Neutral Citation Number: [2012] EWHC 1046 (QB)

Case No: HQ10D01721

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/04/2012

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

Between :

(1)Hallam Estates Ltd	**Claimants**
(2)Michael Stainer	
- and -	
Theresa Baker	**Defendant**

Jonathan Lewis (instructed by **Girlings Solicitors**) for the **Claimants**
Jonathan Price (instructed by **Gaby Hardwicke)**for the **Defendants**

Hearing dates: 18 April 2012

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.

.....

THE HONOURABLE MR JUSTICE TUGENDHAT

Mr Justice Tugendhat :

1. The issue in this appeal is whether the claim form in this action for libel was served in time. The words complained of are in an e-mail dated 17 May 2010. The one year period of limitation had therefore expired by 17 May 2011. The claim form was issued shortly before that date, namely on 11 May. In accordance with CPR Part 7.5(1) the time for service expired before midnight on the calendar day four months after the date of issue of the claim form, namely 11 September 2011. The claim form was in fact served on 9 November 2011. Service was pursuant to an order obtained on 30 August 2011 under CPR 7.6(2), by which the Master ordered that the time for service be extended to midnight on 11 November 2011.

2. The Master's order extending the time for service was made without notice to the Defendant. It therefore provided that the Defendant might apply to set it aside pursuant to CPR Part 23.10(1). On 19 September 2011 the Defendant did apply to set aside the order. On 7 November Master Kay heard that application and reserved his judgment. On 9 November he refused the Defendant's application. He also made an order for service of the claim form by an alternative method, namely upon the solicitors whom the Defendant had instructed, and who represented her on her application to set aside the order of 30 August 2011 (but who did not have instructions to accept service of the claim form).

3. The Defendant appealed with permission granted by Eady J on 30 January 2012. At the end of the argument on 18 April 2012 I stated that I would allow the appeal and give my reasons in writing later, which I now do.

4. The nature of the claim and the background to it are set out in the Particulars of Claim. The First Claimant is the freehold owner of premises in Folkestone known as The Grand, at which the Defendant formerly occupied an apartment. The First Claimant owns the goodwill in the business. The Second Claimant is the sole director and the licensee and together with his wife he also finances the operations of the business. Between August 2008 and August 2011 the Defendant complained of noise with the result that a noise abatement notice was issued against the First Claimant. The Defendant also complained of what she alleged to be breaches of planning laws. The Claimants contend that the Defendant's complaints were totally unjustified. The words complained of in the e-mail dated 17 May were addressed to six individual publishees. One of the addressees is the editor of the Folkestone Herald, but it is not alleged that he republished the allegations complained of.

5. The meanings which the Claimants attribute to the words complained of can be summarised as follows. The Claimants ignored complaints about excessive noise from many residents, they breached a court injunction and a Planning Obligation Agreement with the local council by allowing amplified speech, they routinely permitted drunkenness and such like behaviour beyond midnight, they routinely caused or permitted the illegal serving of alcohol to minors, and other similar allegations. The claim includes one for aggravated damages, and an injunction.

6. There is exhibited a file of correspondence. The Letter of Claim purportedly sent in accordance with the Pre-Action Protocol for defamation was not sent until 22 August 2011. However, there had been references on behalf of the Claimants to a possible

claim in defamation, amongst other causes of action, in letters dated 2 June 2010, 19 July 2010 and 17 November 2010.

7. On 18 August 2011 solicitors for the Claimants had sent a fax to the solicitors for the Defendant asking whether they were instructed to accept service of proceedings. They also wrote that they would be sending a letter pursuant to the Pre-Action Protocol and would serve a claim form with that. When they did send the Letter of Claim the final words read as follows:

> "Given your failure to respond to our fax of 18 August 2011 we are taking steps to serve a sealed copy of the claim form directly on your client, and the relevant certificate of service will in turn be filed at court. We enclose a further copy. We are also sending your client a copy of this letter. Unless we hear from you with suitable proposals in respect of the relief sought above, we will file and serve Particulars of Claim in due course. In this regard, if it is your client's intention to put forward suitable proposals, then please say so by return. We can then agree a formal extension to the time for service of the particulars. If we do not hear from you, the particulars must be served by 9 September 2011. There is, therefore, no scope for ambiguity on this issue. In any event we look forward to your substantive response to this letter of claim by 6 September 2011".

