SERVICE: THE NEW RULES

INTRODUCTION

Service of the claim form is a very unforgiving stage of the proceedings. A stark warning of the potential dangers for the Claimant was given in Anderton -v- Clwyd County Council [2002] EWCA Civ 933 where Mummery LJ observed:

> "The consequences of failure to comply with the rules governing service of a Claim Form are extremely serious for a Claimant and his legal advisors. The situation becomes fraught with procedural perils when a Claimant or his solicitor leaves the service of a Claim Form, which has been issued just before the end of the relevant statutory limitation period, until the last day or two of the period of 4 months allowed for service …".

The solicitor who, nevertheless, likes the danger needs to know the rules and potential pitfalls!

The Civil Procedure (Amendment) Rules 2008 introduced, with effect from 1 October 2008, important changes to Parts 6 and 7 of the Civil Procedure Rules.

The new Part 6 separates out, into different rules, the provisions relating to service of the claim form and the rules relating to service of other documents.

It is with service of the claim form that most difficulties have arisen so this article will focus on that part of the new rule. Additionally, the rules deal with service out of the jurisdiction but that, too, is outside the scope of this article.

To fully appreciate the potential dangers, at the stage of service, it is worth reviewing problems highlighted by cases decided under the original Civil Procedure Rules before turning to look at the new rules.

THE OLD RULES

Cases decided under the old rules, coupled with the law as it then stood in relation to the Limitation Act 1980, revealed a number of pitfalls which can be considered as individual problem areas although the common theme, which ultimately caused difficulty in all the cases, was always that of limitation.

Problem 1: Service

The focus, under the old rules, was service. In other words that the claim form had been received by, not just dispatched to, the Defendant within the appropriate time and by the appropriate means to the appropriate place.

Time and place for service will be considered a little later but, as a preliminary point, it is worth noting that simply sending the claim form, without expressly stating whether or not this was intended to effect service, might, or might not, amount to effective service, thereby causing difficulties even if the claim form was delivered in time to the appropriate place.

In Claussen -v- Yates [2003] EWCA Civ 656 it was held the provision of a copy claim form, in response to a request this be provided "in confirmation of the commencement of the proceedings", did not amount to service. Crucially the Claimant's solicitors made it clear they were not intending to serve the claim form at that stage.

However, in Murphy -v- Staples UK Limited [2003] EWCA Civ 656 the court impliedly accepted that a letter sent to solicitors, which was the proper address for service, enclosing copies of documents that "have been served today on your client's registered office" was sufficient to effect service (even if, though this was not the case, service direct on the Defendant in those circumstances was valid).

Similarly, in Asia Pacific (HK) Ltd -v- Hanjin Shipping Co Ltd [2005] EWHC 2443 (Comm) service was held to have been effected when the Claimant's solicitors wrote "attached please find a copy of the claim form issued by the Claimant's represented by us", even though the claim form was not accompanied by a response pack. This was on the basis that the claim form had been sent, by a permitted method of service, to the appropriate address for service without any indication it was provided for information only, there being no need to expressly state the claim form was sent by way of service. The failure to serve a response pack was merely a procedural irregularity.

Problem 2: The Time Limit

Part 7.5 (2) provided that the time limit, for service of the claim form, was within 4 months after the date of issue (6 months where the claim form was to be served out of the jurisdiction).

That time limit could, in appropriate circumstances, be extended.

If the application was made within the 4 month time limit Part 7.6 (2) applied. Even within those 4 months there still had to be a good reason for an extension of time being required: Hashtroodi -v- Hancock [2004] EWCA Civ 652.

After the 4 month time limit service could only be extended under Part 7.6 (3). That was held to be a complete and self-contained code so an extension of time could not be granted unless the conditions in that rule were fulfilled: Vinos -v- Marks and Spencer Plc [2001] All ER 784. This meant:

- the Court had been unable to serve the claim form; or

- the Claimant had taken all reasonable steps to serve the claim form but had been unable to do so;

and, in either event, the application was made promptly.

Furthermore, the court would not usually allow the power to dispense with service to avoid the terms of Part 7.6 (3): Godwin -v- Swindon Borough Council [2001] EWCA Civ 1478.

