IN THE HIGH COURT OF JUSTICE

[2017] EWHC 2270 (QB)

HQ16P02332

QUEEN'S BENCH DIVISION

MASTER MCCLOUD

BETWEEN

Lauren Stephanie Paxton Jones

Claimant

And

(1) Chichester Harbour Conservancy

(2) Church Commissioners For England

(3) Matthew Sawday

Defendants

Mr Gerard McDermott QC of counsel instructed by Slater and Gordon solicitors for the Claimant.

Mr Christopher Kennedy QC of counsel instructed by Weightmans solicitors for the First Defendant.

Mr James Todd of counsel instructed by BLM solicitors for the Second Defendant.

Mr Benjamin Browne QC of counsel instructed by DAC Beachcroft solicitors for the Third Defendant.

Hearing date: 10th May 2017 with written submissions thereafter.

Handed down: 12 September 2017.

JUDGMENT

1. As I have already noted in the case of *Caretech Community Services Ltd v Oakden and others*, despite efforts by numerous courts at all levels to prevent them, issues over service of claim forms continue to arise. This judgment is one of three cases relating to service issues in which I will be giving judgment, one of which, *Al-Haddad v BBC* remains listed for a further two days of argument later this year. Because of the potential overlap in the legal issues I have asked for written submissions from the parties in those cases for consideration in this case, limited to matters of law in areas of overlap. I carried out a similar exercise in *Caretech*.

2. I shall provide information broadly about the three cases (ie *Caretech*, *Jones* and *Al-Haddad*) since they relate to issues concerning the interpretation and application of the CPR in relation to aspects of service of claim forms.

3. The service issue claims are:

(i) Caretech Community Services Ltd v Berry and Ors [2017] EWHC 1944 (QB).

- Interpretation of meaning of CPR r. 6.15(2) as to the availability of relief in principle (whether rule can apply to cases where there are errors of both method and place of service, whether the rule applies to cases of 'Non-service'**)**, discussion of concepts of "Non-service" versus "Mis-service" and 'good reason', and manner of exercise of discretion to validate service by the wrong method and/or at the wrong place.

(ii) Jones v Chichester Harbour Conservancy (this case)

- Interrelationship between the rules as to the timing of the taking of the 'relevant step' for service under CPR r.7.5 and the operation of the deemed date of service under CPR r. 6.14, where it is said the deemed date of service is out of time for validity of the claim form but where the 'relevant step' is taken during the validity of the claim form. Claimant argues it validly served in time by taking the 'relevant step' during validity.

(iii) Al-Haddad v British Broadcasting Corporation Claim No. HQ16D00807

- Rules 6.15(2) and 3.10, where the claim form was posted to a subsidiary company (BBC Worldwide Limited) instead of the Worldwide Headquarters of the BBC (into whose physical possession it came after expiry), where service was held by me to be invalid and a subsequent application is pursued to validate service on the basis of 'good reason' and/or to grant relief under rule 3.10.

This case

4. I shall refer to the Claimant as "C" and the Defendants as D1-3.

5. The claim concerns injuries sustained by C who at the time was almost 14 years old. She climbed an oak tree in the vicinity of Chichester Harbour but fell from it. She was rendered paraplegic as a result of the fall. She sues on the basis that the tree was

unsafe and alleges that each of the Ds owed her duties in relation to the state of the tree. Liability is in issue.

6. This judgment concerns service of the claim on the Defendants. By its application dated 2 February 2017 D1 seeks an order from me to the effect that service of the claim form was invalid and that the court therefore lacks jurisdiction to hear the claim. D2 and D3 make equivalent applications.

7. C contends that on the true construction of the court rules as to service and on the facts of this case, service was valid. There is no application (it being realistically accepted that such would not be likely to succeed) for retrospective validation of service, alternative service or extension of time for service and hence the whole focus of this judgment is on the question of whether or not service was, in fact and law, valid.

8. The relevance of the above strategically for the Ds is that in this case time for Limitation Act purposes started to run, they say, from 8 July 2013 when the Claimant turned 18 years of age. She issued on 1 July 2016. She had until 1 November 2016 to serve.

