Insight 179

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

Welcome to this week's edition of Insight in which we report on cases relating to:

- The time for service of documents
- Proper compliance with a Part 18 request
- The appropriate rate of interest in a foreign claim
- A claimant's tripping accident while in Mauritius

And we bring confirmation of the latest figures for ASHE 6115.

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Time for service of documents

Diriye v Bojaj and another (2020) EWCA Civ 1400

It was common ground that the claimant/appellant failed to comply with an unless order relating to the service of his Reply. A Deputy District Judge refused the claimant relief from sanctions, which meant that he was debarred from relying on an assertion of impecuniosity to support a claim for credit hire charges. A Circuit Judge dismissed the claimant's appeal and it fell to the Court of Appeal to consider the narrow point of principle of whether the Royal Mail service known as "Signed For 1st Class", which required a signature before the item was delivered, was covered by the description "First class post (or other service which provides for delivery on the next business day)" which formed part of the deemed service provisions of CPR 6.26.

The claimant had made a claim for credit hire and in his Particulars of Claim he expressly asserted he was impecunious. The problem was that no further information or elaboration of that assertion was provided. When giving directions for trial, a Deputy District Judge made an unless order in the following terms:

"The claimant shall be debarred from relying upon the facts of impecuniosity for the purposes of determining the appropriate rate of hire unless (i) By 4:00pm on the 4th April 2018, the claimant files and serves a reply to the defence setting out all facts in support of any assertion that the claimant was impecunious at the commencement of and during the hire of the vehicle in question…' The order went on to deal with further disclosure by a later date.

The Certificate of Posting recorded that the Reply had been posted at 17:36 on 4 April 2018, using the Royal Mail's "Signed For 1st Class" service, and stated: "Delivery aim: next working day". The Royal Mail United Kingdom Post Scheme ("the Scheme") explained this particular service at paragraphs 20.1 and 20.2: *"Royal Mail Signed For 1st Class … items will only be delivered to an addressee or their representative once a signature or similar proof of delivery has been gained. Please note that Royal Mail Signed For 1st Class… [is] not a tracked service; it simply provides a way of gaining the service called Proof of Delivery…"*

The Reply was not signed for (and therefore not received by) the defendant/respondents' solicitors until 9 April 2018. In a letter dated 17 April 2018 the claimant's solicitors appeared to accept that they were in breach of the unless order and that an application for relief from sanctions would be required. However, an application for relief from sanctions was not filed until 31 May 2018 and issued on 5 June 2018.

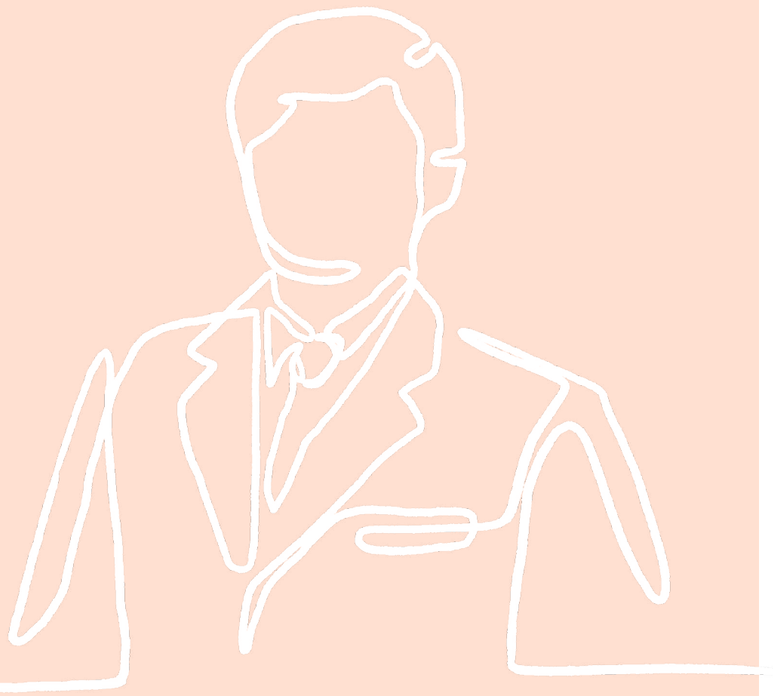
By the time the application was heard by a District Judge (DJ), it was conceded on behalf of the claimant that, pursuant to CPR 6.26, even if it was found that service had been by First class post "or other service which provides for delivery on the next business day", the deemed date for service in accordance with that rule would be the second day after it was posted, namely 6 April 2018. Accordingly, on any view of CPR 6.26, there had been a failure to comply with the unless order.