8. On 25 August 2011 solicitors for the Claimants again wrote asking the Defendant's solicitors whether they were instructed to accept service of the proceedings and, if not, to provide the Defendant's current residential address and contact details. By that time they had appreciated that the Defendant no longer lived at The Grand. They also asked for an extension of time for service of the claim form. On 23 August the solicitors for the Defendant had written that they were seeking instructions from the Defendant, but they have never stated that they had instructions to accept service on her behalf.

THE APPLICABLE LAW

9. The CPR make provision for service of a claim form where the defendant does not give an address at which the defendant may be served. They include the following:

> "6.9 (2) subject to paragraphs (3) to (6), the claim form must be served on the defendant at…[her] usual or last known residence…
>
> (3) Where a claimant has reason to believe that the [usual or last known residence]… is an address at which the defendant no longer resides…, the claimant must take reasonable steps to ascertain the address of the defendant's current residence ("current address").
>
> (4) Where, having taken the reasonable steps required by paragraph (3), the claimant -…

(b) Is unable to ascertain the defendant's current address, the claimant must consider whether there is –

(1) an alternative place where; or

(2) an alternative method by which, service may be effected.

(5) If, under paragraph (4) (b) there is such a place where or a method by which service may be effected, the claimant must make an application under rule 6.15. [Service of claim form by an alternative method or at an alternative place]

(6) Where paragraph (3) applies, the claimant may serve on the defendant's usual or last known address… 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)."

10. CPR Part 7.6 includes the following:

"(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 within rule 7.5 …"

11. The Court of Appeal authorities on the exercise of the court's discretion under CPR Part 7.6(2) are *Hashtroodi v Hancock* [2004] EWCA Civ 652; [2004] 1 WLR 3206; *Collier v Williams* [2006] EWCA Civ 20; [2006] 1 WLR 1945, *Hoddinott v. Persimmon Homes (Wessex) Limited* [2007] EWCA Civ 1203; [2008] 1 WLR 806 and *Cecil v Bayat* [2011] EWCA Civ 135; [2011] 1WLR 3086.

12. These authorities support the following propositions:

"1. In the absence from CPR 7.6(2) of any condition such as is specified in CPR Part 7.6(3) (a claimant who applies for an extension of time after the end of the period specified by Rule 7.5 the court may make such an order only if the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so), the power under CPR 7.6(2) must be exercised in accordance with the overriding objective: *Hashtroodi* para [18].

2. It will always be relevant for the court to determine and evaluate the reason why the claimant did not serve the claim form within the specified period. This is because the

overriding objective is that of enabling the court to deal with cases "justly", and it is not possible to deal with an application for an extension of time under rule 7.6(2) justly without knowing why the claimant has failed to serve the claim form within the specified period: *ibid*. In that paragraph the court quoted with approval the following passage from Professor Zuckerman's book Civil Procedure (2003) page 180:

> "It is only fair to ask whether the applicant is seeking the court's help to overcome a genuine problem that he has encountered in carrying out service or whether he is seeking relief from the consequences of his own neglect. A claimant who has experienced difficulty should normally be entitled to the court's help, but an applicant who has merely left service too late is not entitled to as much consideration…"

3. If there is a very good reason for the failure to serve the claim form within the specified period, then an extension of time will usually be granted. The weaker the reason the more likely the court will be to refuse to grant the extension: *Hashtroodi* para [19].

4. A defendant's solicitors are under no obligation to the claimants to reveal the Defendant's address for service: *Collier* para [99].

5. Service of the claim form serves three purposes:

   (a) to notify the defendant that the claimant has embarked on the formal process of litigation and to inform her of the nature of the claim;

   (b) to enable the defendant to participate in the process and have some say in the way in which the claim is prosecuted; until she has been served, the defendant may know that proceedings are likely to be issued, but not know for certain and not be able to do anything to move things along;

   (c) to enable the court to control litigation, because the overriding objective includes dealing with a case so as to ensure so far as practicable that it is dealt with expeditiously and fairly (CPR Part 1.1(2)(d)): *Hoddinott* para [54].

