Editor's Note

New provisions for service—A great improvement threatened by discretion

Adrian Zuckerman
Professor of Civil Procedure, University of Oxford

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The rules concerning service have been recently amended by the Civil Procedure (Amendment) Rules 2008 (SI 2008/2178), and came into effect on October 1, 2008. This note deals exclusively with service of the claim form within the jurisdiction.

The rules for service of originating process (the claim form in England and Wales) need to fulfil two quite distinct functions. The first is to notify the defendant of the proceedings against him. The second is to define what exactly the claimant has to do to meet the deadline for service of the claim form even in the absence of the defendant's cooperation. The need for notification is obvious. It is a fundamental requirement both at common law and under art.6 of the European Convention of Human Rights. Equally important is the need for a time limit to the service of originating process on the defendant and for clarity about how this is to be done.

Just as commencement of proceedings is subject to limitation periods, service too must be subject to a time limit. For in the absence of a time limit for service of originating process a claimant would be able to keep alive the possibility of legal proceedings indefinitely. Where there is a limitation period for commencing proceedings, the law must stipulate what a claimant must do in order to meet the limitation deadline. To bring an action within the limitation period in England and Wales the claimant must issue a claim form before the expiry of the relevant period. Once the claim form has been issued by the court, the law places a time limit on its service upon the defendant. Under the Civil Procedure Rules 1998 the deadline for service within the jurisdiction is four months and for service out of the jurisdiction it is six months. In reality, these periods for service are extensions of the limitation

period because a potential defendant cannot be free of fear of proceedings unless the limitation period plus the deadline for service have elapsed.

When personal service was the only method for serving originating process, the act of meeting the deadline for service and the act of notification were plainly one and the same and no special provisions were needed. Once the modern methods of transmission of originating process were adopted, such as service by post, fax, email and document exchange systems, the act of transmission and the fact of notification became detached from each other. A party or a court that serves a document would know when and how it was transmitted but not necessarily whether the document reached its destination, let alone whether it came to the served party's notice.

Where service (other than personal service) has elicited no response from the defendant, the claimant has no way of knowing whether this is due to a decision by the defendant not to defend or to the fact that the claim form never reached the defendant. This knowledge gap had to be bridged somehow, otherwise ignorance of whether the transmitted documents actually reached the defendant could lead to legal paralysis. To resolve this inherent uncertainty, modern methods of service were backed up by presumptions of deemed service, which enabled the process to progress even where the served party did not respond. The presumptions enabled claimants who have not received a response from the defendant to proceed by applying for a default judgment.

However, what the rules failed to clarify was what exactly a claimant had to do to meet the deadline for service. For example, where service by post was used, service was deemed to have taken place on the second business day after posting. But since no express provision was made about what exactly amounted to meeting the deadline for service the ground was fertile for many and varied disputes, of which the following are illustrative. Suppose that the deadline for service was on a Tuesday. The claimant posted the claim form on the Monday (the day before), which meant that it was deemed to have been served on the Wednesday, the day after the expiry of the deadline. But what if it had actually reached the defendant on the Tuesday? The rule made no express provision for this. Or take another example, suppose that a claim form was posted on Monday to meet a Wednesday deadline. It was therefore deemed to have been served on the Wednesday. But suppose it had not in fact reached the defendant's address until much later. Could the defendant rebut the presumption created by the deeming provision? Again, the rules provided no clear answer. The court struggled to fashion solutions to such questions but its efforts were hampered by indeterminacy at the heart of the deeming provisions: were they presumptions of notification, which could be rebutted by evidence to the contrary, or were they merely describing methods for meeting deadlines?

This uncertainty has now been resolved by the new CPR Pt 6 and CPR r.7.5 which have been enacted by the Civil Procedure (Amendment) Rules 2008 that came into effect on October 1, 2008. The new CPR r.7.5 expressly sets out how the deadline for service is to be met. This is achieved by introducing the concept of ''completing'' the relevant step required for service by a particular method by a certain time. It provides:

"Service of a claim form 7.5

(1) Where the claim form is served within the jurisdiction, the claimant must complete the step required by the following table in relation to the particular method of service chosen, before 12.00 midnight on the calendar day four months after the date of issue of the claim form.