The DJ held that service effected by "Signed For 1st Class" post was not the equivalent of First-class post, because the mechanism required that the document be signed for before it was delivered, and was therefore outwith the deemed service regime. She therefore found that service did not occur until 9th April.

She then refused the claimant's application for relief from sanctions, applying the three-stage test in Denton. On the claimant's first appeal, a Circuit Judge upheld the decision of the DJ.

Dismissing the claimant's further appeal, the Court of Appeal held that CPR 6.20(1)(b) identified that one of the methods by which a document might properly be served was "first class post, document exchange or other service which provides for delivery on the next business day, in accordance with Practice Direction 6A". Paragraph 3.1 of that PD provided: "*3.1 Service by post, DX or other service which provides for delivery on the next business day is effected by – (1) placing the document in a post box; (2) leaving the document with or delivering the document to the relevant service provider; or (3) having the document collected by the relevant service provider.*"

CPR 6.26 set out the provisions for deemed service. The relevant part of the table was in the following form: *"6.26 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 Method of service Deemed date of service 1. First class post (or other service which provides for delivery on the next business day) 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… 3. Delivering the document to or leaving it at a permitted address If it is delivered to or left at the permitted address on a business day before 4.30p.m., on that day; or in any other case, on the next business day after that day''.*



There were two purposes for the rules relating to deemed service: the first was the fixing of a convenient day from which time would run, during which the party served with the document was entitled to respond to it in accordance with the rules; and the second was that, unless the rules positively provided for a deeming provision as to the fact and time of service, "there will in many cases be practical difficulties in the way of a claimant proving his entitlement to judgment".

'…the Royal Mail's "Signed For 1st Class" service was caught by CPR 6.26, either because it was included within the rubric "First class service" or because it was "another service which provides for delivery on the next business day"'

Neither the DJ nor the judge had a copy of the Royal Mail Scheme. Without sight of it, they reached the incorrect conclusion that the Royal Mail's "Signed For 1st Class" service was not either First class post, or alternatively, another "service which provides for delivery on the next business day". There were several reasons for that but the Court of Appeal concluded that the Royal Mail's "Signed For 1st Class" service was caught by CPR 6.26, either because it was included within the rubric "First class service" or because it was "another service which provides for delivery on the next business day".

Either way, the same deemed service provision set out in CPR 6.26 applied to the service of the Reply in this case. The Reply was deemed to have been served on the second day after it was posted, namely 6 April 2018.

In those circumstances, the claimant failed to comply with the mechanics of the unless order, albeit the default was one of two days' duration, rather than the five days identified by the DJ and the judge.

However, even allowing for the necessary adjustment from 5 days delay down to 2 days, the DJ considered all the relevant matters required by CPR 3.9 and Denton and reached conclusions that she was quite entitled to reach.

The breach in failing to serve the Reply on 4 April was (and was agreed to be) serious. Moreover, even if the Reply had been served on time, the document itself failed to comply with the substance of the unless order. The breach of the unless order was therefore serious and significant.

Stage 2 of Denton required a consideration of whether or not there were good reasons for the default. The DJ rightly found that there were no such reasons here.

In those circumstances, having found a serious and significant breach and no reason or excuse for it, stage 3 of Denton, namely a consideration of all the circumstances of the case, became critical.

Here there was a total delay of two months in the making of this application (6 April to 5 June 2018). That was despite the fact that the

claimant's solicitors knew, and acknowledged on 17 April, that such an application was required. The delay in making the application therefore militated strongly against granting relief from sanctions.