Problem 3: Agreeing an Extension of Time

Whilst the difficulties arising from Part 7.5 (2) and 7.6 (3) would not arise if the parties agreed an extension of time for service of the claim form the trap, in these circumstances, for the Claimant was the requirement found in Part 2.11 that any variation of a time limit would have to be by the *written* agreement of the parties.

In Thomas -v- Home Office [2006] EWCA Civ 1355 the claim form was issued on 1 October 2004 but not served until 23 June 2005. It was common ground an extension of time for service had been given but disputed whether this could effectively extend time for service under the terms of the Civil Procedure Rules.

The Court held that there was nothing in Part 7 which prevented the application of Part 2.11, so that the parties could agree an extension of time for service of the claim form.

However, to comply with Part 2.11 there had to be a "written agreement of the parties" which, in practice, would mean a single document signed by both parties, an exchange of letters or even an oral agreement provided that was confirmed in writing by both sides.

What would not suffice, however, was unilateral correspondence or an oral agreement only confirmed in writing by one side or the subject just of file notes made by the parties. On the facts of the case there was no "written agreement" and service of the claim form was out of time.

Problem 4: The Address for Service

Whilst Part 6.5 (2) required a party to give an address for service the rule went on to provide that if no address was given, and the party to be served had no solicitor acting, the address for service would be that identified by the table in Part 6.5 (6).

Much of the difficulty with this rule was because it encompassed both service of the claim form, where quite often no address for service would be given, and service during the proceedings, when an address normally would have been provided.

A review of cases which considered this rule highlights the problems that occurred in practice.

In Smith -v- Probyn (QBD 25 February 2000) solicitors were involved on behalf of the party to be served, but that party had never indicated the solicitors had authority to accept service, the address of those solicitors was not the address for service of the claim form and hence not valid service upon the Defendant.

However, when the party to be served authorised solicitors to accept service the address of those solicitors became the address for service and sending the Claim Form direct to the Defendant was invalid. In Nanglegan -v- Royal Free Hampstead NHS Trust [2001] EWCA Civ 127 it was held Part 6.5 (5), which at first glance appeared to exclude the claim form from the requirement to serve at the address of any solicitor acting, only applied to the situation which prevailed following service.

Service at the address of the solicitors, once nominated by the Defendant, was held to be necessary even when those solicitors had not confirmed that authority to the Claimant: Horn -v- Dorset Healthcare NHS Trust (2004) and Collier -v- Williams [2006] EWCA Civ 20.

If the Defendant had not given an address for service, and no solicitor was acting, the Defendant could be served at the last known address even if no longer living there: Smith -v- Hughes [2003] EWCA Civ 656. However, the Claimant did have to take reasonable steps to find out, as at the date of service, the last know whereabouts of the Defendant: Mersey Docks Property Holdings -v- Kilgour [2004] EWHC 1638 (TCC). Furthermore, if the Defendant had never been at that address this could not be the "last known address": Marshall and Rankine -v- Maggs [2006] EWCA Civ 20.

A further potential difficulty arose with an argument that if solicitors had been representing the Defendant but never authorised to accept service the Claimant could not use the solicitors address as the address for service (applying Smith -v- Probyn) and could not rely on service at the last known address, as this was only applicable where no solicitor was "acting". This argument, however, was rejected in Collier -v- Williams where it was held "acting" for the purposes of Part 6.5 (5) meant authorised to accept service.

Problem 5: Limitation

In the cases already considered the real problem, underlying the difficulties that arose in each on service, was that the limitation period had expired. Hence the significance of establishing not only that proceedings have been issued within the limitation period but then validly served and the terms of the warning given by Mummery LJ in Anderton.

At the time these cases were considered the issue of, but failure to serve, proceedings left the Claimant in a worse position than if the proceedings had not been issued at all. This was because of the, somewhat controversial, decision in Walkley -v- Precision Forgings Limited (1979) 1 WLR 606 HL that where proceedings had been issued a Claimant could not rely on S.33 Limitation Act 1980.

