



FINAL

Claim No: F61YJ238

IN THE COUNTY COURT AT BRISTOL

B E T W E E N :

TESFA ELLIS

Claimant

-and-

THE CHIEF CONSTABLE OF AVON & SOMERSET CONSTABULARY

Defendant

JUDGMENT

Representation:

Claimant Mr Johnson instructed by:

DPP Law

Defendant Mr Talalay instructed by:

Legal Services Directorate

INTRODUCTION

1. Are the deadlines imposed by the Civil Procedure Rules 1998 such that a claimant can put his claim form and his particulars of claim into the same envelope, send them by Royal Mail to the Defendant only to discover that the claim form was served in time but the particulars of claim were not?
2. That was the situation which the Defendant argued to apply in this case. The Defendant contended that although the claim form was served in time, the particulars of claim were served out of time and applied to strike out the Claimant's claim; she was successful before District Judge Watkins. The Claimant then sought a retrospective extension of time to serve his particulars of claim but this was refused by District Judge Watkins. The relevant orders were made by the District Judge on 12th August 2020.
3. On 25th August 2020 the Claimant filed an appellant's notice in respect of the orders; I granted permission to appeal without a hearing on 17th September 2020 and I heard the appeal at an attended hearing on 22nd October 2021.
4. There is no respondent's notice.
5. I am grateful for the assistance of counsel namely:
 - (1) Mr Johnson (who also appeared in the lower court)
 - (2) Mr Talalay who appeared for the Defendant at the appeal (and in his absence Mr Moss who appeared in the lower court and settled the Defendant's skeleton argument in response to the appeal).
6. Within this judgment I shall set out:
 - (a) A brief background;
 - (b) The role of an appellate court;
 - (c) The rules concerning issue and service of a claim form;
 - (d) The rules concerning service of particulars of claim;
 - (e) The conflict;
 - (f) Such case law with respect to service of the claim form and particulars of claim which I consider to assist;
 - (g) Discussion – Ground One (service);
 - (h) Discussion – Ground Two (extension of time).

BACKGROUND

7. The Claimant is Mr Tesfa Ellis. On 10th May 2013 Mr Ellis was driving his car when he was pulled over by the police. Thereafter the narrative is likely to be contentious but Mr Ellis was arrested that day, taken into custody and charged with offences. It is Mr Ellis' case that he is the victim of the police by way of the torts of false imprisonment, assault, malicious prosecution and misfeasance in public office. He brings his claim against the Chief Constable of Avon and Somerset Constabulary who is vicariously liable for any legal wrongs committed by her officers in the course of their employment.
8. Mr Ellis' causes of action are in tort therefore section 2 of the Limitation Act 1980 would bar him from bringing such claims¹ 6 years after the date on which his cause of action accrued which date would have been 10th May 2013 thus the claims would have become barred on 10th May 2019.
9. Mr Ellis' claim was issued just in time on Friday 9th May 2019; in the body of the claim form particulars of claim were said 'to follow'.
10. It is common ground that Mr Ellis' solicitors sought to serve the claim form and particulars of claim by putting them in the first class post on Monday 9th September 2019 properly addressed to the Defendant's legal services department.
11. By application notice dated 28th October 2019 the Defendant applied for the claim and the particulars of claim to be struck out on the ground that the particulars of claim were served out of time²; I shall refer to this as the 'strike out application'. That application was heard by District Judge Watkins on 30th March 2020; the parties were represented by counsel namely Mr Johnson for Mr Ellis and Mr Moss for the Defendant. The only issue for District Judge Watkins to decide was whether, as a matter of law (in the form of the Civil Procedure Rules 1998) the particulars of claim were served out of time.
12. District Judge Watkins reserved judgment which he circulated in draft format on 29th July 2020; it was clear that the Defendant had succeeded on her

¹ Excluding a claim for personal injury which has a primary limitation period of 3 years.

² That part of the application which contended that the injury claim was time barred became redundant when the injury claim was removed.

application. By application notice dated 10th August 2020 the Claimant applied for relief from sanction with respect to late service of the particulars of claim; I shall refer to this as the ‘extension application’.