The most significant element of the stage 3 review in this case came back to the claimant's consistent failure to grapple with the issue of impecuniosity, which was a critical part of his case. Therefore, in considering all the circumstances of this case, the claimant and his solicitors had never engaged with the need properly to plead and prove his impecuniosity in support of the claim for credit hire charges. They did not do that at the outset of the claim; they did not do so when the subject of an unless order; and they had not done so subsequently. In those circumstances, there was no basis on which the court could grant the claimant relief from sanctions.

The claimant was represented by Lincoln Harford Solicitors LLP

The defendant was represented by DWF Law LLP

Comment

CPR 6.26 is intended to remove any doubt as to how the rules of service are to be interpreted. By this ruling, the Court of Appeal has reinforced that intention.

Part 18

Sheeran and others v Chokri and others (2020) EWHC 2806 (Ch)

This case management hearing included the defendants' application for an unless order that the claimants file and serve "complete and sufficient" responses to its Part 18 Request dated 1 April 2020.

The claimants did not respond to the request either to acknowledge receipt, object or to seek an extended period of time to respond. There was no suggestion that the request was not received.

The defendants issued an application notice dated 23 April 2020 pursuant to PD18.5.5(1). They confirmed in the application notice, which was signed with a statement of truth, that they had had no response from the claimants. They asked the court to deal with the application without a hearing in accordance with PD18.5.5.

By order dated 27 April 2020 ("the 27 April Order") the claimants were ordered to file and serve their response to the request by 4.30pm on 15 May 2020. The 27 April Order specifically included provision for any party to apply to set aside or vary the order by way of application to be made no later than 7 days from service of the order. No application was made by the claimants to seek to vary or set aside the 27 April Order.

Not only did the claimants do nothing to seek to set aside or vary the 27 April Order, they both paid the summarily assessed costs and on 6 May 2020 they filed and served a response to the request. In respect of all of the requests made, they responded in terms that the request was an inappropriate use of Part 18, as it sought early disclosure of information and evidence, which the defendants were not entitled to. This was commonly described in short form as the answer "not entitled".

The defendants submitted that the position on the authorities was that "not entitled" was non-compliance with the 27 April Order and was not a complete and sufficient response. They issued the current application seeking an unless order in respect of the request.

Finding largely in favour of the defendants, the Master held that the CPR provided a system of checks and balances, which would have entitled the claimants to apply to set aside or vary the 27 April Order even if it had not said it on its face. The claimants had a number of opportunities and mechanisms by which they could object to the request in advance of having to comply with the 27 April Order.

The question for the court was whether the 27 April Order had been breached.

'…"not entitled" was not good enough and certainly was not a complete and sufficient answer to the request. It was a non-answer'

It was plain on the authorities that "not entitled" was not good enough and certainly was not a complete and sufficient answer to the request. It was a non-answer. The answer "not entitled" was a breach of the 27 April Order as differentiated from an attempt to respond.

The claimants made an oral application for an out of time extension of time to pursue an application to set aside the 27 April Order. An out of time application engaged the three-stage Denton test.

The explanation provided by the claimants for the failure to apply to set aside or vary the order simply did not get anywhere near to persuading the Master that there was a good reason for the non-compliance and breach in this case.

At the third stage of Denton all the other factors were taken into account. This included consideration of the overriding objective and the need to manage cases efficiently, fairly and at proportionate cost having regard to the complexity, importance, and value of the case. There were a number of competing factors to consider at this stage of the exercise.

The Master balanced against the claimants' non-compliance with the 27 April Order, the submissions by the claimants that the request appeared to include requests for early evidence and disclosure. There was now an agreed timetable for the future conduct of the case including disclosure and witness evidence. It seemed that it was not reasonable or proportionate or in keeping with the overriding objective or efficient case management to refuse the claimants' application. They were granted permission to issue an application to set aside the request out of time, extended to the date for disclosure and not on an unless basis in any event.

The claimants were represented by Brais & Krais Solicitors

The defendants were instructed by Keystone Law

Comment

This judgment drives home the point that a Part 18 request must either be answered or challenged if there are serious objections to its content. It cannot simply be 'batted-off'.

