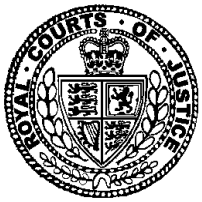

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10.30 am on 20th April 2020.

Case No: LM-2017-000132

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT

[2020] EHWC 935 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 20th April 2020

Before:

DEPUTY MASTER HILL QC

- -

Between:

RICHARD JOHN SLADE

Claimant

-and-

DEEPAK ABBHI

Defendant

- -
- -

Thomas West (Solicitor Advocate) for the **Claimant**
William Willson (instructed by Birketts Solicitors) for the **Defendant**

Hearing date: 25th February 2020

- -

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.

DEPUTY MASTER HILL QC:

Introduction

1. This case was listed before me on 25th February 2020 for a Part 71 examination of the Defendant as a judgment debtor. He lives in the United States. On 20th February 2020 the Defendant applied to set aside or vary the terms of a previous order addressing the manner in which the documentation relating to the examination had been served upon him. That application was also listed for 25th February 2020.

2. In order to save the time and cost of a potentially unnecessary journey from the United States to London, the Defendant was not present in Court on 25th February 2020. It was therefore clear that the examination itself could not proceed, other than in the Defendant's absence. In the event, the complex issues relating to the content of the Defendant's application took up the time allocated for the entire hearing, such that I reserved this judgment. On that basis, the examination could not have proceeded even if the Defendant had attended. This is my judgment on the Defendant's application dated 20th February 2020.

The factual background

3. The Claimant is a solicitor who at all material times was the sole principal in his firm of Richard Slade and Company. The Defendant is the son-in-law of a former client of Mr Slade. The Claimant alleged that the Defendant had undertaken to pay his father-in-law's legal fees. These had gone unpaid and the Claimant brought proceedings to recover them.

4. The matter went to trial before HH Judge Russen QC (sitting as a Judge of the High Court). By a judgment dated 24th September 2018, he found in the Claimant's favour. A quantum hearing followed, leading to an order that the Defendant pay the Claimant a total of £430,000 by 15th March 2019. The monies were not paid.

5. Shortly thereafter the Claimant applied for and was granted an order for examination of the Defendant as to his means under CPR 71. The examination was originally listed for 27th June 2019.

6. On 15th April 2019, the order for examination and the application notice were served by e-mail on the Defendant's solicitors. The email did not make any reference to the provisions for personal service in CPR 71.3.

7. In a letter dated 16th April 2019 and send by email on that date the Defendant's solicitor confirmed receipt of the documentation and saying "*Since we remain on the record as Mr Abbhi's solicitors you are entitled to treat our address as Mr Abbhi's address for service. We would have expected you to serve the documents by letter, in the usual way, (there being no urgency requiring service by email) but are content to accept service of the documents by email*". Again this letter made no reference to the

provisions for personal service in CPR 71.3. Whether this letter amounted to an acceptance of service of the CPR 71 order is a key factual dispute in this application.

8. The letter continued by noting that the application had been made without notice, such that the Claimant had a duty to give full and frank disclosure to the Court of all material matters. The Defendant's solicitors expressed concern that the Claimant had not informed the Court that the Defendant had sought permission to appeal and a stay, and asserted that the Claimant had misrepresented what the trial judge had found.

9. On 13th June 2019 the Rt. Hon. Lord Justice Longmore granted the Defendant permission to appeal and stayed the order for examination as to his means. The hearing listed for 27th June 2019 was vacated. No new date was set and no directions were given as to how notice of the new hearing was to be served.

10. On 6th December 2019 the Defendant's appeal was dismissed and the stay was lifted.

11. On 20th December 2019 the Defendant issued a petition for permission to appeal to the Supreme Court. A decision on that petition is awaited. However the Defendant did not argue that the examination should not take place because of his extant petition.

12. The Defendant's solicitor was invited by the Claimant's firm to give dates to avoid for the listing of a new date for the examination but did not reply. In due course a new date for the examination was obtained by the Claimant without reference to the Defendant.