Walkley has now been overturned by the House of Lords in Horton -v- Sadler [2006] UKHL 27. Thus the cases on service now have to be viewed on the basis there is a possible escape route, but that would depend upon the Claimant persuading the court to exercise discretion under S.33 on the facts of each individual case.

THE NEW RULES

Whilst the time limit for service remains 4 calendar months amendments to Part 7 shift the focus from receipt by the Defendant to the taking of a final step by the Claimant.

Additionally, the new Part 6 reflects the general tenor of case law, to give greater certainty, as well as seeking to eliminate some of the technical points that have been argued in the past.

Part 7

The new Part 7.5 confirms the relevant time limit remains 4 months from the issue of the claim form.

However, what is now required from the Claimant, before 12 midnight on the calendar day 4 months after issue, is for the appropriate step to be taken, depending on the method of service.

A table in the new rule sets out the step necessary, by the deadline, for each method of service.

Method of service	*Step required*
First class post, document exchange or other service which provides for delivery on the next business day	Posting, leaving with, delivering to or collection by the relevant service provider
Delivery of the document to or leaving it at the relevant place	Delivering to or leaving the document at the relevant place
Personal service under rule 6.5	Completing the relevant step required by rule 6.5(3)
Fax	Completing the transmission of the fax
Other electronic method	Sending the e-mail or other electronic transmission

The new Part 7.6 still gives the court power to extend time, now for the "step required" under the new Part 7.5. However, this remains as restrictive a provision as the rule it replaces. It seems likely the court will continue to regard this as a self-contained code so that the Claimant will have to show the precise circumstances envisaged by the rule

applied rather than the more general considerations applicable when simply applying the overriding objective.

Part 6

The available methods of service, referred to in Part 7, are set out fully in Part 6.3. Additionally, the claim form may be served on a limited company in accordance with the Companies Act 1985 or the Companies Act 2006 and on a limited liability partnership in accordance with S.725 Companies Act 1985.

Part 6.4 deals with personal service, which will need to be followed where this is the chosen method of service or otherwise required.

Part 6.6 (2) requires the Claimant to include in the claim form an address at which the Defendant may be served, and unless the court otherwise orders that address must include a full post code.

Part 6.7 requires the claim form to be served at the business address of the Defendant's solicitor where either:

- The Defendant has given in writing the business address within the jurisdiction of a solicitor as an address at which the Defendant may be served with the claim form; or

- A solicitor acting for the Defendant has notified the Claimant in writing that the solicitor is instructed by the Defendant to accept service of the claim form on behalf of the Defendant at a business address within the jurisdiction.

The latter alternative closes a potential loophole, under the old rule, of a solicitor indicating authority to accept service without such confirmation from the Defendant.

The Defendant may, of course, give an address for service within the jurisdiction, other than the business address of a "solicitor". If so Part 6.8 confirms the Defendant may be served at such an address.

Where neither Part 6.7 nor Part 6.8 apply, and personal service is not required or chosen, the starting point is that the claim form must be served on the Defendant at the place shown in the following table, found in Part 6.9 (2).

Nature of defendant to be served	***Place of service***
1. Individual	Usual or last known residence.
2. Individual being sued in the name of a business	Usual or last known residence of

	the individual; or principal or last known place of business.
3. Individual being sued in the business name of a partnership	Usual or last known residence of the individual; or principal or last known place of business of the partnership.
4. Limited liability partnership	Principal office of the partnership; or any place of business of the partnership within the jurisdiction which has a real connection with the claim.
5. Corporation (other than a company) incorporated in England and Wales	Principal office of the corporation; or any place within the jurisdiction where the corporation carries on its activities and which has a real connection with the claim.
6. Company registered in England and Wales	Principal office of the company; or any place of business of the company within the jurisdiction which has a real connection with the claim.
7. Any other company or	

corporation	Any place within the jurisdiction where the corporation carries on its activities; or any place of business of the company within the jurisdiction.

This table is only a starting point as Part 6.9 (3) provides that where a Claimant has "reason to believe" the address of the Defendant referred to at paragraphs 1, 2 or 3 in the table is an address at which the Defendant no longer resides or carries on business reasonable steps must be taken to ascertain the Defendant's current residence or place of business, the "current address".