The appropriate rate of interest in a foreign claim

Troke and another v Amgen Seguros Generales Compania and another (2020) EWHC 2976 (QB)

This appeal related only to the rate of interest awarded on what were otherwise agreed levels of damages to be paid by the defendant insurer ("the defendant") to the claimant victims of a road traffic accident in Spain ("the claimants"). The appeal engaged a potentially important and difficult question about what law governed the award of interest in relation to a tort sued upon within this jurisdiction but committed in another jurisdiction.

It was accepted that the claimants were entitled to sue the defendant insurers directly in England and Wales in order to recover those damages.

It was the claimants' case that Spanish law (the lex causae) governed both the award and the rate of interest and the judge should, therefore, have awarded interest at the rates identified in the following passage from the agreed joint expert report on Spanish law ("the Expert Report"):

"Interest

Article 20 of the Spanish 50/1980 Insurance Contract Act contemplates a penalty interest where insurers have not made a relevant interim payment within 3 months from the accident. The applicable statutory interest rate is:

(i) From 28/12/2014 to 28/12/2016 interest will accrue at 6% (2014), 5.25% (2015) and 4.5% (2016).

(ii) From 29/12/2016 until final payment, a flat variable rate of 20%."

These rates ("the Spanish rates") resulted in a substantially higher award of interest than the rates applied by the judge, who applied rates of 0.5% on special damages and 2% on general damages, which was accepted as having been appropriate if no regard was had to the Spanish rates.

Dismissing the appeal, the High Court Judge held that the first question was whether the judge was wrong to decide that the *lex fori* rather than the *lex causae* applied to his award of interest in this case. It was an elementary and uncontroversial proposition that procedural questions (in this case) would be governed by English and not Spanish law. But that begged the harder question: was the award of interest procedural?

'The claimants' cause of action was in tort, and not in contract; it was a non-contractual claim under Rome II'

Whether the award of interest was to be characterised as a procedural rather than a substantive right might depend on the basis upon which interest was claimed. If there was a contractual right to interest, as there sometimes was, that would be governed by Rome I and not Rome II, and it would be a claim of substantive right (under the contract) and would not, therefore, be excluded by Article 1(3) of Rome I. But that was not this case. The claimants' cause of action was in tort, and not in contract; it was a non-contractual claim under Rome II.

The judge was correct in thinking that his power to award interest under S69 County Courts Act 1984 as the *lex fori* (the counterpart of the High Court power under S35A Senior Courts Act 1981) was not inconsistent with Rome II, and was permitted by Article 1(3).

That being so, the judge was entitled to apply the rate of interest prevailing in the forum, since he was ordering interest pursuant to the forum law (the County Courts Act 1984). The judge might equally have applied the Spanish rates, not as a matter of *lex causae,* but using the discretion given to him by the *lex fori.* However, he was not asked to do that and, it being in his discretion, it could not be said that he was bound to do that.

The claimants argued that the right to interest proved in the joint Expert Report was a substantive right in this particular case, and that it was therefore part of the *lex causae* which fell to be applied to their tort claim under Rome II.

The appellate judge rejected the argument that the Expert Report was describing a substantive as opposed to a procedural right to interest. It followed that the judge was right not to apply the Spanish rates as a matter of substantive law to be governed by the *lex causae.*

The claimants were represented by Trowers & Hamlins LLP

The defendants were represented by Irwin Mitchell

Comment

This judgment is helpful in clarifying that, subject to a judge's discretion on interest, it falls under the procedural rules of the forum in which the claim is being dealt with, rather than the substantive law of where the accident occurred.

A tripping accident on holiday

TUI UK Limited v Morgan (2020) EWHC 2944 (Ch)

In Insight 163 we reported the first instance decision in this case, in which the claimant succeeded. This was the defendant's appeal.

The claimant/respondent and her husband were on holiday in Mauritius. On the second evening on the way to dinner they walked along an outside sun terrace adjacent to the swimming pool at about 7pm when it was still light. At about 9pm, by which time it was dark, the claimant returned to her room via the same route. Just after she walked back onto the sun terrace, which was unlit, she collided with a heavy wooden sunbed and fell, suffering injuries to her knees, face and head.