13. On 28th January 2020, having been notified of the new date, the Defendant's solicitor wrote to the Claimant's firm taking the point that the original order had not been served personally in accordance with the mandatory terms of CPR 71.3, saying "*We did not waive the obligation to effect personal service*".

14. The Claimant's firm did not engage further with the Defendant's solicitor. Instead, on 12th February 2020 the Claimant made a without notice application to Deputy Master Kay QC.

15. The Deputy Master dealt with the application on the papers. On 13th February 2020 he made an order which declared that the 16th April 2019 letter from the Defendant's solicitor had the effect of waiving the requirement for personal service under CPR 71 and the order was validly served. He also ordered that (i) delivery of the CPR 71 order to the Defendant's solicitors by email on 15th April 2019 amounted to good service of the order; (ii) delivery of the notice of hearing to the Defendant's solicitors by email on 22nd January 2020 was good service of that notice; (iii) the Claimant had permission to ask the list of additional questions provided on 12th February 2020; and (iv) the Claimant could serve the order itself by email on the Defendant's solicitors.

16. The order having been made without a hearing, it provided, in the usual way, for the Defendant to apply to set it aside or vary it, and specified that any such application would be heard before the examination with the examination to proceed if it was dismissed.

17. On 20th February 2020 the Defendant applied to set aside or vary the terms of Deputy Master Kay QC's order, specifically those parts relating to the waiver of the

requirement for personal service of an order made under CPR 71.2 on the Defendant and the order for substituted alternative service under CPR 6.27 on the Defendant through his solicitor.

18. The Claimant opposed the application.

19. In order to decide the application I have been taken to and considered several witness statements from both the Claimant and the Defendant's solicitor, Paul Matthews.

20. Mr Matthews has given evidence to the effect that he was unaware of the service requirements stipulated by CPR 71.3 and understood the 16th April 2019 letter to be indicating confirmation simply that his firm would accept email service as required by CPR PD6A paragraph 4.1(1) (see paragraphs 10-13 of his fourth witness statement dated 20th February 2020).

21. The Claimant in response states that a fair reading of the correspondence is that the 15th April 2019 email specifically asked whether the Defendant's solicitor would accept email service of the CPR 71 application, and that in response the Defendant's solicitor had accepted service and thus waived the requirement for personal service (see paragraphs 9-10 of his fourth witness statement dated 21st February 2020).

The legal framework

CPR 71.3

22. CPR 71.2 makes provision for a judgment creditor to apply for an order that a judgment debtor is required to attend court to provide information about their means and any other matter about which information is needed to enforce the judgment or order.

23. CPR 71.3(1) provides that "*an order to attend court must, unless the court otherwise orders, be served personally on the person ordered to attend court not less than 14 days before the hearing*".

24. CPR 6.5(1) provides that "*where required by another Part, any other enactment, a practice direction or a court order, a claim form must be served personally*". CPR 6.7 (and CPR 6.23) (service at solicitors' address) are qualified by the requirement for personal service: "*in the rare circumstances where personal service of the claim form on the defendant is mandatory, r 6.7 yields*" (White Book, 6.7.1).

25. The guidance in the White Book states that alternative service is possible under CPR 71.3, but states that normally "*there will have to be an attempt at personal service first*".

26. CPR 71.7 ("Adjournment of the hearing") states that "*if the hearing is adjourned, the court will give directions as to the manner in which notice of the new hearing is to be served on the judgment debtor*". The White Book, at 71.7.1, comments that "*If the hearing is adjourned e.g. for the debtor to produce documents – the better practice is for the debtor to be given the date and time of the new hearing before leaving court. Additionally, or alternatively, the debtor should be asked to agree to postal service of notice of the new date. The expense of further personal service should be avoided if at*

all possible".

Alternative/Substituted Service

27. CPR 6.15 governs service of the claim form by an alternative method or at an alternative place. CPR 6.27 provides that CPR 6.15 applies to any document in the proceedings as it applies to a claim form and reference to the defendant in that rule is modified accordingly.

28. Service on a person who resides out of this jurisdiction raises special considerations, because service is "*an exercise of the power of the court…[and]…an exercise of sovereignty within a foreign state*" (*Cecil v Bayat* [2011] 1 WLR 3086, at para 61 and the cases cited therein at paras 62-64).

