C.J.Q. 401) it was suggested that the words should be interpreted as requiring claimants to show that they reasonably believed the address in question to be the defendant's last known residence. The advantage of this interpretation is that it would enable claimants who had reasonable grounds to believe that the defendant last resided at a particular address to serve at that address. But the Court of Appeal rejected this interpretation.

Dyson L.J. noted that there is no other area of the law where the concept of knowledge is equated with that of belief. A fact which is false cannot be known, he explained.

> "As a matter of the ordinary meaning of words, to say 'I know X' entails the proposition that 'X is true'. We do not see how the phrase 'last known

> residence' can be extended to an address at which the individual to be served has never resided'' (*Collier* at [68]).

Dyson L.J. thought that whatever the advantages of the proposed interpretation, it did not:

> ''warrant rewriting the rules so as to make them bear a meaning which they plainly do not have. Nor do we see how interpolating the words 'or reasonably believed' in the phrase 'the address known to be last residence of the individual' adds to certainty or reduces the risk of satellite litigation'' (at [69]).

Be that as it may, although ''last known residence'' was taken to mean the place at which the defendant actually resided at least at some point, the reasonableness of the claimant's belief remains relevant even if the defendant never resided at that address. This is because a claimant who discovers that the address was not ''the last known residence'' may apply for an extension of time to serve the claim form. If the claimant applies after the expiry of the four-months period for service, CPR r.7.6(3) requires him to show that he ''has taken all reasonable steps to serve the claim form but has been unable to do so''. And the same is relevant even in application before the expiry of time. Dyson L.J. explains how such application has to be approached:

> ''101. If a claimant purports to serve on an address which he mistakenly believes is the last known residence of the defendant, it is therefore necessary to consider the reasonableness of his belief that the address is indeed the defendant's last known residence. If the claimant is misled by the defendant as to his residence, then the court is likely to hold that the claimant had reasonable grounds for his belief. In such circumstances, the court is likely to hold that there is a very good reason for the claimant's failure to serve within the 4 months period and to grant an extension of time under CPR 7.6(2). In such a case the defendant may even be estopped from denying that the address to which the document is sent is his last known residence.
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> 102. But it is incumbent on a claimant to take reasonable steps to ascertain a defendant's last known residence. What that involves must depend on the circumstances of the case. In many cases, the claimant will know the address for certain. Where the position is less clear, a direct request of the defendant, or his legal representatives (if they do not have instructions to accept service) may yield an answer. Other enquiries may have to be made.''

Judging by the way in which the Court of Appeal applied these principles, reasonableness is going to be difficult to establish. For in the case under consideration, the defendant told the claimant that the address in question was his ''new address'', the claimant met the defendant at that address, the house appeared to be a residence, the claimant corresponded with the defendant at that address, and the defendant's solicitors were less than forthcoming when asked for an address for service. It is difficult to escape the conclusion that

postal service has now become so risky that claimants would be better off reverting to the old and expensive system of personal service. This decision, it is suggested, makes service unnecessarily hazardous. For the reasons explained in (2005) 24 C.J.Q. 401, claimants need to be sure that if they have taken all reasonable steps to ascertain the defendant's address their claim will not be defeated by what is often an unmeritorious technical objection, of the kind that the facts outlined above illustrate.

(ii) The position where the claim form is posted to an address at which the defendant resided at some time but no longer resides there

That Court of Appeal's ruling that a person's address cannot be his "last known residence" unless it was actually his residence at some point, was sufficient to dispose of the issue in the case before the court since it was proved that the defendant never lived at the address to which the claim form was sent. Had the court stopped there the question would have been left open about the position where the address is one at which the defendant has resided at some time, though no longer resides there. Dyson L.J. expressed the court's view on this question since it is a matter of considerable practical importance. He stated (*Collier* at [71]):

> "71. What is the position where the address is one at which the individual to be served has resided at some time? The point does not arise for decision in the present case. But in view of the uncertainty that exists as to the meaning of 'last known residence', we think that it may be helpful if we express our view in particular on the interesting suggestion made by Mr Zuckerman. What state of mind in the server is connoted by the words 'last known'? In our judgment, Mr Zuckerman's interpretation goes too far. As we have said, there is an important distinction between belief and knowledge. It is a distinction particularly well understood in the criminal law, but elsewhere too. The draftsman of the rules deliberately chose the word 'known'. In our view, knowledge in this context refers to the serving party's actual knowledge or what might be called his constructive knowledge, ie knowledge which he could have acquired exercising reasonable diligence. We arrive at this conclusion on the basis of what we understand the words to mean. We do not believe that there are any policy reasons which require us to give the words a strained or unusual meaning. The risk of satellite litigation is inherent in whatever interpretation is adopted. It is true that a defendant who has not in fact received the claim form should have no difficulty in setting aside a default judgment. But it is not desirable that defendants should be put to the trouble and expense of making applications to set aside default judgments."