The claim alleged breach of an implied term that the services to be provided by the defendant/appellant under the contract with the defendant would be provided with reasonable care and skill, especially with regard the provision of lighting at the place where the accident occurred. As part of her claim, the claimant relied upon Regulation 15 of the Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992 No. 3288) (the "Regulations").

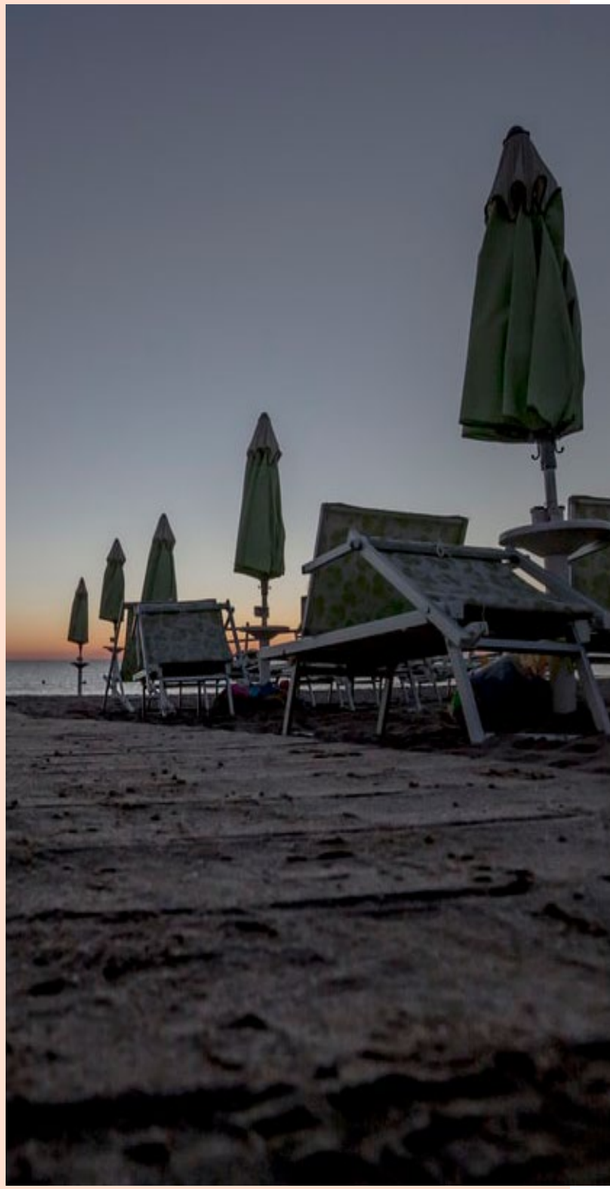
The judge at first instance found the defendant liable, subject to a finding of contributory negligence of 20%.

The judge concluded that the preponderance of the evidence on how dark the accident spot was at the time showed that whilst it was not pitch dark, it was dark enough to make it very difficult to see the dark wooden sunbed, especially when someone was walking from the lit pathway onto the unlit sun terrace. The cause of the accident was therefore the lack of lighting on or adjacent to the sun terrace and the time of the accident.

The defendant/appellant advanced five grounds of appeal, which were summarised as follows:

(1) The judge misunderstood the ISO Standard cited in evidence as setting minimum standards of emergency or general lighting in external areas.

(2) The judge was wrong to find that the ISO Standard set a universal principle in respect of emergency



or general lighting.

(3) The judge should not have felt bound to infer a local standard on the basis of the limited evidence before him and, to the extent that he did, he was wrong to infer a local standard from the fact that the hotel installed additional lighting after the accident. Instead, the judge should have found that the local standard was not proven.

(4) There was no good evidence before the judge to the effect that the deficiency in lighting would have made any difference. That is, the claimant had not proved that but for the 0.26 lux difference in lighting, the accident would not have happened.

(5) The structure of the judgment showed that the judge pre-determined the issue of liability before giving consideration to the issue of local standards. The issue of local standards was fundamental to the resolution of package travel cases and should have been at the forefront of the judgment.