29. To make an order for alternative/substituted service on a defendant domiciled out of the jurisdiction but not in a Hague Service Convention territory, there must be a "*good reason*" to do so (*Abela v Baadarani* [2013] UKSC 44, per Lord Clarke, at para 33). Guidance as to what constitutes a "*good reason*" for these purposes was given in *Societie Generale v Golas Kuyumculuk Sanayi Ithalat Ihracat AS* [2017] EWHC 677, at para 49(1)-(8). One factor is whether the order has been brought to the Defendant's notice and if so how. The "*good reason*" test is appropriate for cases of this nature because there is no risk that service will subvert the provisions of the Convention (*Abela*, at para 34).

30. However, where service is to be carried out on a Defendant who resides outside of the jurisdiction but in a Hague Service Convention territory, alternative service "*should be regarded as exceptional, to be permitted in special circumstances only*" (*Cecil*, at para 65). Whether the state in question had objected to service being effected otherwise than through its designated authority is a pertinent factor (*Societie Generale*, at para 49(9(b)).

31. Considerations of delay or expense are not "*exceptional circumstances*", not least because most litigants would wish to avoid these elements and thus if they were regarded as "*exceptional circumstances*" orders for alternative service would become the norm and risk subverting the Convention (*Cecil*, at paras 66-67; *Marashen Limited v Kenvett Limited* [2017] EWHC 1796 (Ch), at para 62 and *Societie Generale*, at para 49(9(b)). The sort of circumstances that might amount to "*exceptional circumstances*" for these purposes include where there are grounds for believing that the Defendant has or will seek to avoid personal service where that is the only method permitted by the foreign law, where an injunction has been obtained without notice, or where an urgent application on notice for injunctive relief is required to be made after issue of proceedings (*Cecil*, at para 68).

32. Further, an order for service by an alternative method within the jurisdiction against a person who is outside of the jurisdiction can only be made if the court has satisfied itself that the case is a proper one for service outside of the jurisdiction, and where an order has already been made to that effect. This is because the source of the power to make an order for service by alternative means in respect of a defendant outside of the jurisdiction is via CPR 6.37(5)(b)(i), which in turn presupposes that an order for service out of the jurisdiction has been made (*Marashen*, at paras 17 and 18).

The Defendant's application and submissions

33. The Defendant's broad position on the application was that the Claimant had acted inappropriately in obtaining the *ex parte* order from Deputy Master Kay QC; and that the CPR 71 order should be served on him personally and he should be afforded adequate time to prepare for the examination, not least because a series of additional questions had recently been set out for the examination. The Defendant's submissions can be summarised as follows.

34. First, the application to Deputy Master Kay QC should not have been made on an *ex parte* basis. CPR 23.4(2) provides that an application may be made without notice if this is permitted by either a rule, a practice direction or a court order. An application for declaratory relief that a Defendant had waived the right to personal service does not fall into any of these categories and should not be determined on an *ex parte* basis. The application also contained errors of fact and law. Significantly, it failed to highlight that the Defendant was resident out of the jurisdiction and in a Hague Service Convention territory. If the Defendant had been properly notified of the application, submissions could have been made on his behalf, and the order would not have been made.

35. Second, the order declaring that the Defendant had waived his right to personal service under CPR 71.3 should not have been made because:

    (i) The regime for personal service under CPR 6.5 is mandatory. The provisions for service on parties' solicitors under CPR 6.7 and CPR 6.23 are specifically made subject to and qualified by the mandatory provisions of personal service in CPR 6.5.

    (ii) CPR 71.3 provides that an order to attend court must be served personally, "*unless the court orders otherwise*". Accordingly the Part 71 regime is amenable to orders for substituted/alternative under CPR 6.15/6.27, but there was no basis for such an order here because:

        (a) The Defendant had made clear through his solicitor that he was insisting on his right to be served personally.