Method of service	**Step required**
First class post, document exchange or other service which provides for delivery on the next business day	Posting, leaving with, delivering to or collection by the relevant service provider
Delivery of the document to or leaving it at the relevant place	Delivering to or leaving the document at the relevant place
Personal service under rule 6.5	Completing the relevant step required by rule 6.5(3)
Fax	Completing the transmission of the fax
Other electronic method	Sending the e-mail or other electronic transmission

(2) Where the claim form is to be served out of the jurisdiction, the claim form must be served in accordance with Section IV of Part 6 within 6 months of the date of issue."

Thus, compliance with the four months' deadline for service within the jurisdiction is determined only by asking whether the "step required" for effecting service by a particular method of service was "completed" by midnight on the day of the expiry of the four months period for service. The methods of service are now to be found in CPR r.6.3, which by and large re-enacts the methods that were in existence before the amendment, such as personal service, service by first class post, by document exchange, by leaving the claim form at a specified place (such as the defendant's usual or last known residence), fax or other electronic means. One innovation is, however, that service by post is no longer limited to the use of the Royal Mail services but also includes other services which provide for delivery on the next business day.

The fact that a claimant has met the four months deadline, e.g. by posting the claim form by midnight on the day on which the four months period for service expires, does not mean that this is the starting point for calculating the time for the ensuing proceedings. The first time limit that must be fixed following service concerns the time that is to be given to the defendant to respond to the claim. A defendant must know how much time he has to respond. Thus CPR r.10.3(1) provides that where the particulars of claim are served with the claim form, the period for filing an acknowledgement of service is "14 days after service of the claim form". The calculation of time for filing a defence similarly starts with the day of service because CPR r.15.4(1) provides that the period for filing a defence is, if the defendant files an acknowledgment of service, "28 days after service of the particulars of claim".

There will be little point in calculating such deadlines from the completion of the required step for service since it would normally take some time before the claim form and particulars of claim could come to the defendant's attentions. If the claim form is posted just before midnight on a Monday it would normally reach the defendant only on Wednesday. Similarly, if the claim form was faxed or emailed just before midnight it would normally come to the defendant's attention only on the next business day at the earliest. For this reason the new CPR r.6.14 provides:

> ''A claim form served in accordance with this Part is deemed to be served on the second business day after completion of the relevant step under rule 7.5(1).''

This provision does not create a presumption of fact. It has nothing to do with facts. It is merely an indication of the starting time for calculating the period for responding to the claim. It therefore follows that a clear distinction now exists between the calculation of time for the purpose of meeting the deadline for service of the claim form, on the one hand, and the starting line for calculating deadlines following service. In order to determine compliance with the four-month deadline for service of the claim form, one asks whether the claimant has completed the step he needs to take in order to effect service by ''midnight on the calendar day four months after the date of issue of the claim form'' (CPR r.7.5(1)). For example, if postal service is used, the deadline for service will have been met if the claim form is posted by midnight on the critical day. If delivery to the usual or last known address was employed, the deadline will have been met if the claim form was delivered by midnight. But a different method is used for calculating the deadlines following service: they are counted from the second business day after the completion of the relevant step, e.g. the second business day after posting, or after delivery to the defendant's address.

It should be noted that the deemed date of service is now the same for all methods of service. That is to say, a claim form will be deemed to be served on the second business day whether the method was first class post, fax, email, document exchange, or even personal service. Whatever the method that the claimant employed, the defendant will have 14 days for filing an acknowledgement of service from the second business day following the completion of the relevant step.

However, we must not lose sight of the fact that, quite apart from provisions for meeting deadlines, the rules of service of originating process must also provide for notification of the proceedings to the defendant. As already observed, notice of proceedings is a basic requirement of justice. A number of provisions in the amended rules deal with this aspect. As before, where the defendant has given his solicitors' address as the address for service (or the solicitors have done so on his behalf) the claim must be served on the solicitors (CPR r.6.7). If the defendant has given another address within the jurisdiction for the purpose of service, then he ''may be served'' at such address (CPR r.6.8(a)). There is an important difference between CPR r.6.7 and CPR r.6.8, in that the former is obligatory, while the latter is merely permissive. The

claimant must serve the claim form where the solicitors' address was given for service, but where some other address has been given the claimant may serve at this address, but he may also effect personal service or serve at the defendant's residence.