Dismissing the appeal, the High Court Judge held that grounds 1, 2, and 3 all sought to attack the judge's findings in relation to the contractual standard of skill and care in this case in respect of lighting the area where the accident occurred.

The question before the judge was not whether that standard was – according to its terms or according to local law or practice – applicable, but whether it was an appropriate standard to use to determine the factual question of whether the defendant had breached its duty to perform the services it was providing to the claimant

with reasonable skill and care.

'…what (the judge) was looking for was a proxy for the local standards that were lacking in this case'

That was exactly how the judge regarded the ISO Standard. The judge was entitled to prefer the evidence of the claimant's expert, based upon his experience in Mauritius, that the ISO Standard was what was likely to have been used in the absence of any local regulation. The judge also recorded that it was the claimant's expert's opinion that the ISO Standard was likely to be that applicable to the issue of minimum luminosity in the accident area.

It was quite clear that neither the expert nor the judge was under the impression that the ISO Standard was, either on its own terms or by virtue of local law, actually the standard applicable to the place where and the circumstances in which the accident occurred. It was not. Rather, in the absence of definitively applicable rules, the judge was looking for material that he could use to inform the defendant's obligation to exercise reasonable skill and care. Although the judge did not put it in these terms, what he was looking for was a proxy for the local standards that were lacking in this case.

The judge accepted that the ISO Standard prescribed an irreducible minimum in respect of emergency lighting. In so finding, it was clearly at the forefront of his mind that the ISO Standard was not of direct application to the issue of luminosity at the accident site. Again, the judge was applying what were inapplicable standards in order to fill the void in the local law. He was absolutely right to do so.

The argument on ground 4, simply put, was that the judge should have considered whether the “minor” difference in lighting of 0.3 lux materially contributed to the accident. The defendant contended that there was no evidence on this issue and that therefore the judge had no proper basis to make the finding on causation that he did.

The appellate judge did not consider there to be anything in this point. The trial judge concluded that the accident was caused “by the lack of lighting”. That finding had to be read against what followed in relation to the standard of skill and care. Thus, the lack of lighting (noting the judge’s use of the definite article) must be a reference to the deficiency of 0.36 lux which was found to prevail at the spot where the accident occurred. Otherwise, it would have been more appropriate to talk about a more general lack of lighting.

The whole point of the emergency lighting described in the ISO Standard was to enable the ordinary person to navigate areas so lit safely. The judge was entitled to make the inference that had the minimum standard described in the ISO Standard been met, the claimant would have been able to see where she was going.

Ground 5 amounted to no more than a re-run of grounds 1, 2 and 3. There was nothing objectionable in the structure of the judgment, and it was rejected for the basic reason that it was obvious that ample consideration was given by the judge to the issue of local standards. It was not enough to say that that issue did not appear in the “right place” in the judgment.

The claimant was represented by Wilkin Chapman LLP

The defendant was represented by MB Law

Comment

This case was decided on its facts and the trial judge’s acceptance of the claimant’s expert’s view of what would have been the applicable standard for lighting at the time. An appellate court will always be reluctant to interfere with findings of fact in the court below.

However, as we commented at the time, the trial judge may also have been influenced by the fact that following the accident, the hotel installed additional lighting in the area. That was said to have been designed and arranged with ambience in mind, but the judge took the view that it was likely to have been prompted by the accident.

Ashe 6115 uplifts

The latest edition of average earnings was published by the Office for National Statistics on 3 November. For care workers the revised figures are:

Percentile	60th	70th	75th	80th	90th
2019 Revised	10.03	10.81	11.25	11,87	13.83
2020 Provisional	10.64	11.34	11.86	12.50	14.27
Increase	6.08%	4.90%	5.42%	5.31%	3.18%

Comment

From a compensator's point of view, these figures reflect a disturbing upward trend in earnings for care workers. They are running well ahead of other measures of inflation. Moreover, we are yet to feel the impact of Brexit on the availability of overseas workers who have traditionally filled these roles.

Horwich Farrelly

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