Given that knowledge consists of a belief that is factually correct, if the claimant knows that the defendant lived at X until last month, and this fact is true, he can truthfully state that the defendant's "last known residence" is X. (See *Mersey Docks Property Holdings Ltd v Kilgour* [2004] EWHC 1638 at [63], Judge Toulmin; *Arundel Corp v Khoker* [2003] EWCA Civ 1784 at [13],

Mummery L.J.) The phrase "last known residence" is not peculiar to the law but is a fairly common and well-understood idiom, though it usually takes the form "last known address". In ordinary usage the question: "What is Y's last known address?" implies that the person posing the question wants to know where Y could last normally be contacted, even if Y no longer lives there.[2]

The above quoted dictum therefore proceeds on the assumption that the claim form may be served at the defendant's "last known residence" even if it is no longer his residence at the time of service. This is, however, subject to an important caveat. Dyson L.J. rejected the suggestion (in (2005) 24 C.J.Q. 401 at 404) that the claimant should be merely required to show that he believed the address in question to be the defendant's last known residence and that such belief was not patently unreasonable. This suggestion, Dyson L.J. thought, went too far. What is required is that the claimant should believe that the address in question was the defendant's "last known residence" and that such belief should represent what any claimant exercising reasonable diligence would have known (which conforms with Dyson L.J.'s view in *Cranfield v Bridgegrove Ltd* [2003] EWCA Civ 656; [2003] 1 W.L.R. 2441 at [103]). Dyson L.J. was careful to say that a claimant may be fixed with "constructive knowledge, ie knowledge which he could have acquired exercising reasonable diligence." Thus, if the claimant thought that the defendant lived at Y St, but could have discovered from the telephone directory that he lived at Z St, service at the former address will not be valid. The same will be true, for example, where the claimant is an assignee of the cause of action: he will be fixed with the assignor's knowledge of where the claimant most recently lived (*Mersey Docks Property Holdings Ltd v Kilgour* [2004] EWHC 1638).

(iii) Unresolved problems and difficulties

Given that the defendant must at least at some point have had his residence at the address to which the claim form was sent, and that reasonable belief is not enough, a lot may turn on the meaning of "residence". A number of questions may arise such as: What does it mean to reside? Does it mean that the defendant has to be "in residence"? What does the word "usual" add to the phrase used the table to CPR r.6.5(6) "usual or last known residence"?

Quite apart from such problems, the fact that the actual residence is required (and not just a place in which the claimant is entitled to believe on reasonable grounds that the defendant resided) makes postal service more hazardous than it should. For even if the claimant has verified the defendant's address by reference to normally reliable sources, such as telephone directories and electoral registers, service can be defeated if it emerges that the defendant never lived there after all. The Court of Appeal in *Collier* proceeded on the assumption that there were no good policy reasons for holding that a "last known residence" should

[2] This usage is frequent in the wording of advertising for missing persons services. Inquirers after missing persons are asked to provide any available information, including "last known address", which implies that this is not the current address, for otherwise the missing persons service would not be needed. A person who wishes to find out where Y lives now would not ask "What is Y's last known address?", but would simply inquire: "What is Y's address?".

be taken to mean the place at which, to the claimant's reasonable belief, the defendant resided. But in fact there is a very good reason for adopting such an approach. First, there is need for a default address at which claimants can serve the claim form when the defendant has not provided an address for service. Secondly, this address must be relatively easy to ascertain. Thirdly, the rules of service must provide ways by which diligent claimants can safely meet the deadline for service even where defendants have been uncooperative.

Reasonable steps to serve the claim form

As already noted, an extension of time for service of the claim form may be obtained if reasonable steps have been taken to serve the claim form in time. The Court of Appeal has now indicated that no leniency would be shown for sloppy practice. Failure by a defendant to respond to the letter of claim was no reason at all, the court held, for not serving the claim form in time. Dyson L.J. stated that it "should clearly be understood, therefore, that where there is no reason, or only a very weak reason, for not serving the claim form in time, the court is most unlikely to grant an extension of time" (*Collier* at [133]).