Part 6.9 (4) requires the Claimant to serve the claim form at the Defendant's current address if that address is ascertained. If that address cannot be ascertained this rule requires the Claimant to consider whether there is an alternative place where or an alternative method by which service may be effected and, if so, to make an application to the court for an order under Part 6.15.

If, however, the Claimant cannot ascertain an alternative place or an alternative method by which service may be effected Part 6.9 (6) does permit the Claimant to serve the Defendant at the address in the table set out in Part 6.9 (2).

It may be safest to apply to the Court until the approach to this rule has been clarified by decisions.

Part 6.15 (1) allows the court to make an order permitting service by an alternative method or at an alternative place, not otherwise permitted by the new rule, where there is good reason to do so. The application, which will need to be supported by evidence, must specify the method or place of service, the date on which the claim form is to be deemed served and time limits for filing an acknowledgement of service, admission or defence. The application may, however, be made without notice.

Part 6.16 gives the court power to dispense with service of a claim form but only in "exceptional circumstances". However, and importantly, Part 6.15 (2) allows the court to order, on application, 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.

Special rules apply to service of a claim form in proceedings against the Crown, found in Part 6.10, to service of the claim form by a contractually agreed method, found in Part 6.11, to service of the claim form relating to a contract on an agent of a principal out of the jurisdiction, found in Part 6.12, and to service of a claim form on a child or a protected party, found in Part 6.13.

By Part 6.14 a claim form will be deemed served on the second business day after completion of the relevant step under Part 7.5 (1). The significance of this, under the new rule, is not whether service has been validly effected in time but, rather, for the purposes of calculating when the acknowledgement of service and/or defence will be due.

These rules all relate to service of the claim form within the jurisdiction. Part 6.20 to Part 6.29 deal with service of other documents within the jurisdiction. Part 6.30 to Part 6.47 deal with both service of the claim form and of other documents out of the jurisdiction.

PRACTICE POINTS

It is important practitioners are aware of the new rules, as these apply immediately to proceedings which need to be served whenever issued, as well as being mindful of some of the pitfalls that remain from the earlier regime.

Some general practical steps may help guard against encountering difficulties with service of the claim form.

- Try to avoid, unless really unable to live without the excitement this entails, taking action at the last minute even though the new rule, potentially, might be seen as giving a couple of extra days right at the end of the 4 month period. The general approach should be that claims, if not capable of outright settlement, should be issued and, once issued, claim form should be served. If there are likely to be problems try to anticipate these and make the appropriate application to the court, under the new Part 6.15, at the earliest opportunity.

- Be clear, when wanting to effect service, that is exactly what is being done. Ambiguity may be resolved in favour of an intention to serve but it is safest to avoid the argument.

- Do not, unless the difficulties really are insurmountable, delay taking the step required to effect service of the claim form beyond the 4 month time limit. If an order is obtained without notice there is the risk it will be set aside later on application by the Defendant. If agreement is reached with the Defendant ensure that is evidenced in writing by all parties. Should there be difficulties in gathering the documentation which would normally accompany the claim form such as particulars of claim, medical report and/or schedule serve the claim form promptly and, if agreement extending time cannot be reached, apply to the court for an order extending time for the outstanding documentation, as the more general considerations found in the overriding objective will apply: Totty -v- Snowden [2001] EWCA Civ 1415.

- Know the new rules to ensure, when service is effected, the step appropriate to the chosen method of serve is taken and the claim form sent, accordingly, to the correct address for service. If there is any doubt about the appropriate address

ask the Defendant to confirm or even authorise solicitors, if necessary stipulating the address that will be assumed as correct in default of any response.

- Take care at the stage of completing the claim form so that the address, or at least an address, at which the Defendant may be served is given, including a post code.

- Remember that if things do go wrong it may, now, still be possible to issue a fresh claim form and make an application under Section 33 Limitation Act 1980 (applying Horton).

- Ensure the file has a record, with information that could be utilised as evidence if necessary, that the relevant "step required" was taken, when and by whom. In many cases it will not be necessary to prove this but it is better to be instilling good practice for those occasions when this may be critical.