13. There was a further hearing on 12th August 2020 when District Judge Watkins:

- (a) handed down his written judgment on the strike out application and struck out the claim because he determined that the particulars of claim were served out of time;
- (b) gave an oral judgment refusing the extension application;
- (c) refused the Claimant permission to appeal;
- (d) made a costs order against the Claimant.

ROLE OF THE APPELLATE COURT

14. In this case the appeal is limited to a review of the decisions of District Judge Watkins and Mr Johnson argues only that the decisions were wrong within the meaning of Rule 52.21(3)(a).

15. It is common ground that no discretion arose with respect to the strike out application and the only question was whether as a matter of law the judge was right to conclude that the particulars of claim were served out of time.

16. A discretion does arise with respect to the extension application which concerns a case management decision and so I must be persuaded that District Judge Watkins erred in his application of CPR 3.9 (which addresses relief from sanctions).

ISSUE & SERVICE OF THE CLAIM FORM

17. The claim form, on issue, is a unique document of critical legal effect; in particular:

- (1) it opens the jurisdiction door of the court in that it starts legal proceedings and enables the court to make orders;

(2) it stops time running against the claimant within the meaning of the provisions of the Limitation Act 1980³.

18. Part 6 of the Civil Procedure Rules 1998 applies to service of documents.

Section 2 of Part 6 provides a bespoke regime for service of the claim form within the (geographical) jurisdiction.

19. CPR 6.14 provides for deemed service (i.e. delivery⁴) of a claim form; it reads:

"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)."

20. CPR 7.5 provides a bespoke method of service of a claim form; it reads:

"7.5-(1) 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 of service chosen, before 12:00 midnight on the calendar day four months after the date of issue of the claim form"

In this case the relevant step in the table is posting by first class post.

21. CPR 7.5 says nothing about the date of deemed service (delivery).

22. Therefore the deadline is set by the 'step' which is to be taken before 12:00 pm on the calendar day four months after issue. That step is dispatch.

23. The claim was issued on 9th May 2019 and on Monday 9th September, on the last day available to the Claimant, the Claimant took the rule 7.5 step of posting the claim form (i.e. dispatching) which was thus deemed served (delivered) on Wednesday 11th September further to Rule 6.14.

24. Why make mention of 'deemed served' at all? The answer would seem to be straightforward – a deemed delivery day needs to be set from which procedural time limits run notably for an acknowledgement of service to be filed.

SERVICE OF PARTICULARS OF CLAIM

25. Unlike a claim form, particulars of claim are not issued by a court; the obligation is on the claimant to file them in accordance with CPR 7.4(3).

³ Paragraph 5.1 of PD71 stops time running when the claim form was received by the court office.

⁴ Not the same as receipt.

26.CPR 7.4 requires a claimant to provide particulars of claim in one of the following 3 ways:

- (a) Contained within the claim form (rule 7.4(1)(a)) or
- (b) Served with the claim form (rule 7.4(1)(a)) or
- (c) Served within 14 days after service of the claim form.

27. Now does ‘served’ mean taking the step – dispatch – or the date on which the law deems delivery?

28. CPR 7.4(2) imposes a longstop as follows:

“Particulars of claim must be served on the defendant no later than the latest time for serving a claim form.”

(Rule 7.5 sets out the latest time for serving a claim form).

29. As already observed, CPR 7.5 addresses only the action of serving, not the date of deemed service. “Serving” must mean dispatch.

30. What of “served”?

31. CPR 6.26 addresses deemed service of a document other than a claim form; it reads:

“A document, other than a claim form, served within the United Kingdom in accordance with these Rules or any relevant practice direction is deemed to be served on the day shown in the following table-“ [emphasis added]

and pursuant to that table , if first class post is used, the deemed date of service is:

“The second day after it was posted, left with, delivered to or collected by the relevant service provider provided that day is a business day; or, if not, the next business day after that day”

In this context “served” must mean delivered.

THE CONFLICT

32. So, on an ordinary reading of the rules; the process of serving the claim form, namely the rule 7.5 step, was taken on the last possible day being 9th September 2019 when it was dispatched. Service of the claim form (delivery) was deemed to have taken place on 11th September 2019 but nothing turns on identifying this day other than setting a day from which procedural time limits run.