9. On 18 October 2016 C applied to extend time for service of the claim form until 17th January 2017. That order was made by Master Fontaine. The order stated in its material part:

> *"1. The date for service of the claim form is extended to 17th January 2017."*

10. The claim form was sent by email to D1 at 4.27pm on 17 January 2017 and there was an indication that the hard copy had been placed in the DX (in fact it appears that the claim forms were posted by first class post but nothing turns on that). The hard copy was physically received by D1 on 18 January 2017. D1 had not indicated a willingness to accept service by email.

The Rules

11. The rules directly referred to in argument are as follows:

CPR 6.14 "A claim form served within the United Kingdom 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)."

CPR 7.5 "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 chosen, before 12.00 midnight on the calendar day four months after the issue of the claim form.

Method of Service	*Step required*
First class post, document exchange…	Posting, leaving with, delivering to or collection by the relevant service provider"

CPR 7.6(1) "The Claimant may apply for an order extending the period for compliance with rule 7.5."

Legal argument

12. It is Ds' position that the effect of that order was to require the steps required by CPR r.7.5 to be taken on or before midnight on Friday 13th January 2017 on the basis that if that was done then, by operation of the 'deemed date of service' provisions of CPR r.6.14, the deemed date of service would then be the second business day after completion of that step, ie Tuesday 17th January 2017 which was the service deadline set by Master Fontaine's order.

13. In this instance Ds say the 'step' required by r.7.5 was 'Posting, leaving with, delivering to or collection by the relevant service provider' for postal or DX service, there having been no indication by Ds that they would accept service by email.

14. CPR r.7.6(1) permits extensions of time for service of claim forms, and that, the Ds accept, was the rule relied on when the application was presented to Master Fontaine. However the Ds' position is that the order actually made on the application fixed the deadline by reference to 'service' of the claim form and not (for example) by setting a deadline for the latest date by which the required step under rule 7.5 was completed. Hence they say that the deemed date provisions must be taken into account and the last day for placing in the DX or posting must have been 12-midnight on 13th January 2017 if service properly so called was to take place in time for the 17th January 2017 deadline.

15. C does not contend that the email delivery was 'service' but was done for courtesy, and she relies therefore, for service, on the posting of the claim forms.

16. C argues that Ds' position as to the proper understanding of the rules for service and deemed date of service is based on a fundamental misunderstanding for what a claimant must do to serve a claim form within the period its validity. It is C's case that all that is, under the present wording of the rules, required is that C must complete the step required by rule 7.5 by midnight on the deadline specified. If she does so, she has complied and is in time.

17. C cited notes from the White Book at 6.14.1 of the 2017 edition, p273:

"This arrangement marks a significant change from the effect which r7.5 had before October 1, 2008. The principal objective of the change was to reduce the instances in

which the deemed date of service provisions had the effect of rendering service of claim forms out of time, with the result that, for the purpose of doing justice in individual cases, other provisions in the CPR that might be conceivably called in aid to rescue the claimant's claim … were pressed into uses for which they were not designed."

And at 6.14.3 p274 in that same publication:

"… it is important to notice that the question whether there has been compliance with the time limit fixed by rule 7.5 for service of a Claim Form within the jurisdiction … is determined, not by enquiring as to whether the deemed date for service fell within the period, but by asking whether the 'step required' was 'completed' within the period …"

18. C's argument follows the above and says that in the case of an extension of the time for service extending the four month period in rule 7.5, such as Master Fontaine's order, the same point applies, ie that the rule (with the extended time limit) is complied with by completing the relevant step on or before the last date of validity. Since the claim forms were posted before midnight well before the deadline of 17th January, C argues that she has complied with the order and rules and the claim form was accordingly validly served. In this context C argues that the relevance of the 'deemed' date of service rules in rule 6.14(1) is for such matters as calculating the time for taking of subsequent steps such as service of acknowledgement of service.