Notification would normally be straightforward where the defendant nominated solicitors for service or has given some other address for this purpose. But what if the defendant is uncommunicative or unresponsive? Plainly, the defendant's evasiveness cannot be allowed to deny the claimant the possibility of suing and thereby deny the claimant access to justice. Consequently, the rules make provision for such an eventuality. Where the defendant has not given an address for service and the claimant cannot effect personal service, or does not wish to do so, CPR r.6.9(2) stipulates places where the claim form may be served:

> ''(2) Subject to paragraphs (3) to (6), the claim form must be served on the defendant at the place shown in the following table.

Nature of defendant to be served	**Place of service**
1. Individual	Usual or last known residence.
2. Individual being sued in the name of a business	Usual or last known residence of the individual; or
	principal or last known place of business.
3. Individual being sued in the business name of a partnership	Usual or last known residence of the individual; or
	principal or last known place of business of the partnership.
4. Limited liability partnership	Principal office of the partnership; or
	any place of business of the partnership within the jurisdiction which has a real connection with the claim.
5. Corporation (other than a company) incorporated in England and Wales	Principal office of the corporation; or
	any place within the jurisdiction where the corporation carries on its activities and which has a real connection with the claim.
6. Company registered in England and Wales	Principal office of the company; or
	any place of business of the company within the jurisdiction which has a real connection with the claim.
7. Any other company or corporation	Any place within the jurisdiction where the corporation carries on its activities; or
	any place of business of the company within the jurisdiction.''

It is reasonable to consider it satisfactory notification if the claim form is sent to, or left at, the defendant's usual or last known address or the defendant's principal or last known place of business, if the claimant has a reasonable belief that the claim form would reach the defendant. But it may not always be reasonable to hold such a belief. CPR r.6.9(3) therefore states:

> ''(3) Where a claimant has reason to believe that the address of the defendant referred to in entries 1, 2 or 3 in the table in paragraph (2) is an address at which the defendant no longer resides or carries on business, the claimant must take reasonable steps to ascertain the address of the defendant's current residence or place of business ('current address').''

If having taken such reasonable steps the claimant ascertains the defendant's current address, the claim form must be served at that address (CPR r.6.9(4)(a)). If the claimant is unable to ascertain the defendant's current address, then CPR r.6.9(4)(b) states that, ''the claimant must consider whether there is (i) an alternative place where; or (ii) an alternative method by which, service may be effected''. If there is such a place or a method by which service may be effected, the claimant must make an application under r.6.15 for permission to serve in this way (CPR r.6.9(5)).

There will be circumstances, however, where the claimant has reason to believe that the defendant no longer resides at his last known address or place of business but he cannot ascertain the defendant's current address nor find an alternative place or method for reaching the defendant. For such an eventuality CPR r.6.9(6) provides:

> ''Where paragraph (3) applies, the claimant may serve on the defendant's usual or last known address in accordance with the table in paragraph (2) where the claimant—
> (a) cannot ascertain the defendant's current residence or place of business; and
> (b) cannot ascertain an alternative place or an alternative method under paragraph (4)(b).''

The purpose of this provision is to ensure that the claimant's ability to serve the claim form within the four-months service period cannot be defeated by the defendant's evasiveness. Put differently, if the claimant cannot establish the defendant's current address or an alternative method that would bring proceedings to the defendant's notice, then the claim form may be served at the defendant's last known residence or last known place of business. Service would be valid even though it is known that the defendant no longer resides or carries business at that address. It follows that since service is valid the provision requiring the defendant to acknowledge service within 14 days bites, and failing such acknowledgement the claimant would be able to obtain a default judgment.

As noted above, where a claimant has reason to believe that the defendant no longer resides or carries business at the last known residence or place of business, but considers that there is an alternative method or place for reaching the defendant, the claimant must apply for service by an alternative method

(CPR r.6.9(4), (5)). CPR r.6.15 deals with applications for serving the claim form by an alternative method or at an alternative place. It states:

> "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place."

A number of aspects deserve special notice. First, an application for service by an alternative method or at an alternative place may be made before or after the claimant has attempted service by the normal methods, outlined in CPR r.6.3 and CPR r.6.9.