33. The particulars of claim were dispatched on 9th September 2019 and deemed served on 11th September 2019. If the rule read words to the effect of "Particulars of claim must be served on the defendant no later than the date on which the claim form is deemed served under Rule 6.14" the conflict would not arise. However, the deadline for service of the particulars of claim is the rule 7.5 step so does "served" mean a rule 7.5 step i.e. 'dispatch' or 'deemed delivery" within the meaning of CPR 6.26.
34. There is a further anomaly in that a claimant can avoid the need to serve the particulars of claim altogether by ensuring that they are contained in the claim form. And what if the particulars of claim were stated in the claim form to be "see attached" or "see enclosed" and/or stapled to the claim form?
35. It must be observed that the risk of falling foul of a crucial deadline in this case is one of the Claimant's own making.
36. However, it does seem quite extraordinary to me that a claimant can set out his particulars of claim within his claim form, put the latter in the post and be in time but if he chooses instead to put his particulars of claim in the same envelope as the claim form but as a separate document and posts the envelope, the claim can be in time but not the particulars of claim.

CASE LAW

37. The word "serving" can carry different meanings. In Ageas (UK) Ltd v Kwik-Fit (GB) Ltd [2013] EWHC 3271 Green J needed to consider the meaning of "serving legal process" as used in a term within a share purchase agreement rather than in any rule of court. He said at paragraph 54:

"The expression is one which can bear a number of different and conflicting meanings covering points in time before, on, and after receipt. For instance it can mean dispatch in the sense that a document is "served" from the point in time of its dispatch or sending and therefore prior to its receipt. In such cases the modes of dispatch are frequently spelled out (fax, DX, first class recorded post, etc). The parties by this method in effect agree a risk transfer away from the sender and on to the other party: see the discussion of such clauses

*in Ener-G Holdings Plc (ibid) at paragraphs [23], [29], [30], [35] per Lord Neuberger MR. Alternatively, the phrase "service" (and its cognates) might be read simply to mean delivery in a form which brings the contents of the document being served to the actual attention of the intended recipient. In such circumstances a document or other instrument will be served only when it is proven that the intended recipient was in actual possession of the document or instrument in issue. This is in my view the normal meaning of the concept of "service". And yet further it is possible that "service" (and cognates) may be treated as having occurred at a point of time after actual receipt by the inclusion in the contract of provisions which define service as having occurred, for example, "x" days or hours following proof of actual receipt. This analysis shows that the phrase "serving" is not a term which necessarily imports a fixed or technical meaning. Its ordinary meaning is delivery upon and receipt by the intended recipient, but that can be modified by contractual provisions. This is not, in my view, one of those cases where the parties have carefully and deliberately chosen a very precise legal term of art which, accordingly to consistent case law, should be accorded its technical meaning and which the parties would accordingly understand as having a precise legal meaning: see the discussion of legal terms of art in Lewison, *The Interpretation of Contracts* (5th edition, 2011) section 5.08 et seq."*

38. In Venulum Property Investments Ltd v Space Architecture Limited and others

[2013] EWHC 1242 the claimant took the step of serving his claim form on the last possible date but did not serve particulars of claim in the mistaken belief that they had another 14 days in which to do so. The issue before Edwards-Stuart J was whether an extension of time to serve the particulars of claim should be granted but he did say this in his introduction within paragraph 2:

"In fact, the long-stop deadline for service of the Particulars of Claim is four months after the issue of the claim form; see CPR 7.4(2) and 7.5(1).

However, I do not know what Edwards-Stuart J meant by service.

39. In T&L Sugars Ltd v Tate & Lyle Industries Ltd [2014] EWHC 1066 Flaux J had to consider a very similar point to that argued before Green J in Ageas. At paragraph 31 he held:

"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 acknowledgment of service. In my judgment, that construction of the rules is supported not only by the reasoning of Green J in the Ageas case at [63]-[80], with which on this point I entirely 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."