Case law

19. Ds referred to Brightside Group Ltd and others v RSM UK Audit LLP and others [2017] EWHC 6 (Comm.). It was a case concerning rule 7.7 which is a rule whereby a defendant can give notice requiring a claimant to serve the claim form or to discontinue the claim. If the claimant fails to do so the court may dismiss the claim or make some other order. The question arose whether the claim form had been served within the time specified in a notice given under that rule. The claimant argued that by leaving the claim form at a relevant place for the purposes of rule 7.5, within time under the notice, service had taken place in time, notwithstanding the deemed date provisions of rule 6.14.

20. Andrew Baker J. decided (as a first instance judge) that (para. 12) "... if the Claim Form was delivered to or left at the relevant place, for the purpose of CPR 7.5(1), on 10 June 2016, then so far as the CPR are concerned, the date on which service occurred as a result was 14 June 2016 by operation of CPR 6.14." He held that the Claimant had complied with rule 7.5(1) ie that the Claim form was delivered on 10 June 2016. He then went on to consider the impact of rule 6.14 on whether the Claim form had been 'served' or not within time under the notice.

21. He stated at para 13 "*That is squarely and specifically the question addressed and answered by CPR 6.14, for claim forms served within the jurisdiction ... The answer*

given by CPR 6.14 to whether the question of when service took place is not the date on which the claimant took the step referred to in CPR 7.5(1) relevant to the method of service employed. The answer is the second day after completion of that step, because for the purpose of the CPR that is deemed by CPR 6.14 to be the date on which service took place." He went on to refer to Godwin v Swindon BC [2001] 1 WLR 997 and Anderton v Clwyd CC (No. 2) [2002] 1 WLR 3174 where it was decided under the original version of the rules that the deemed date of service was a fixed date and not merely a rebuttable presumption of service on a given date. Albeit that the deemed date provisions had been changed to provide a more uniform approach to what the deemed date was (by repealing rule 6.7 as it then was and creating rule 6.14), that did not in his view "*affect the decision in the cases as to the nature of the deemed date*". Rule 6.14 accordingly in his judgment determined the date of service of the claim form in the circumstances in *Brightside*.

22. In discussing the position, Baker J. observed at para 15 that "*CPR 7.5 creates and defines the important notion that a claim form has a limited lifespan, a temporal validity, following its issue. That notion is created and defined by imposing upon the claimant an obligation in relation to service, to be complied with within a defined period after issue. The claim form only validly founds the court's jurisdiction to try the claimant's claim on its merits if that obligation is complied with ...*"

23. I refer also (but for brevity do not quote) paragraphs 16 and 17 of the Brightside judgment, and to paras. 19 and 20, the points (ii) and (v) of his para 24 and paras 29 and 30 all of which require (and repay) careful and close reading.

24. I was referred to T&L Sugars v Tate and Lyle Industries Ltd [2014] EWHC 1066 (Comm). That concerned a contractual provision relating to a date defined by reference to the issue and service of court proceedings. The court (Flaux J.) considered at first instance the wording of rule 7.5 in its current form. He held at para. 31 that: *"In my judgment these two rules, CPR 7.5 and 6.14, taken together draw a clear distinction between the date when service is actually effected, which is when the relevant step under 7.5 has been completed and the date two business days later when service is deemed to take place under CPR 6.14. If one asks oneself why that distinction is there, it is not as Mr Nicholls QC suggests because service does not actually occur until the deemed day, but because, whereas CPR 7.5 is looking at when actual service takes place, so that a Claimant who takes the requisite step, depending upon which method of service he employs, can be sure that he has served within the four months of validity of the claim form (thereby avoiding, if relevant, any limitation issues). CPR 6.14 is looking at when service will be deemed to have taken place for the purpose of other steps in the proceedings thereafter, beginning with the filing of an acknowledgement of service. In my judgment, that construction of the rules is supported not only by the reasoning of Green J. in the* Ageas[1] *case at 63-80, with which on this point I entirely*

[1] *Ageas* was cited before me and the Defendant made the point that insofar as it deals with validity of service of the claim form it is strictly obiter. I shall not discuss it further here since in my judgment it is on all fours with T&L from which I have quoted extensively above.

agree, but by the wording of the rules themselves and by the various commentaries on the CPR, not only Blackstone's Civil Practice on which Mr Mill relied but, on a proper analysis, the notes to the White Book."