6. Whether the limitation period has expired is also of considerable importance. If an extension is sought beyond the expiry of the limitation period, the claimant is effectively asking the court to disturb the defendant who is by that time entitled to assume that his rights can no longer be disputed: *Hashtroodi* para [18]. In the law

of limitation "a miss is as good as a mile". The stronger the claim, the more important is the defendant's limitation defence which should not be circumvented by an extension of time for serving a claim form save in exceptional circumstances: *Cecil* [54]-[55].

7. It is for the claimant to show that his "good reason" directly impacts on the limitation aspect of the problem, as for instance where he can show that he has been delayed in service by reasons by which he does not bear responsibility, or that he could not have known about the claim until close to the end of the limitation period. If he cannot do that, he is unlikely to show good or sufficiently good reason in a limitation case: *Cecil* para [108]."

13. By CPR Part 52.11 this appeal is limited to a review of the decision of the lower court unless this court considers that in the circumstances it would be in the interests of justice to hold a re-hearing. Before the court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should or should not have considered, or that his decision was totally wrong: *Phonographic Performance Limited v. AEIR Rediffusion Music Limited* [1999] 1 WLR 1507 at 1523.

THE JUDGMENT OF THE MASTER

14. No criticism is made of the brief summary of the law which is set out in paragraph 3 of the Master's judgment. He directed himself by reference to a summary of the above principles given by Gross J (as he then was) in *FG Hawkes (Western) Ltd v Beli Shipping Co Ltd ("The Katarina")* [2009] EWHC 1740 (Comm); [2010] 1 Lloyd's Law Reports 449.

15. The Master's reasoning is in his judgment at paragraphs 6, 7 and 8, which read as follows:

"(6) In essence the submissions made by the Defendant concentrate upon the contention that the Claimant did not appear to know why there was a delay in serving the Claim Form. In my view the Defendant's submissions are ill founded and the approach adopted is wrong. The question posed by Gross J does not initially require consideration as to *why there was delay in service* but as to *why the Claim Form has not been served*. The simple answer to that question is the same now as it was before Master Eastman. The reason the Claim Form was not served is because the Defendant left her known address and the Claimant is not aware of her new address.

(7) Having established the reason why the Claim Form was not served the next question is whether that situation arose by reason of incompetence, neglect or oversight by the Claimant. In my view the simple answer to that question is that it did not. It is not a case where the Claimant had failed to take steps to ascertain the Defendant's address. It

was known. The Claimant knew the address of the Defendant and intended to serve at that address. However, before service was effected the Defendant removed and has refused to communicate a new address. The Defendant has submitted that the Claimant was or ought to have been aware that the Defendant had indicated a general intention that she *might* leave the premises at some unspecified time in the future. In my view any suggestion that the Claimant should have been aware of the date of the Defendant's departure and have reacted to it relies upon a greater degree of prescience on the part of the Claimant than can reasonably have been expected in the circumstances. The Defendant has suggested a number of steps which the Claimant could have taken to effect service earlier. In my view these are formulated with the benefit of hindsight and amount to a policy of perfection. The Claimant knew the address of the Defendant and the reason why the Defendant was not served was because she moved away leaving no forwarding address. If the Claimant had been aware that the Defendant was about to remove leaving no forwarding address, he could have served before she left but that is being wise after the event.

(8) It is necessary to give some consideration to the question of prejudice. As has been pointed out prejudice is inevitable where there is delay and a case becomes stale. As this is a defamation claim and there is therefore a short limitation period. By comparison with other cases it is probable that there is less prejudice caused by the effluxion of time and it is difficult to see how the claim can yet have become stale. In my view the Defendant has not established that this case involves particular prejudice which I need to take into account in exercising my discretion."

GROUNDS OF APPEAL 1 and 3: EVIDENCE OF GOOD REASON FOR DELAY - THE RELEVANCE OF DELAY IN SERVICE

16. The reason accepted by the Master as a good reason, as set out in paragraph 6 of his judgment, relates and relates only, to the period in late August when the Claimants became aware that the Defendant had left her known address. No criticism is made of his acceptance of that reason in relation to that period, so far as it goes. However, Mr Lewis submits that the Master erred in confining his attention to that period at the end of August. It is common ground that, apart from references to unspecified "tactical reasons", no reason has been given for why the Claimants left service so late, in particular there is no explanation for the period from 17 May 2011 onwards (or for the failure to comply with the Pre-Action Protocol).