40. In DB Bank Ltd v Sinclair Solicitors Ltd unreported 17/12/15 Master Matthews (as he then was) needed to consider whether a claim form had been served in time. He was taken to a note in the White Book in which the authors presumed the last day for service of the particulars of claim is the last day of service of the claim form (rather than the taking of the step). Master Matthews did not agree and he considered that service comprised the taking of a step. Whilst this decision is informative it is common ground that this part of the Master's judgment is obiter.

41. In Paxton Jones v Chichester Harbour Conservancy & others [2017] EWHC 2270 Master McCloud was obliged to visit the issue of service in the context of an order made by another master that “the date for service of the claim form is extended to Tuesday 17th January 2017”. The claimant took the step of putting the claim form in the post on that day but was the order complied with? The defendant argued that the step should have been taken on Friday 13th January 2017 to achieve service on 17th January. After careful consideration of the caselaw the argument did not find favour with Master McCloud. She pointed out that if the defendant was right in their argument one would have a claim form which was valid for the last 2 days of its life but incapable of being served.

42. Can the same point be made with respect to particulars of claim if their date of service is governed by CPR 6.26? Although particulars of claim are not an originating process I think the answer is “yes” because a claimant would be in the position of being able to serve a live claim form but unable to serve particulars of claim in time leaving the claimant open to the very attack that the Defendant has brought in this case.

43. In Kennedy v National Trust for Scotland [2019] EWCA Civ 648 the Court of Appeal were commenced with jurisdiction and service and the tension between ‘taking the step’ and ‘deemed service’. At paragraphs 134 the Court said:

A deeming provision does not state absolute truth. It states that which is assumed to be true for limited purposes. In Inland Revenue Commissioners v Metrolands (Property Finance) Ltd [1981] 1 WLR 637 at 646, Nourse J reviewed the leading authorities on deeming provisions and summarised their effect as follows:

"When considering the extent to which a deeming provision should be applied, the court is entitled and bound to ascertain for what purposes and between what persons the fiction is to be resorted to. It will not always be clear what those purposes are. If the application of the provision would lead to an unjust, anomalous or absurd result, then,

unless its application would clearly be within the purposes of the fiction, it should not be applied. If, on the other hand, its application would not lead to any such result then, unless that would clearly be outside the purposes of the fiction, it should be applied."

And at 137:

In our view, the judge below was correct to follow the reasoning of Flaux J in T&L Sugars Ltd and Master McCloud in Paxton Jones. As Mr Callus submitted, in enacting the 2008 Rules, there was a specific legislative choice to prefer the date of actual service rather than deemed service. Godwin and Anderton have no application to rule 7.5(2).

44. In Oran Environmental Solutions Limited & another v QBE Insurance (Europe) Limited & another [2020] EWHC the issue was whether the claim form was served in time in the context of a court order that "the Claimants serve the claim form and file and serve particulars of claim by 4pm on 6th January 2020". On 6th January 2020 the Claimants 'took the step' but the Second Defendant argued that the claim form and particulars of claim were served out of time and that 'serve' meant actual physical service or the date of deemed service. The Second Defendant also submitted that if 'serve' in this case meant 'take the step' there would be different meanings for the claim form and particulars of claim. The Second Defendant sought to distinguish previous case law on the basis that the court order had a specific time – 4pm. The Second Defendant was unsuccessful.

45. Cockerill J also considered that claim form/ particulars of claim dichotomy. At paragraph 49 she said:

"I have also given thought to the issue of dual meaning which formed part of the basis of Ms Padfield QC's submissions. I am not persuaded that in context - in other words where Particulars of Claim were in any event being served with the Claim Form - this creates any difficulty. The reality of the situation is that the particulars are effectively being treated as being served as if they were part of the Claim Form. In that context it is not necessary to look at it as a separate

mechanism such that it would involve reading the word "serve" in the Order in two different ways. In that context I note that CPR 7.4(1) provides that particulars of claim may "be contained in or served with the claim form". I would understand that to denote that where particulars of claim are either contained in or served with the claim form, they are subject to the same rules for service and are taken as served at the same time. The contrary would be nonsensical."