Decision

25. In my judgment the decision in *Brightside* is of limited assistance either way: it was not a decision relating to rule 7.5 and strictly therefore insofar as it refers to wider questions of valid service of claim forms it is obiter. However stopping there would not assist because the reasoning is set out fully by Baker J. and demands consideration.

26. It seems to me after careful reading of the *Brightside* judgment that it is authority for the proposition that *with the exception of the question whether a claim form was served while still valid under the 4 or 6 month period of validity* (if need be, extended by court order), the deemed date provisions of rule 6.14 operate in all other cases so as to determine the date of service. He considered that the operation of rule 6.14 was not limited merely to the calculation of time for steps <u>subsequent</u> to service but applied equally to the case of a rule 7.7 notice which was something setting a deadline prior to service. He considered himself bound by the earlier (Court of Appeal) decisions under the previous rules as to the role of the deemed date provisions in that sense.

27. However it seems to me that his judgment when carefully and closely read is consistent with a different position in the case of the narrow question with which I am concerned namely whether the claim form was served within its period of validity. By the amendments in 2008 it seems to me that the position changed materially as regards that question, and that is consistent with Baker J.'s observations as follows which in my judgment correctly acknowledge that after the 2008 amendments to the rules the approach has changed:

> Para 19: *"For claim forms served within the jurisdiction, CPR 7.7 still has reference to when service occurs, but CPR 7.5 does not; the unsurprising consequence, for that case, is that what must happen by the deadline stated by the Rule, to comply with CPR 7.5, is not the same as what must happen by the deadline set by the notice, for there has to be compliance with a CPR 7.7 notice."*
>
> Para. 20: *"I do not agree with the claimants that the effect of CPR 6.14 is to fix the date on which service is taken to have occurred, for the sole purpose of fixing, and thus assessing compliance with, subsequent deadlines defined by reference to when service took place. That is an important consequential effect. In most cases where the claim form has been served within the jurisdiction, it may be the only effect of CPR 6.14 that will matter, because the validity of that service is not defined by reference to CPR 6.14. .... But the purpose and effect of the CPR deemed date of service always was, and remains, to fix the date on which service of a document is taken to have*

occurred for the purpose of assessing compliance with any deadline for achieving that service. That CPR 7.5 no longer imposes such a deadline, in the case of claim forms served within the jurisdiction, has not changed that. Put more shortly, CPR 6.14 fixes the date on which service of a claim form occurs, for all, not only for some, purposes."

Para 24 (ii) *"CPR 7.5(1) now defines the temporal validity of a claim form, for service within the jurisdiction, by the obligation imposed on the claimant to complete the 'step required' within four months from issue. It therefore defines what must be done within four months by a claimant who serves within the jurisdiction for the resulting service of his claim form to be valid. It does not* provide or imply that service of a claim form served within the jurisdiction occurs upon completion of that step."

28. The judgment in *Brightside* is, I confess, one which is challenging in some respects. The indication in para. 20 that "*CPR 6.14 fixes the date on which service of a claim form occurs, for all, not only for some, purposes*" sits for example uncomfortably with the view at para 24(ii) that CPR 7.5 (1) "... *defines what must be done within four months by a claimant who serves within the jurisdiction for the resulting service of his claim form to be valid.*"

29. My judgment is that the true ratio of *Brightside* insofar as it is not otherwise strictly obiter where it speaks beyond the confines of rule 7.7, is that CPR 7.5(1) is in truth a special case. It is a rule which exists in its current form to provide a clear statement to a claimant as to "*what must be done within four months by a claimant who serves within the jurisdiction for the resulting service of his claim form to be valid.*". It does not alter the role of 'deemed date of service' for purposes <u>outside</u> that question. I have interpreted *Brightside* in the way I have, which I think is the intended sense and with which I agree. In the event that I am wrong in my interpretation of *Brightside* then (noting as I do that the application of rule 7.5 in relation to the 4 month period of validity was not in issue before him in any event) then in my respectful judgment Baker J.'s observations are incorrect, if they mean that a claim form can cease to be validly served within the 4 month period even given proper compliance with rule 7.5, if the deemed service provisions 'bite'. In that event I am not obliged to apply the decision as I would otherwise be under the doctrine of judicial comity between judges of coordinate jurisdiction.

