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FOIL UPDATE 12th June 2023

The application of CPR 11

Pitalia and another v NHS England (2023) EWCA (Civ) 657

In this case, a sealed claim form was served after the expiry of four months from its issue. The defendant acknowledged service and applied to challenge jurisdiction within 14 days, but failed to do so expressly under CPR 11. Could the court remedy the defendant's error and strike out the claim?

On 17th January 2020, the claimant/appellants made an application, amended on 7th August 2020, that sought:

(i) an order that valid service had been effected, whether by rectification of the claim form under CPR 3.10 or by permitting service under CPR 6.15 or by dispensing with the need for service under CPR 6.16;

(ii) an order that time for service be extended.

The defendant/respondent filed an Acknowledgment of Service under cover of a letter dated 21st January 2020. On the Acknowledgment of Service form the respondent ticked the box stating, "I intend to defend all of this claim" but not the box stating, "I intend to contest jurisdiction."

IN BRIEF

The Court of Appeal held that a defendant's application to strike out a claim on the grounds of late service of the claim form was not fatally flawed by a failure to make the application expressly under CRR 11.

Three days later, on 24th January 2020, the respondent made an application for the claim to be struck out due to non-compliance with CPR 7.5.

A District Judge struck out the claim and the claimants' appeal was dismissed by a Circuit Judge.

Dismissing the claimants' further appeal, the Court of Appeal held that the following principles emerged from the authorities in this area:

(i) *Barton v Wright Hassall LLP (2018)* makes clear the particular importance attached by the Supreme Court to the timely and lawful service of originating process. Failure to comply with the rules about such service is to be treated with greater strictness than other procedural errors. In the present case, if the respondent's solicitors had made their application of 24th January 2020 expressly seeking a declaration under CPR 11(1) that the court had no jurisdiction to try the claim, there would have been very little that the appellants could have said in response.

(ii) On the other hand, the principle established in *Vinos (2001)* and followed in cases such as *Ideal Shopping (2022)* is that CPR 3.10 cannot be used to override an express prohibition in another rule. An example of such an express prohibition is in CPR 7.6(3). If a claimant applies retrospectively for an order to extend the time for service of a claim form the court may make such an order only if the remaining conditions laid down by the rule have been fulfilled. If they have not been fulfilled then Rule 3.10 is simply not available. But the *Vinos* principle must not be expanded into saying that CPR 3.10 cannot be used to rectify any breach of the CPR. Otherwise, the rule would be deprived of its utility. When CPR 3.10 is invoked, it presupposes that some error of procedure has been made. Without it, civil litigation would be even more beset by technicalities than it is already.

(iii) There is a valid distinction between making an application which contains an error, and failing to make a necessary application at all. *Steele v Mooney (2005)* is a useful illustration. In that case the claimants sought the defendants' consent to a draft order extending time for service of the Particulars of Claim. That consent was forthcoming, but the extension of time was useless since the claimants had omitted to refer to the claim form. This court, distinguishing *Vinos*, held that the application for an extension of time was clearly intended to be for service of the claim form as well as the particulars. The subsequent application for relief was not in substance an application to extend time for service of the claim form, but an application to correct the application for an extension of time which had been made within the time specified for service and which by mistake did not refer to the claim form.

Hoddinott lays down that if a defendant acknowledges service without making an application under CPR 11(1) for an order declaring that the court has no jurisdiction (or should not exercise its jurisdiction) to try the case, this is taken to be an acceptance of jurisdiction. The decision in *Hoddinott* was binding on the Court of Appeal and it had not been impliedly overruled by *Barton*. The Circuit Judge had been right to reject the argument, based on the use of the word "expired" in *Barton*, that there was an analogy between the expiry of a claim form and the death of a living creature. Plainly in some circumstances an expired claim form could be revived: see CPR 7.6(3).

The failure of the defendant's solicitors, when completing the acknowledgment of service form, to tick the box indicating an intention to contest jurisdiction was not fatal to their application for relief. Even if the box had been ticked an application would still have been required to be made within 14 days. CPR 11(1) did not say that a box on a form must be ticked: it said that an application must be made. As the judge put it, a tick in the box was neither necessary nor sufficient as a basis for challenging jurisdiction.

The critical question, therefore, was whether the defendant's application of 24th January 2020 could, by the use of CPR 3.10, be treated as having been made under CPR 11(1).
The failure to make express reference to CPR 11(1) in the letter of 21st January 2020 or the application of 24th January 2020 was an error capable of rectification under CPR 3.10. The three documents - the acknowledgment of service, the covering letter and the application to strike out supported by witness statements - together made the defendant's intentions clear. This was in substance an application to stop the case on the grounds that the claimants had failed to serve the claim form in time. The case was much closer to *Steele v Mooney* than to *Vinos* or *Hoddinott.*

The Court of Appeal was not impressed by the argument on behalf of the appellants that if their failure to comply with the rules was to be treated so strictly despite the serious consequences, the same procedural rigour should be applied to the respondent. That argument was contrary to the decision of the Supreme Court in *Barton.* Errors in issuing and serving originating process are in a class of their own.
The full judgement may be found at: Pitalia & Anor v NHS England [2023] EWCA Civ 657 (09 June 2023) (bailii.org)