Secondly, according to CPR r.6.15(1) before authorising alternative service the court must be satisfied that there is good reason for doing so. The fact that the defendant is no longer at the last known residence or business address would provide such reason. Crucially, however, the court's power in this regard is not confined to situations where the alternative service is likely to bring proceedings to the defendant's notice. The court would first try to ascertain whether there is a place or method for service which would be likely to bring proceedings to the defendant's notice. Obviously, if there is such a place or method, it would be preferred to service at a place or by method which are unlikely to produce actual notice. Examples of alternative places or methods are provided in 6 Practice Direction 9.1(3). Where appropriate, service may be effected by posting or delivering to an address of a person who knows the defendant, or by a SMS text message, or leaving a voicemail message at a particular telephone number saying where the claim form is, or by email to a company. As a measure of last resort, however, the court may sanction service by an alternative method or at an alternative place even if there is no prospect of producing actual notice.

CPR r.6.15(2) deserves close attention, it states:

> "(2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."

This provision seems to empower the court to validate retrospectively service which was otherwise bad. It would appear that this provision was inserted in order to reverse the position put in place by *Elmes v Hygrade Food Products Plc* [2001] EWCA Civ 121. In that case on the last day of the period for service the claimant served the claim form on the defendant's insurers instead of the defendant. On discovering the mistake, the claimant applied for an order curing the defect. The Court of Appeal held that the court had no power under CPR r.3.10(b) or CPR r.6.8 to deem retrospectively that there has been valid service by an alternative method when that was plainly not the case. Similarly, in *Nanglegan v Royal Free Hampstead NHS Trust* [2001] EWCA Civ 127; [2001] 3 All E.R. 793 the claimant served the particulars of claim by posting them to the defendant instead of to the defendant's solicitors as the defendant had requested. The Court of Appeal held that it had no power to provide retrospective validation for a service which was clearly defective.

Presumably the rule maker considered it undesirable that a claimant should lose the possibility of prosecuting his claim merely because he made a mistake in service. If so, such scruple is misplaced and potentially destabilising. There are perfectly good reasons for requiring that service should be affected in a particular place or on a particular person. Take a situation such as the one in the *Nanglegan* case just mentioned. If a defendant took the trouble of giving his solicitors' address as the address for service, and if CPR r.6.7 states that in such cases ''the claim form must be served'' on the solicitors, why should the claimant not be held to it? A defendant who has left matters in the hands of his solicitors should be able to ignore all communications concerning the case and let his solicitors deal with the proceedings.

An interpretation of CPR r.6.15(2) which would allow the court to ignore all defects in service and confer retrospective validation would drive coach and horses through the limitations imposed by CPR Pt 7. It would reintroduce the kind of wasteful satellite litigation that the Court of Appeal had largely succeeded to eliminate (see *Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203; [2008] C.P. Rep 9. at [59]).

It will be recalled that the new CPR r.7.5 states that where,

> ''the claim form is served within the jurisdiction, the claimant must complete the step required by the following table in relation to the particular method of service chosen, before 12.00 midnight on the calendar day four months after the date of issue of the claim form''.

Clearly, the language is mandatory. Since mishaps and accidents can always occur, CPR r.7.6 provides a carefully drafted safety valve for situations where something has gone wrong:

> ''(1) The claimant may apply for an order extending the period for compliance with rule 7.5.
> (2) The general rule is that an application to extend the time for compliance with rule 7.5 must be made—
> (a) within the period specified by rule 7.5; or
> (b) where an order has been made under this rule, within the period for service specified by that order.
> (3) If the claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if—
> (a) the court has failed to serve the claim form; or
> (b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and
> (c) in either case, the claimant has acted promptly in making the application.''

The whole purpose of this provision is to ensure that the limit of four months for effecting the service is taken seriously because, as noted earlier, this period is in reality an extension of the limitation period. It stands to reason, therefore, that just as the statutory limitation period must be adhered to so must its extension, for otherwise people would never be free of the risk of being sued.

The principle reflected in CPR r.7.6 is that claimants should make reasonable efforts to serve in time and in accordance with the rules before they appeal to the court for more time. This is why a claimant applying for an extension of time after the expiry of the period for service is required to show that he has taken reasonable steps to serve in time.

Although CPR r.7.6(3) bites only where the application for an extension of time is made after the end of the period for service, it has been held that even where the application of extension of time is made before the expiry of the period for service, the presence or absence of a good reason for the failure to serve in time would still be relevant in the exercise of judicial discretion (*Hashtroodi v Hancock* [2004] EWCA Civ 652; [2004] 3 All E.R. 530). The aim of both the rule, and of the judicial guidelines developed for the exercise of discretion outside the rule, is to ensure that claimants and their legal representatives make reasonable efforts to comply with the rules of service before they come to seek indulgence.