30. *T&L Sugars* appears to me to be deciding a point under a contract and one may say the same things about its ratio as were said above about *Brightside* namely that in strict point of law it is not a decision about whether for the purpose of the valid service of a claim form under rule 7.5, the taking of the relevant step in time is what matters. But here again, the case is fully argued and the judgment fully reasoned. Moreover the provisions in the contract being considered were very close to amounting to a question of whether a claim form had for CPR purposes been served within its period of validity. The decision plainly assists the Claimant and is consistent with my interpretation above of *Brightside*. I note that Baker J. in some respects

disagreed with T&L Sugars especially to the extent that he considered that T&L Sugars was in effect creating an unhelpful notion of two different types of service namely that for the purpose of the validity of the claim form and that for all other purposes. I do not agree that *T&L Sugars* creates such a distinction in substance, but only (and necessarily) reflects the decision inherent in the amended rules themselves namely to carve out the service of claim forms as being subject to separate provisions, namely those in rule 7.5.

31. It is the case that there is an unfortunate tension between rule 7.5 and rule 6.14. The construction contended for by the Defendants in a literal sense based on the wording of those rules is not a fanciful one. There is after all nothing express in the rule which says that the deemed date of service provisions of rule 6.14 are *disapplied* for the purposes of calculating whether the claim form was served within its period of validity.

32. The consequence, if I adopt the literal approach of the Defendants is that their preferred reading of the two rules taken together would create a 'dead' period of a day or two at the end of the period of validity of the claim form during which in these circumstances the claim form could not validly be served by any of the methods in rule 6.14 which have deemed dates of service after expiry of the claim form, even if the Claimant carries out the step mandated by rule 7.5 during validity of the claim.

33. It seems to me that a purposive interpretation of the rules is required, taking into account the striking fact that the rules were amended significantly precisely to introduce the requirement to take the relevant step in rule 7.5 before expiry of the claim form.

34. I should also note, as I did in *Caretech*, that one sees from the glossary to the CPR that 'service' is defined there (and hence in the original Statutory Instrument creating the Civil Procedure Rules) as follows:

[…]

"Service

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

35. Although the Glossary does not override the rules, it is informative that when the rules changed the definition did not (this was a point in fact prayed in aid by the Defendants but in my judgment it somewhat assists the Claimant). The amended rule introduced a clearer set of "steps required", of the sort foreshadowed in the glossary which remedied deficiencies in the previous wording which had caused a raft of case law about the 'deemed date' provisions and their impact on validity of service.

36. The heading in the rules immediately above rule 7.5 is "Service of a claim form". The heading does not do more than act as a pointer to the purpose of that rule but it is relevant that it does not say "Steps required to commence service", or "Latest date for commencing service of claim form" or suchlike: it refers simply to service of the claim form which is a pointer to the purpose of the rule, namely defining what steps

must be taken so as to ensure valid service. The parties kindly provided me with written submissions as to the current 'state of play' in terms of the correct approach to using headings in statutory instruments such as the court rules. The position uncontroversially remains that they are an aid to construction. It was Ds' position that the rule headings added little in this case. They had not changed with the amended rules. In my judgment taking the rule and heading as I find it, it assists the Claimant modestly.

37. In my judgment the reasoning in the footnote to the White Book is, with respect, correct namely that the purpose of the changes was to try to ensure that Claimants knew clearly what step to take, and by when, so as to serve the claim form in time. To re-introduce the snare of the 'deemed date of service' provisions (which was what in my judgment the amended rules were intended to avoid) by creating a 'dead' period at the end of the validity of the claim form would be counter to the purpose of the amended rules.