The application procedure for obtaining an extension of time for service

In *Collier v Williams* the Court of Appeal clarified the powers of the court to set aside or vary an application that has been disposed of without a hearing under CPR r.23.8. It noted that 23 PD 11.2 provides that "where rule 23.8(c) applies the court will treat the application as if it were proposing to make an order of its own initiative". This is a reference to the power of the court to make orders of its own initiative under CPR r.3.3. CPR r.3.3(5)(a) states that where the court has made an order without a hearing "a party affected by the order may apply to have it set aside, varied or stayed". Therefore, since CPR r.23.8(c) covers any situation where (regardless of whether or not the parties agreed) the court considers it is appropriate to deal with the application without a hearing, in such situations, "*any* party affected by an order made without a hearing [has] the right to apply to have it set aside, varied or stayed" (*Collier* at [34]). Dyson L.J. considered that:

> "it is good practice to require any application under CPR 3.3(5) to be made at a hearing rather than on paper. If a judge dismisses an application under CPR 3.3(5), whether on paper or at a hearing, any further application under CPR 3.3(5) should usually be struck out as an abuse of process, unless it is based on substantially different material from the earlier application (in which case different considerations will arise). We do not consider that the possibility that such further applications might be made is a good reason for adopting a strained interpretation of CPR 23.8." (*Collier* at [37])

The Court of Appeal went out of its way to explain when it is appropriate for a party who is dissatisfied with the order to use the setting-aside procedure.

Dyson L.J. endorsed the following guidelines stated by Patten J. (*Collier* at [39]–[40] referring to Patten J. in *Lloyds Investment (Scandinavia) Limited v Christen Ager-Hanssen* [2003] EWHC 1740 (Ch)):

> ". . . the Applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him. The latter type of case would include, for example, a case of material non-disclosure on an application for an injunction. If all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done, in my judgment, in the context of an appeal. Similarly it is not . . . open to a party to the earlier application to seek in effect to re-argue that application by relying on submissions and evidence which were available to him at the time of the earlier hearing, but which, for whatever reason, he or his legal representatives chose not to employ."

Where the court has made an order of its own initiative without a hearing under CPR r.3.3(4), it is good practice that any application under CPR r.3.3(5) to set aside the order should be made at a hearing rather than on paper. The court stated:

> "If a judge dismisses an application under CPR 3.3(5), whether on paper or at a hearing, any further application under CPR 3.3(5) should usually be struck out as an abuse of process, unless it is based on substantially different material from the earlier application (in which case different considerations will arise)."(*Collier* at [37])

The Court of Appeal drew attention to the danger in dealing with important applications on paper. Dyson L.J. explained:

> "An application for an extension of time for service of the claim form is potentially of critical importance, especially where the application is made shortly before the end of the 4 months period for service and where the cause of action has become time-barred since the date on which the claim form was issued. If the application is allowed and an extension of time is given, the defendant can always apply under CPR 23.10 for the order to be set aside, in which case the applicant may be worse off than if it had been refused in the first place. It is highly desirable that on the without notice application, full consideration (with proper testing of the argument) is given to the issue of whether the relief sought should be granted. Equally, if an application is made late in the day and refused on paper when proper argument would have made it proper to grant, a great deal of heart-ache can be saved. We think that applications of this kind, where time limits are running out, should normally be dealt with by an urgent hearing. We accept, however, that owing to time constraints, pressure of business and the like, it will sometimes not be possible to deal with such an application other than on paper. Even in such cases,

> however, consideration should be given to dealing with the application by telephone.'' (*Collier* at [38]).

Dispensing with service under CPR r.6.9

CPR r.6.9 empowers to court to ''dispense with service of a document''. Although the jurisdiction is very wide, its exercise for the purpose of overcoming defective service is extremely limited. It is now widely understood that there is no jurisdiction under CPR r.6.8 to order alternative service retrospectively so as to cure defective service, but CPR r.6.9 is still invoked to this end. *Kuenyehia v International Hospitals Group Ltd* [2006] EWCA Civ 21 will have extinguished any notion that CPR r.6.9 provides an escape route where service has been defective. Neuberger L.J. stated that:

> ''the time limits in the CPR, especially with regard to service of the claim form where the limitation period may have expired, are to be strictly observed, and extensions and other dispensations are to be sparingly accorded, especially when applied for after time has expired'' (*Kuenyehia* at [33]).

In that case the claimant asked the defendants' solicitors whether they had authority to accept service, but received no reply. They nevertheless served the claim form on them. Since the solicitors had no authority to accept service, service was invalid. The claimant also purported to serve the claim form on the defendants by faxing it to their office. The fax was received within the period for service but it was ineffective since the defendants never consented to fax service. Service by electronic means is permitted only if the party to be served has given written confirmation ''that he is willing to accept service by electronic means'' and of his fax number (6 PD 3.1(1)).

By holding that the validity of service was not redeemed by the fact that the defendant was in receipt of the claim form before the time for service expired, the Court of Appeal has effectively put paid to the argument that service may be valid notwithstanding that it was not in accordance with the rules provided it reached the defendant in time.