17. Mr Price submits that this ground is misconceived. The Master was entitled to confine his consideration to the reasons applicable for the non-service in the period of

late August and to disregard the absence of evidence for the period form mid May to mid August.

18. In my judgment the court in *Hashtroodi* was referring to the whole of the four month period provided by CPR Part 7.5. It seems to me that that is clear from para [18]. But it is also clear from para [21] where Dyson LJ said:

> "But it should not be overlooked that a claimant has four months in which to serve his or her claim form".

19. Accordingly the Master erred in confining his considerations of the reason why the claim form was not served in time to the period in late August.

GROUND OF APPEAL 4: LIMITATION PERIOD

20. Mr Lewis submits that the Master erred in para 8 of his reasons in that he did not treat the fact that his order would or might deprive the Defendant of a limitation defence as being by itself a reason to refuse the extension of time. Instead he treated the expiry of the limitation period as potentially raising only such matters of prejudice as may be caused by the mere effluxion of time (whether or not that effluxion of time led to the expiry of the limitation period).

21. Mr Price submits that the Master correctly directed himself as to the relevance of the limitation period, and that paragraph 8 of his reasons is in accordance with the law with which he directed himself.

22. In my judgment the Master fell into error. The authorities are clear that the loss of a limitation defence is by itself a matter of considerable importance and "a miss is as good as a mile". Many cases stress that time is always of the essence in defamation claims, and that is why the limitation period is uniquely one year only. That is referred to in the Pre-Action Protocol at para 1.4. The Claimants should not have been granted an extension of time which would or might have the effect of depriving the Defendant of a limitation defence. That is so whether or not the Master was right to say that "By comparison with other cases it is probable that there is less prejudice caused by the effluxion of time and it is difficult to see how the claim can yet have become stale".

GROUND OF APPEAL 2: CPR PART 6.9

23. Mr Lewis submits that CPR 6.9 sets out the course that a claimant should follow where a claimant has reason to believe that the intended defendant no longer resides at the last known address. He makes no criticism of the steps taken by the Claimants to ascertain the current address. In addition to asking the Defendant's solicitors for that address, they had made other enquiries which had proved fruitless. Accordingly it was open to them to serve at the defendant's last known address. They had no need to apply for an extension of time.

24. Mr Lewis submits that it is no excuse to claim that they could not be sure that the steps they had in fact taken would be found by the court to have been reasonable steps as required by Rule 6.9(3). This is a reference to the Respondent's Notice in which the Claimants state as follow:

> "The Claimants could not have served the proceedings on the Defendant before the expiry of the original deadline for service (on 9 September 2011) under CPR 6.9 for the following reasons:
>
> 1. The date on which the Claimants had reason to believe that the Defendant's last known address was an address at which she no longer resided was 22 August 2011. The expiry of the four month period under CPR 7.5 was 12 midnight on 9 September 2011. This was a period of 18 days. The Claimants had not and could not have taken reasonable steps to ascertain the address of the Defendant's current residence in this period.
>
> 2. Alternatively if they had or could have taken reasonable steps in this period, the Claimants would have been obliged to make an application under CPR 6.15… which in itself would have necessitated the application under CPR 7.6.
>
> In the circumstances, service under CPR 6.9(6) was not available to the Claimants and the Claimants acted in a way that was entirely consistent with the overriding objective".

25. Mr Price submits that the application for an extension of time was itself a reasonable step within the meaning of Rule 6.9(3).

26. It seems to me that on the particular facts of the present case this ground of appeal adds nothing to the first ground. If, as the Claimants contend, they had left it too late to take reasonable steps to ascertain the address of the Defendant, that raises the question, to which the evidence provides no answer, namely why they had left it until 22 August before attempting to serve the Claim Form. The Master expresses no view on this point, and I see no error in his taking that course.

