

# No special status for litigants in person; Barton v Wright Hassall LLP [2018] UKSC 12 by Kate Wilson

The Supreme Court has confirmed that parties will not be treated differently when taking significant steps in litigation, such as servicing the claim form, depending on whether a party is a litigant in person or represented.

## Background

Mr Barton brought a claim for professional negligence against his former legal representatives. He was a litigant in person. Upon issuing the claim, he elected to serve the Claim Form himself rather than allow the Court to serve the Claim Form on the Defendant. Mr Barton had exchanged emails with the Defendant's solicitors. On the day prior to the end of the limitation period, and without confirmation that service by email would be accepted as required by CPR 6.4, the Claimant emailed the claim form to the Defendant's solicitors. The Defendant's solicitors responded two weeks later stating that they would not accept service by email. In the absence of valid service, the claim was time barred.

The Claimant made an application under CPR 6.15(2) to validate service retrospectively. The District Judge, the County Court judge and the Court of Appeal declined to do so.

Mr Barton argued that

- 1) the mode of service had been effective to bring the Claim Form to the Defendant's attention;
- 2) he was entitled to assume that the Defendant's solicitors would accept service by email because (i) as a litigant in person the rules of service were relatively inaccessible to him and he did not know about them; and (ii) the Defendant's solicitors had corresponded with him by email in the 24 hours prior to service of the claim form, reminding the Claimant that they will "await service of the Claim Form and Particulars of Claim but not informing him that they would not accept service by email;

- 3) the Defendant was playing a “technical game” from which they should not be allowed to derive any advantage.

### **When should the court validate non-compliant service of the Claim Form?**

In Abela v Baadarani [2013] 1 WLR 2043, the Supreme Court provided the following guidance under CPR 6.15(2):

- 1) the test is whether “*in all the circumstances, there is good reason to order that steps taken to bring the claim form to the attention of the defendant is good service*” (para 33);
- 2) Service has a number of purposes, but the most important is to ensure that the contents of the document are brought to the attention of the person to be served (para 37). This is therefore a “critical factor”. However, “the mere fact that the defendant learned of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under rule 6.15(2)” (para 36);
- 3) The question is whether there is good reason for the Court to validate the mode of service used, not whether the claimant had a good reason to choose that mode;
- 4) Endorsing the view of the editors of *Civil Procedure* (2013), vol i, para 6.15.5, Lord Clarke pointed out that the introduction of a power retrospectively to validate the non-compliant service of a claim form was a response to the decision of the Court of Appeal in *Elmes v Hygrade Food Products plc* [2001] EWCA Civ 121; (2001) CP Rep 71 that no such power existed under the rules as they then stood. The object was to open up the possibility that in appropriate cases a claimant may be enabled to escape the consequences for limitation when a claim form expires without having been validly served.

This is not a complete statement of the principles to be applied, as the facts of each case will be different. The Supreme Court in *Barton* endorsed the above, however also regarded the issue of what, if any, prejudice the defendant would suffer by

retrospective validation of a non-compliant service of the claim form, as a relevant factor.

### **No special status as a Litigant in Person**

The Supreme Court acknowledged that, at a time when the availability of legal aid and conditional fee agreements are being restricted, some litigants may have little option but to represent themselves. However, the rules do not distinguish between represented and unrepresented parties: *“Their lack of representation will often justify making allowances in case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court.”* (para 18). This is particularly so if the step affects the other party’s legal rights, for example under the Limitation Act.

### **Rules for service of the Claim Form are not inaccessible or obscure**

Lord Sumption stated: *“Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take.”*

The Supreme Court found that the relevant rule for service in this case, CPR 6.3 and Practice Direction 6A, were not inaccessible and obscure for the following reasons

- They are accessible on the internet and prominently headed “service of documents” and flagged in the table of contents;
- The Claimant had received from the Courts Service a blank certificate of service for him to complete. This referred the Claimant to Part 6 of the CPR and the website address where this could be found;
- Mr Barton was an experienced litigant by the date of non-compliant service as he had been in litigation with various parties since 2005. He knew that not all solicitors accepted service by email, however apart from looking at the legal notices of the Defendant’s solicitor’s website he took no steps to check whether they accepted service by email or to ascertain what the rules were;

- It was unreasonable to assume that correspondence by email also indicated that the Defendant's solicitors accepted service by email.

### The Defendant was not "playing technical games"

The Court of Appeal and Supreme Court rejected the submission on behalf of the Claimant that the Defendant was playing technical games. There was nothing which the Defendant could have reasonably been expected to do which could have rectified the position. Even if they had realised that service was invalid prior to limitation expiring (one day after service by email), they were not under a duty to warn him to re-serve or give him advice of this kind.

### Conclusion

The Claimant had issued the claim form at the very end of the limitation period and opted not to have it served by the court. He attempted to serve it at the very end of its period of validity, leaving himself little time to rectify any mistake. The Supreme Court refused to interfere with the decision of the courts below as the prejudice to the Defendant, which has accrued a valid limitation defence, is clear. There was no good reason to validate the step taken. By a majority of 3:2, the Supreme Court therefore rejected the Claimant's appeal.

Lord Briggs and Lady Hale dissented as the main purposes of the rules of service had been achieved; there were a number of mitigating factors which although were also characteristics of Mr Barton being a litigant in person, although this is not the same as stating that a litigant in person constitutes a free-standing good reason why his botched attempt at service should be validated; the meaning of CPR 6.15 has twice in recent years divided the Supreme Court and it is questionable whether its provisions and that of the Practice Direction about service by email are sufficiently clear or still satisfy the requirements of the overriding objective.

Although many opponents of litigants in persons will rely upon this judgment, courts are likely to continue to give unrepresented parties leeway when making case

management decisions. It is clear, however, that a robust approach will be taken when significant steps are taken in litigation and in particular where service is defective.

### **Profile**

Kate has a busy personal injury practice involving clinical negligence, employer's liability, public liability, accidents abroad and road-traffic accident claims, acting on behalf of Claimants and Defendants.