        (b) There was no legal or factual basis for the proposition that the Defendant had waived the requirement for personal service through correspondence from his solicitors. The Defendant's solicitors neither intended to, nor could they have, waived the strict requirements for personal service under the CPR. The Defendant's solicitor did not even know, at the time, that personal service was mandatory and so he could not have made an 'informed choice' as to waiver (and knowledge is a pre-requisite for waiver: see, for example, Wilken, The Law of Waiver, Variation and Estoppel, 4-023). He had later made clear that he had not waived the obligation to effect personal service. The factual disputes on this issue could not properly be determined on an *ex parte* basis.

(c) There had been no attempt at personal service which the White Book indicated would usually occur before an order for substituted/alternative service under CPR 71.3 would be made.

36. Third, the order for substituted/alternative service should not have been made:

(i) As the Defendant is resident in a Hague Service Convention territory, such a order can only be made in exceptional circumstances.

(ii) The *ex parte* application had not made clear that Defendant was so resident. It had also set out the wrong legal test for the order for alternative service ("*good reason*", and not "*exceptional circumstances*"). It had sought an order for service by alternative means on the basis that it "*was intended to save the costs of effecting service personally [if that could be agreed]*". A desire to save costs/convenience is not an exceptional circumstance.

(iii) "*Exceptional circumstances*" for the purposes of the correct test would be characterised by clear evidence of a desire to seek to avoid personal service (see *Cecil* at para 68). Consistent with this, the guidance in the White Book in relation to personal service of CPR 71.2 orders makes clear that alternative service will require prior (unsuccessful) attempts to personally serve the defendant. That had not happened in this case.

(iv) Accordingly (and through no fault of its own) in making the substituted/alternative service order the Court applied the wrong test.

(v) In any event, there being no order for permission to serve out of the jurisdiction, an order for alternative service on a resident outside of the jurisdiction within the jurisdiction is not possible (see *Marashen*, paras 17-18).

37. For these reasons the Defendant invited me to find that the order should not have been made and invited me to set it aside.

The Claimant's submissions

38. The Claimant's position in summary was that the Defendant was taking a technical point around service that had not been raised (and had been waived) in April 2019 when the CPR 71 order was first served, in order to avoid the examination taking place now that his appeal had been dismissed. His submissions can be summarised as follows.

39. First, it was acceptable for the application to have been issued without notice and urgently. CPR 6.27 does not require any reason to be given for proceeding without notice. It will often be necessary because the need for substituted service has arisen precisely because effective service has otherwise not been possible. Here, the Claimant's motivation in making the application was to attempt to keep the date set aside for the examination because that would result in a better use of court time.

40. The Claimant's application was, in substance, a request that the court grant substituted service of the Part 71 order. As such, it fell to be considered under CPR 6.15. The rule is applicable only to substituted service of a claim form but CPR 6.27 extends its

effect to the service of other documents. On an application under CPR 6.27(2) "…*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*". CPR 6.15(3)(b) expressly permits such applications to be made without notice. So too does the analogous CPR 6.28, which allows the court to dispense with service. It follows that the application was regular.

41. The application had not been factually inaccurate. It had made clear that personal service had not been effected (or even attempted) because of the acceptance by the Defendant's solicitor of service of the original application notice. The Defendant's residence was not relevant to the question of whether personal service had been waived or whether the order for substituted/alternative service should be made.

42. Second, the order in relation to waiver of personal service was properly made:

    (i) Although the terms of CPR 71.3 are mandatory, it is always possible for a party to waive strict compliance with a rule and this is what happened here. The Defendant's solicitors had unequivocally waived the requirement of personal service, especially bearing in mind the history of the litigation in which both parties had served other documents by e-mail (and there will always be a history of relations between the parties in CPR 71 proceedings).

    (ii) *Rhodes v Innes* (1831) illustrated that waiver of personal service is possible. *Rhodes* concerned the delivery of a writ to a son on the promise that he would take them to his father. Tindall C.J. said: "*There is no magic in the word 'personal', and if a party by his conduct or agreement chooses to waive personal service, a service less strict may be sufficient*".

    (iii) CPR 6.11 expressly permits service of a claim form by a contractually agreed method (see, for example, *New York Mellon v Essar Steel India Limited* [2018] EWHC 3117 (Ch)). The parties' solicitors plainly had an agreement that service would be accepted. It might be said that this gave rise to an estoppel from which the Defendant ought not be permitted to resile, especially when the same is not consistent with the overriding objective including the avoiding of unnecessary time and costs.