RECONSIDERATION OF THE APPLICATION

27. It follows that I must exercise the court's discretion afresh.

28. There is no reason given for why the court should make an order that would have the effect of depriving the Defendant of a limitation defence if the claim form was not served by 9 September.

29. There is no evidence before the court as to why the Claimants did not pursue the defamation claim that they had for so long been intimating in correspondence with the expedition required by the general law and the Pre-Action Protocol. The Claimants' manner of proceeding is, of course, not what is contemplated by the Pre-Action Protocol. The Protocol aims to encourage the early communication of a claim and the mutual disclosure of information and other matters *before* a claim form is issued.

30. On one alternative view, the Claimants had taken the reasonable steps required by CPR Part 6.9(3) to ascertain the Defendant's current address, in which case they were entitled to serve on her last known address in accordance with r6.9(6). On this view they did not need an extension of time. There is no reason why they could not, on 30 August, have applied for an order under r.6.15 for alternative service to be made on the solicitors in the form of the order they in fact obtained on 9 November. On the alternative view of the facts, the Claimants had not taken those reasonable steps. But in that case they had not given an acceptable explanation for their inability to do that. So it is not necessary for me to express a view as to whether the steps they had taken were reasonable, as required by the rules.

31. In my judgment the application to set aside the order of 30 August 2011 must therefore succeed.

32. In the circumstances I do not need to deal with further arguments advanced by Mr Lewis on his appeal. However, there is one point which is raised in the Respondent's Notice.

THE RESPONDENT'S NOTICE

33. In the Respondent's Notice the Claimants raise a new point. They argue that the application to set aside the order of 30 August 2011 was made outside the seven day time limit prescribed by CPR Part 23.10 and so that, absent a successful application by her for relief from sanction, she could not succeed.

34. This point was not advanced in the skeleton argument for the Claimants before the Master, and is not addressed in his judgment.

35. The facts relevant to it include the following. On 1 September 2011 the solicitors for the Claimants wrote stating that on 30 August they had made an application for extension of time and they enclosed the Application Notice, the witness statement of Ms Thorpe made in support of the application, and what they described as "draft order". The letter went on to say that the court had granted an extension.

36. On 5 September solicitors for the Defendant wrote saying they had seen no such order, but only the "draft order referred to in the letter but that is neither endorsed by the Master nor is it dated".

37. According to the evidence, what had been enclosed in the letter of 1 September is an order bearing the court's seal. That seal has a date (although the blanks left for the date in the body of the order have not been completed), but the name of the Master who made the order is not given. On 8 September 2011 solicitors for the Claimants wrote stating that the reference to "a draft order" had been an oversight.

38. On 12 September solicitors for the Defendant replied citing CPR 40.2(1) which provides:

> "(1) Every judgment or order must state the name and judicial title of the person who made it…
>
> (2) Every judgment or order must -

(a) bear the date on which it was given or made; and

(b) be sealed by the court".

39. On 20 September 2011 solicitors for the Claimant wrote to the solicitors for the Defendant enclosing a copy of the order of 30 August 2011 "duly amended by the court" under the slip rule.

40. Mr Lewis submits that the seven days prescribed by CPR Part 23.10 runs from 20 September, the service of the amended order. Accordingly the Application Notice of 15 September was in time.

41. Mr Price submits that the order as originally served is saved by CPR Part 3.10 which reads as follows:

> "Where there has been an error of procedure such as a failure to comply with a rule…-
>
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders;
>
> (b) the court may make an order to remedy the error".

42. Further Mr Price submits that the Defendant ought to have applied for relief on extension of time but failed to do so.

43. In my judgment this is not a point which is open to the Claimants to take on this appeal, since it is not a point which was raised before the Master or addressed by him. If it had been raised, it may well be that the Defendant would have taken some other step, such as asking for an extension of time. I cannot speculate on what would have happened in those circumstances. It would not be just to allow the point to be raised now.

CONCLUSION

44. It is for these reasons that I allowed this appeal.

45. Nothing in this judgment should be taken as a finding by me that the Claimants' solicitors are liable in law for the loss of the Claimants' opportunity to pursue the defamation claims. I have not been asked to consider that question, and the evidence that would be relevant to it would not have been relevant to the questions that I did have to decide, and was not before the court.