However, if CPR r.6.15(2) were to be interpreted as providing unlimited power to give retrospectively validation to bad service it would become very easy to side step CPR r.7.5 and CPR r.7.6. A claimant who has served the claim form on an insurance company rather than on the defendant, or on the defendant rather than on his solicitors would be able to make an application under CPR r.6.15(2) to declare,

> ''that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service''.

A broad interpretation of this rule would have several undesirable consequences. First, it would weaken incentives that litigants have to comply with the rules of service, because they would be able to rely on the court to save them from their own sloppy compliance. Secondly, and equally important, such interpretation would encourage satellite litigation because the more extensive discretion is, the greater the scope for disputes about its exercise. The court cannot willy-nilly indicate that all unconventional steps taken to bring the claim form to the attention of defendants will be retrospectively validated. Such a policy would effectively nullify the rules which require that service should be carried out by methods outlined in CPR r.6.3, at places indicated by CPR r.6.9, and within the period set out in CPR r.7.5. Inevitably, the court would have to adopt a policy that each application should be judged in the light of the circumstances of the particular case. Seeing that the permutations of circumstances are infinite, it follows that the outcome of any application would be inherently uncertain until the court has delivered its decision. And a final decision on such applications may not be reached until there have been one or two appeals. Inevitably, the scope for litigation about service is now far greater than it was before the recent amendment.

A number of options are open to avoid this undesirable outcome. The first is to interpret the words,

> ''that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place'',

in CPR r.3.15(2), as referring to situations where an order had been made under CPR r.3.15(1) permitting service by an alternative method. Under such interpretation, the court's power to cure defects would be limited to situations where permission for service by an alternative method or at an alternative place has been given, but the service did not comply with the court's order. Such interpretation would of course greatly limit the power to cure defective service, but would be contrary to what may have been the rule-maker's intention.

Alternatively, the court could declare a self-denying policy to limit the exercise of the discretionary power, as it had done in *Hashtroodi v Hancock*. The most satisfactory limit on the exercise of discretion would be to hold that the power under CPR r.6.15(2) would be exercised only where there has been good reason for the failure to serve the claim form according to the rules; or at any rate to make this an important consideration in the exercise of discretion. Such interpretation would preserve the integrity of the policy underlying CPR r.7.5 and of the pre-amendment decisions which provided guidelines of how discretion should be exercised when an application is made for the extension of the time for service prior to the expiry of the service period. The argument for such interpretation gains force from CPR r.6.16 which states:

> ''(1) The court may dispense with service of a claim form in exceptional circumstances.
> (2) An application for an order to dispense with service may be made at any time and—
> (a) must be supported by evidence; and
> (b) may be made without notice.''

Prior to the recent amendment, the power to dispense with service was held to be exercisable after the expiry of the period for service only in exceptional circumstance (*Anderton v Clwyd CC* [2002] EWCA Civ 933; [2002] 3 All E.R. 813). This new rule limits the discretionary power further by requiring exceptional circumstances even where the application to dispense with service is made before the expiry of the period for service. If the power under CPR r.6.15(2) were held not to be similarly limited, then an applicant who has failed to serve but who still has time to do so can send the claim form by any method or to any place of his choosing and then apply for a declaration under CPR r.6.15(2) that the service is good, thereby escaping the constraints of CPR r.6.16(1). The benefits of a restrictive approach were explained by the Court of Appeal in *Hoddinott v Persimmon Homes (Wessex) Ltd*, where Dyson L.J., who had also delivered the judgment in *Hashtroodi* went out of his way to explain:

> ''[59] Nothing that we have said in this judgment should be interpreted as undermining the approach articulated in *Hashtroodi* and the later cases. In his judgment, the district judge said: 'In my experience, there are very few applications [without notice for an extension of time for service of the claim form] being made since the 2006 cases unless there are real

> difficulties in actual physical service. Even fewer are being granted.' But even where there is no good reason for failing to serve within the 4 months' period, the court will exceptionally exercise its discretion to grant an extension where CPR 7.6(2) applies. In our view, the unusual combination of facts in this case justifies the exercise of this discretion.''

In conclusion, the changes made by the new rules bring much needed clarification and provide litigants with much better guidelines about what needs to be done to meet deadlines. But much of this good work can be undone by a lax and unprincipled exercise of judicial discretion to provide retrospective validation to bad service.