46. Unsurprisingly Mr Johnson relies heavily on Oran and Mr Talalay seeks to distinguish Oran.

DISCUSSION – GROUND 1

47. District Judge Watkins was faced with civil procedure rules that arguably conflict with each other and arguably conflicting authorities of differing weights. However, the District Judge does not seem to have been referred to Oran. Unfortunately there does not seem to have been a reported case which determined as an issue in that case the question whether particulars of claim sent in the same envelope as a claim form are served on the date of posting (the step or act of serving) or on the date of deemed service.

48. In my judgment, if one reads the Rules and applies the correct context, it is apparent that distinction needs to be drawn at times between service meaning dispatch and service meaning delivery.

49. In my judgment service of the particulars of claim within the meaning of CPR 7.4 means the process of serving as applied to a claim form namely dispatch and does not mean a deemed service date. The deemed service date (delivery) remains important for setting further procedural deadlines.

50. I cannot see how Venulum assisted the District Judge as he says or that there is a binding point of law therein. Those cases which concerned the claimant thinking that the rules gave him an additional 14 days to serve the particulars of claim even though the period of validity of the claim form was exhausted are of some assistance and I have to observe that I consider Master Matthews'

comments in DB UK Bank to support the Claimant in this case rather than the Defendant.

51. I do not find any real authority in support of the Defendant's arguments whereas I consider that the other authorities, notably T&L Sugars, Paxton Jones and Oran to support the Claimant's argument.

52. Accordingly I would allow the appeal.

DISCUSSION – GROUND 2

53. If I am right about Ground 1, Ground 2 is redundant but a higher court may decide that I was wrong on Ground 1 so I address Ground 2 in any event.

54. Therefore the de facto position would be as follows:

- (a) The Claimant was out of time for serving his particulars of claim;
- (b) At the (first) hearing before District Judge Watkins it was made clear to the judge that the Claimant was positively not making an application for relief from sanctions (see paragraph 56 of the judgment);
- (c) The application for relief was made on 10th August 2020
- (d) The application was supported by a statement from Mr Hagan; no attempt was made to explain the delays.

55. It appears to be common ground that the District Judge took the correct approach which was to consider relief from sanction within the meaning of CPR 3.9 applying the 'Denton' criteria per Denton v TH White Ltd [2014] EWCA Civ 906 namely in the following order:

- (1) Assess the seriousness and significance of the breach
- (2) Why the default occurred
- (3) Consider all the circumstances of the case including the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.

56. The only point taken by the Claimant in this appeal is with respect to stage 3 and the District Judge's approach with respect to the balance of prejudice.

57. However, it must be observed that:

(1) There was a serious and significant breach as found by the District Judge in paragraph 10 of his judgment;

(2) The default occurred because the Claimant did not understand the rules (paragraph 14 of the judgment)

58. So far as stage 3 is concerned the District Judge directed himself properly that:

"there is a balance to be struck between the prejudice to the parties"

see paragraph 15 where he accepts the serious impact on the Claimant if relief was not granted and public's interest in a court scrutinising alleged wrongdoing on the part of the police.

59. At paragraph 17 of his judgment the judge explores the harm caused to the quality of evidence by reason of delay.

60. At paragraph 20 it is apparent that the District Judge took into account all of the circumstances of the case. It seems the only factor in favour of the Claimant was the prejudice he would suffer if relief was refused; every other factor was in the Defendant's favour.

61. Ground 2 of the appeal reads as follows:

"The decision of the Learned Judge not to extend time for service of the Particulars of Claim was wrong because the Learned Judge, considering all the circumstances of the case, placed undue weight on the prejudice to the Defendant resulting from the passage of time since the cause of action accrued"

62. In my judgment this ground is simply not made out on any reading of the judgment of the District Judge; he carried out the correct exercise in a careful and correct way and reached a decision that he was entitled to reach on the material before him.

63. Accordingly I dismiss this ground of appeal.

FINAL STEPS

64. I invite counsel to agree a draft minute of order. The order will need to make provision for further steps in the litigation. In the event that a further hearing is required before me to address e.g. costs I should be notified by e-mail with an

agreed time estimate. I direct under Rule 52.12 (2) (a) that the time for filing any appellant's notice does not start to run until I have approved a minute of order.

HHJ RALTON

16th NOVEMBER 2021