The Court of Appeal disapproved of the judge's exercise of discretion to dispense with service under CPR r.6.9. The court reviewed the decisions on the subject and summarised their effect as follows (*Kuenyehia* at [26]):

> ''First, it requires an exceptional case before the court will exercise its power to dispense with service under r 6.9, where the time limit for service of a claim form in r 7.5(2) has expired before service was effected in accordance with CPR Part 6. Secondly, and separately, the power is unlikely to be exercised save where the claimant has either made an ineffective attempt in time to serve by one of the methods permitted by r.6.2, or has served in time in a manner which involved a minor departure from one of those permitted methods of service. Thirdly, however, it is not possible to give an exhaustive guide to the circumstances in which it would be right to dispense with service of a claim form.''

The Court of Appeal held that there was no justification for dispensing with service even though the defendant actually received the faxed claim form within the period for service, because the claimant's solicitor waited until the very last day to serve a claim form and failed to effect service in accordance with CPR r.6.2 even though there was no impediment to serving in accordance with the rule.

Service that takes place when the defendant is out of the jurisdiction

By taking the view that service may be good even if the defendant was not living at the address in question at the time of service, the Court of Appeal seemed to set its face against reviving decisions such as *Barclays Bank of Swaziland Ltd v Hahn* [1989] 2 All E.R. 398 (where the defendant argued that service was void because he was at the time in an aeroplane bound for his home in London); *India Videogram Association Ltd v Patel* [1991] 1 All E.R. 214 (where the defendant had left for India 10 days before service); *Rolph v Zolan* [1993] 4 All E.R. 202 (where the defendant moved to Spain, but continued to retain the house to which the summons was sent); and *Forward v West Sussex County Council* [1995] 4 All E.R. 207 (where at the time of a car accident the defendant gave his address to the claimant as being X, but after attempted service it transpired that the defendant had moved away). In the first three it was held or assumed that service was invalid if it could be shown that at the time of service the defendant was in fact out of the jurisdiction.

Yet, the first three mentioned decisions have emerged from their deserved obscurity as a result of Lawrence Collins J.'s decision in *Chellaram v Chellaram* [2002] 3 All E.R. 17 and more recently Evans-Lombe J.'s ruling in *Fairmays (A Firm) v Palmer* [2006] EWHC 96 (Ch). In these the court held that service of the claim form, issued for service within the jurisdiction, could only be effectively served when the defendant is physically present within the jurisdiction. It is, however, suggested that these decisions are inconsistent with the Court of Appeal's view in *Collier*.

Evans-Lombe J. was aware of the difficulty in which the law now places claimants, and said that it gave him no satisfaction to arrive at this conclusion. His unease is understandable. It seems that a claim can be defeated by the defendant's absence from the jurisdiction, even where the claimant had no reason to know of the defendant's trip abroad. An example will illustrate the point. C wishes to bring a claim against D. C issues proceedings five months before the expiry of the limitation period. The claim form is posted to D's "last known residence" two months before the expiry of the limitation period. Not having received a response, C obtains a default judgment. After the expiry of the limitation period, D who has been abroad succeeds in setting aside the default judgment on the grounds that he had been out of the jurisdiction at the time of service. C cannot revive the claim since the limitation period has expired.

What this example illustrates is that the rules do not offer claimants a sure way of both commencing and serving proceedings within the limitation period. Claimants can commence proceedings within the limitation period without

the need for the defendant's co-operation by issuing a claim form. But the claim form must be served within four months. It is this four months period for service that claimants cannot be sure of meeting. Defendants seem to be under no obligation whatever to co-operate by making themselves amenable to service. A claimant may not be able to locate the defendant to effect personal service. If the claimant has established the defendant's current address, he may discover too late that the defendant never lived there. Or he may discover that the defendant was on holiday at the time. There may be ways of reducing these risks, such as applying for substitute service, but they are bound to be expensive.

Conclusion

The effect of the above decisions may be summarised as follows.

1. Where the defendant has given a solicitor's address for service, the claim form may be validly served at that address, regardless of whether the defendant has authorised the solicitor to accept service, and regardless of whether the solicitor has notified the claimant of willingness to accept service.
2. For the purpose of CPR r.6.5(6) the phrase "no solicitor acting" means "no solicitor acting so that he can be served".
3. "Last known residence" would appear to mean the address at which, to the claimant's reasonable belief, the defendant last resided so long as it is in fact the case that the defendant resided at that address at some time in the past. If it turns out that the defendant never lived at that address, service is invalid regardless of how reasonable the claimant's assumption had been.
4. The jurisdiction to dispense with service under CPR r.6.9 will be used to redeem service that was not in accordance with the rules only in truly exceptional circumstances and only if the claimant has either made an ineffective attempt in time to serve by one of the methods permitted by r.6.2, or has served in time in a manner which involved a minor departure from one of those permitted methods of service.
5. Applications for an extension of time for service of the claim form are best made at an oral hearing if they are made close to the end of the period for service, especially where this falls at the end of the limitation period.
6. It would appear that if the claim form is served when the defendant is out of the jurisdiction service is invalid, but this may be doubted.