BCLP. Client Intelligent

Insights

AS 'THE WORLD SHIFTED ON ITS AXIS ON 23 MARCH 2020' – WHERE DOES ONE NOW SERVE THE CLAIM FORM?

Jul 02, 2020

Much has been written over the last 3 months on where proceedings should be served during the current COVID-19 pandemic. After all, across the country people have exchanged their usual offices for a life of 'working from home', leaving offices where proceedings would ordinarily be served unoccupied. A recent case shows that claimants should not rely on the technicality of the rules alone, but may be under additional pressure to act sensibly when it comes to service.

Until now it has been understood that compliance with the (fairly complex) rules on service set out in the Civil Procedure Rules means service is "good", even if in fact the envelope containing the claim form never reaches the defendant party. Of course, in practice claimants or their solicitors tend to make every effort to ensure the defendant knows about the claim form, but that is usually a practical courtesy rather than due to any strict procedural requirement.

However, as the case of **Melanie Stanley v London Borough of Tower Hamlets** shows, during these 'unique' circumstances brought about by lockdown, extra caution must be applied to bringing the claim form to the defendant's attention, particularly if default judgment is to be sought later.

Melanie Stanley v London Borough of Tower Hamlets

On 26 June 2020 Mr Justice Julian Knowles in the High Court, Queen's Bench Division, granted an application by the Defendant, the London Borough of Tower Hamlets (the "**Council**"), to set aside a judgment in default that was awarded in favour of Melanie Stanley (the "**Claimant**"), on 17 April 2020.

Background to the default judgment application

Proceedings were issued on a protective basis on 4 December 2019 with the Claimant claiming damages of up to £10,000 following an admitted data breach and psychological distress alleged to have arisen from that data breach. On 23 January 2020, the Claimant sent a letter before claim to the Council, and then a follow up letter on 6 February 2020. No response was received to either letter.

On 13 February 2020, the Claimant's solicitor telephoned the Council's Legal Services Department and asked if the Council would accept service of proceedings by email. He was told service had to be effected by post and that service by email would not be accepted. This confirmation was of course, however, given over a month before 'lockdown' commenced on 23 March 2020.

Since the Council continued to fail to respond to the letter before claim, the Claimant sent the claim form and Particulars of Claim by post to the Council on 25 March 2020, meaning that the deemed date of service of the claim form was 27 March 2020.

By 10 April 2020, the Council had not filed an Acknowledgment of Service. The Claimant therefore applied for judgment in default, which was granted on 17 April 2020.

Was default judgment correctly obtained or should it be set aside?

The Council argued that the court should use its discretion to set aside the default judgment under CPR r 13.3. The Council's key argument was that the Claimant's solicitor had served papers on an office that he knew or ought reasonably to have known would be closed during a national lockdown, and that provided a good reason to set aside the default judgment.

The Judge agreed:

"I am satisfied that there is a good reason to set aside the default judgment. That reason is the unprecedented national health emergency which was unfolding at precisely the time Mr McConville posted his documents to the Council."

The Council had indeed stated that service was to be effected by post to the Council's offices, and would not be accepted by email, but this was 5 weeks before lockdown and it was the Claimant's solicitor who was at fault for not checking whether service by post was still possible and feasible:

"The world shifted on its axis on 23 March 2020 and it was incumbent on him as a responsible solicitor and an officer of the court to contact the Council to acknowledge that the situation had changed, and to discuss how proceedings could best and most effectively be served."

Conclusion

The Judge did not believe that the Claimant's solicitor 'unscrupulously took advantage of the situation' but instead stated that he had exercised poor judgement and not acted reasonably by posting the proceedings to an office that he knew or should have known would be shut due to a national emergency. While the Judge did not excuse the behaviour of the Council in failing to respond to the letters before claim, he held that this 'was history by the time of lockdown'.

The Judge concluded by stating that the circumstances which led to the Council's default were unique, namely the COVID-19 crisis, and that but for the Council's offices being shut it would have responded in time to the claim. The Judge summarised by saying:

"It would be unconscionable in my view for the Claimant to benefit from the unprecedented health emergency which prevailed at the end of March (and which is still subsisting today)."

BCLP comment

The circumstances of the case are certainly of their time, but there is a lesson here for litigating parties while lockdown subsists or offices remain closed – slavish reliance on the CPR, without due regard for the factual circumstances which may impede service, may be regarded as "unconscionable" - and give a defendant more scope to have a default judgment set aside than it would have in more normal times.

In circumstances similar to those in which the Claimant found itself in this case, the best way to proceed may be to attempt to agree that service may be effected by email (consent must be obtained in accordance with Practice Direction 6). Failing that, effecting service using any other method allowed by the CPR will still be in order – but it should be coupled with practical attempts to ensure a copy of the proceedings is brought to the actual attention of the defendant by other means.

As a final resort, it may be possible to seek an order from the court either to accept an alternative service method, or to validate a chosen method retrospectively. We have experienced the courts being more amenable to such orders during the lockdown, but these orders should by no means be assumed as a given, and will of course involve additional (irrecoverable) expenditure.

It may be that this is far from the only instance in which a claimant has relied upon technical compliance with the CPR's service rules as a basis to seek default judgment despite the defendant being unaware of service having been effected due to 'lockdown'. If so, defendants subject to a recent default judgment will undoubtedly wish to rely upon the court's reasoning and exercise of discretion in this case, even if service was effected in compliance with the rules.

Conversely, claimants who may wish to obtain default judgment having served proceedings in the last 3 months should take every practicable step to ensure that the other side is on notice of the proceedings having been served. While clients may celebrate default judgment being entered, they will not subsequently thank their advisers for any 'poor judgement' if that order is later set aside due to a failure to recognise or give due regard to the practical difficulties which COVID-19 has created with the service of proceedings.

BCLP has extensive experience of acting on default judgments and applications to set aside default judgments. Get in touch if you would like to be advised on what the current circumstances mean for obtaining or seeking to challenge a default judgment.

The author would like to thank trainee solicitor Robert Hodgson for his assistance with this article.

MEET THE TEAM

Andrew Street

London

andrew.street@bclplaw.com
+44 (0) 20 3400 3658