43. Third, the order for substituted/alternative service was properly made:

    (i) The suggestion that substituted service requires an attempt at regular service to be made first is not supported by any reference to the CPR: CPR 6.15 in particular makes no such requirement. Even if the solicitors' waiver was, for some reason, ineffective, the fact that it had been proffered would be sufficient reason on its own for granting substituted service. In such a context the test defaults to a "*good reason*" one.

    (ii) Having decided that the Defendant's solicitors had accepted service within the jurisdiction, it would not have been necessary for the Master to consider the need for an order to serve out of the jurisdiction and his decision was not *ultra vires*.

    (iii) The 27th June 2019 order did not comply with CPR 71.7 in that it failed to

specify the manner in which the new hearing date should be given. The Claimant's application sought to resolve this ambiguity in a sensible manner by requesting that service be made in the same way as the original order.

44. For these reasons the Claimant invited me to dismiss the Defendant's application.

45. At the hearing the Claimant made an application for permission to serve the Part 71 order out of the jurisdiction (to the extent necessary, depending on my judgment) and this was not objected to by the Defendant.

Discussion and conclusion

46. In making this application the Defendant relied heavily on the fact that the application to Deputy Master Kay QC was made on an *ex parte* basis.

47. I am not persuaded that a declaration in relation to service cannot, in principle, be made on an *ex parte* basis. Courts are required to determine questions around service as the cases such as *Abela* and *Cecil* illustrate, and there may be circumstances when such questions can fairly be determined without notice.

48. In order to determine whether such declaration was fairly made in this case, I have looked carefully at the material that was before the Deputy Master.

49. The 12th February 2020 application was supported by the third witness statement from the Claimant of the same date. This statement set out the procedural history and referred to the key correspondence around the alleged waiver issue dated 15th/16th April 2019 and 28th January 2020. However the statement did not make clear that the Defendant was resident outside the jurisdiction in a Hague Service Convention territory or address the legal consequences of that. Moreover, it referred to the *Abela* "*good reason*" test and not the *Cecil* "*exceptional circumstances*" test which was appropriate given where the Defendant resided. These were material omissions. The Deputy Master could not have been expected to correct these omissions from the passing reference to service out of the jurisdiction in one of the items of correspondence exhibited to the witness statement.

50. I also accept the submissions made by the Defendant that the factual disputes inherent in the issue of whether the Defendant had waived personal service made this unsuitable for *ex parte* determination.

51. For these reasons I consider it appropriate to set aside Deputy Master Kay QC's order.

52. Next, I have considered whether I should make the same order, based on the fuller material before me.

53. It is clear that the requirement for personal service in CPR 71.3 is on its face mandatory.

54. I do not find the argument advanced by the Defendant that a party can never agree to waive the requirement for personal service persuasive. However I do not need to reach a final view on that issue because having considered all the evidence I am

satisfied that this Defendant had not, in fact, done so.

55. I have reached this conclusion based on all the evidence, but principally (i) Mr Matthews' evidence that when he sent the 16th April 2019 correspondence he was unaware of the requirements of personal service in CPR 71.3, such that he cannot have had the level of knowledge required for a waiver; and (ii) his later email dated 28th January 2020 expressly making clear that he had not waived the requirements for personal service. This case is therefore different on its facts from the agreement in *New York Mellon*.

56. As to whether I should make the same order for substituted/alternative service that Deputy Master Kay QC made, I accept the Defendant's analysis. The lack of an order for permission to serve out of the jurisdiction is fatal to the application (see *Marashen*, paras 17-18) and in any event the "*exceptional circumstances*" test (see *Cecil*, at para 65) is not met. There has been no prior attempt at personal service; there is no evidence of a desire to seek to avoid personal service; and the arguments around expediency advanced by the Claimant do not meet the exceptionality threshold.

57. For all these reasons the Defendant's application dated 20th February 2020 succeeds. I set aside the order Deputy Master Kay QC dated 13th February 2020, save for paragraph 3 (giving the Claimant permission to ask further questions).