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Service of an unsealed claim form

Ideal Shopping Direct Limited and others v Mastercard Incorporated and others (and related appeals) (2022) EWCA Civ 14

This appeal concerned whether service of an unsealed amended claim form was good service and, if it was not, whether the failure to serve a sealed claim form was an error of procedure capable of rectification under CPR 3.10. A High Court Judge held that, since the documents served were not sealed, they were not claim forms so that no claim form was served within the time permitted for service under CPR 7.5 as extended by agreement of the parties. He went on to hold, following the decision of the Court of Appeal in *Vinos (2001)* that the defect in service could not be remedied under CPR 3.10.

The two grounds of appeal were:

(1) That the judge erred in holding that a claim form was not issued until it was sealed and did not become a claim form until it was sealed. If there was such a general rule prior to the introduction of the compulsory CE File system, the judge erred in holding that the general rule was not displaced by PD51O. That conclusion was inconsistent with the provisions of PD51O and gave rise to unacceptable levels of uncertainty on the part of claimants required to use Electronic Working.

IN BRIEF

The Court of Appeal upheld the decision of a High Court Judge that service of an unsealed claim form did not constitute good service.

Moreover, the defect could not be remedied under CPR 3.10.

(2) The judge erred in his approach to rule 3.10. He was wrong to follow the *Vinos* line of authority. Alternatively, he erred in his application of *Vinos* to the present case.

Dismissing the appeal, the Court of Appeal held that the problem which the appellants faced was not caused by any lacuna in the Electronic Working Pilot, but by their failure to take one or other of the correct courses available to them and by their solicitors' mistaken belief that service of an unsealed amended claim form would be good service.

In relation to the first ground of appeal, the starting point under the CPR, in a case where Electronic Working did not operate, was that the general rule was that the claim form must be sealed before it could be validly served. Reading rules 2.6(1) and 7.5 together, the claim form that was issued and served must by definition be a sealed one. This was not only the court practice as accurately stated by the notes at 6.2.3 and 6.3.2 of the White Book, but was reflected in the case law.

The question then was whether the general rule that a claim form must be sealed before it could be validly served was in some way abrogated in the case of Electronic Working under PD51O. The answer was clearly no. Paragraph 1.2(1) made clear that the Pilot operated within the CPR and subject to the applicable procedural rules unless there was an exclusion or revision within the practice direction. Since the present claims were Part 7 claims, this meant that the provisions as regards service of such claims applied, including the general rule that claim forms had to be sealed before service.

The judge was right to conclude as he did that the unsealed documents served by the appellants were not "claim forms" within the Rules and that no claim form was served on the respondents within the period for service as extended by agreement.

The second ground of appeal concerned the scope of rule 3.10 and whether it was available in principle in this case. The appellants were asking the court to do the very thing which *Vinos* and the line of authority which followed it did not permit. The general provision in rule 3.10 could not be used to override a specific provision, here rule 6.15 or rule 6.16. The appellants could not satisfy the "good reason" or "exceptional circumstances" criteria under those two rules and they were not permitted to use rule 3.10 to bypass the requirements of those specific provisions. Likewise, since the appellants could not have satisfied condition (b) of rule 7.6(3), as they could not have shown that they had taken all reasonable steps to comply with rule 7.5 or that they had been unable to do so, they could not be permitted to use rule 3.10 to bypass the requirements of rule 7.6(3).

Since rule 3.10 was not available in principle to cure the defect in service in the present case, it was not strictly necessary to consider whether, if it were available in principle, the Court should grant a remedy as a matter of discretion. However, the point was dealt with briefly.

The court concluded that this would not be an appropriate case in which to grant the remedy which the appellants sought. First, where a claimant left the filing of claim forms until the last day for service, it courted disaster and had a limited claim on the indulgence of the court. This was all the more so where the failure to serve sealed amended claim forms was due to a mistake on the part of the appellants' solicitors, as in this case.

Second, whilst there was force in the appellants' point that the respondents were fully aware of the claims being made against them and had 30-page particulars of claim, so that the error in procedure here caused them no prejudice, knowledge of the claims by the defendant was a necessary but not sufficient factor for the court to consider when exercising its discretion as to whether to grant relief.

Third, whilst there was also force in the claimants' point that, unless relief was granted under rule 3.10, the appellants would suffer the prejudice of some of their claims becoming time-barred, that prejudice was outweighed by the prejudice to the respondents of being deprived of limitation defences.

Accordingly, even if relief under rule 3.10 were available in principle, which it was not, the Court of Appeal would not exercise the discretion to grant relief in favour of the appellants.

The full judgment may be found at: Ideal Shopping Direct Ltd & Ors v Mastercard Incorporated & Ors [2022] EWCA Civ 14 (13 January 2022) (bailii.org)