38. In my judgment:

(1) the correct approach when determining whether, for the purpose of answering the question "was the claim form served during its period of validity?" is to ascertain whether the Claimant has carried out the step required by rule 7.5 within the time provided for doing so. That would apply equally to cases where time for service has been extended by order (as here) and to cases where the basic 4 or 6 month period of validity applies; and

(2) as to the purpose of the 'deemed date' provisions in rule 6.14 those have to be given an interpretation which gives them a meaningful function and in my judgment the deeming provisions operate as a means to ensure that it is clear to the parties what date is to be used for the purpose of calculating such things as the date for service of acknowledgement of service or defence.

39. Just as rule 7.5 is intended to assist the Claimant to avoid the trap of being deemed to be out of time, in my judgment rule 6.14 correspondingly assists the Defendant such that a reasonable assumption is made about how long, as a matter of fact, the claim form takes to arrive after posting and therefore represents a fair approach to the starting point for calculating time to respond. Otherwise the starting point would be that the time for service of a defence starts to run at the instant of posting of the claim form, which would be a strange approach since in the real world the Defendant cannot realistically be in receipt of the defence at that stage.

40. One point remains: the point was made, I think quite fairly, that the order of Master Fontaine did not say that the time under rule 7.5 was extended, rather it extended the time for 'service' of the claim form. In that sense taken literally the order might better have been expressed by reference to rule 7.5 but noting as I do that (a) the application before her was clearly under rule 7.5 and (b) that she was not making a decision based on any argument over whether the wording she adopted would be other than an order in line with the basis of the application, my judgment is that the

proper interpretation of her order is that it was or was intended to be an extension of time for taking the necessary steps under rule 7.5. Such happens to be consistent, I note, with the judgment of Master Matthews in the *Chancery Division in DB UK Bank Ltd* in which he interpreted an order of Deputy Master Cousins granting 'an extension of time for service of the claim form' as being an extension of time for compliance with rule 7.5(1). That was an outcome described by Baker J in Brightside as '*unsurprising'*.

41. I was provided with submissions in writing by the parties as to the law on the approach which the court should take to the interpretation of a court order in terms of the extent to which the context is admissible. The point was made in submissions that the power remains to correct orders under the slip rule where they do not reflect the intention of the court, and that plainly the context is admissible for slip rule applications (which this is not). However this was said not to be a case for operation of the slip rule since that is limited to accidental slips or omissions. In particular the Defendants relied on Leo Pharma A/S & Leo Laboratories v Sandoz Limited [2010] EWHC 1911 (Pat) in which Flaux J. observed that *'matters deliberately included by the parties in an order drawn and sealed by the court do not constitute accidental slips or omissions within the rule.'* In so stating Flaux J. was taking into account previous case law and he noted at 17 that *"It is common for the court to encourage parties to agree matters of detail in the drawing up of its order with the proviso that the parties may mention it again in the event of disagreement. Whilst in the circumstances it could be said that the court had no specific intention at the time it spoke its order, a subsequent agreement as to the form of order would plainly be within the intention of the court'.*

42. In this case Ds made the point that equivalently, albeit Master Fontaine's order was not an order drawn up by the parties in agreed terms, the fact that the order sealed was drafted by C's own representatives placed it outside the scope of the slip rule.

43. It was said I should not readily look at context lying behind the making of an order other than where there is a slip rule application. I accept that, and it would be unhelpful if it became the norm to 'go behind' orders. However in this case the application itself was seeking the exercise of the court's powers to extend time for compliance with rule 7.5 and (there not having been any argument before her as to making some decision other than either allowing the application or not) it is plain that the court's intention in extending time for service was (very much as in *Chancery Division in DB UK Bank Ltd*) to extend time for compliance with rule 7.5.

44. Accordingly my judgment is that the claim form was validly served during the period of its validity and I so declare.

MASTER VICTORIA MCCLOUD

12/9/17