

Service of the Claim Form: A Cautionary Tale

R (Good Law Project) v Secretary of State for Health and Social Care
(Pharmaceuticals Direct, Interested Party)
[2021] EWHC 1782 (TCC)

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***Ewan West* acted for the Secretary of State, instructed by the Government Legal Department.**

***Imogen Proud* is instructed by the Secretary of State for Health and Social Care in *R (Good Law Project) v Secretary of State for Health and Social Care HT-2020-0002226/291/292/419*, referred to in this case note.**

References in square brackets are to paragraphs of the judgment.

The judgment is available [here](#).

Overview

This judgment will be of interest to all public law and procurement practitioners, as it is concerned with valid service of the claim form in a judicial review context.

The High Court has ruled that when a claimant sends an unsealed claim form to a defendant prior to the court issuing the claim form, that defect (the fact that the claim form was unsealed) cannot be cured under CPR 3.10 so as to render service valid. CPR 3.10 applies only to “steps taken in the proceedings” and there are no extant proceedings prior to the issue of the claim form (see [45]).

The Judicial Review

On 29 June 2021, the High Court (Mrs Justice O’Farrell) determined four applications arising out of a judicial review challenge to the Defendant’s award of a contract for personal protective equipment (“PPE”). The Good Law Project (“GLP”) sought to challenge the lawfulness of the award of a contract for

FFP3 Meixim 2016 respirators, worth £102.6 million to the Interested Party, Pharmaceuticals Direct (the “**Contract**”) (at [5]).

The grounds of challenge were:

1. breach of the duties of equal treatment and transparency contrary to the Public Contracts Regulations 2015 (“**PCR 2015**”); and
2. breach of the common law duty to act without apparent bias (at [16]).

The Valid Service Issue

(a) The Facts

In the Defendant’s substantive response of 22 April 2021 to GLP’s pre-action letter, the Government Legal Department (“**GLD**”) specified that new proceedings were to be served on the Treasury Solicitor by email at newproceedings@governmentlegal.gov.uk (the “**New Proceedings Email Address**”), copying named individuals at GLD who had been recipients of pre-action correspondence (at [13]).

The Claimant filed the claim in the Administrative Court on 27 April 2021. On the same day the Claimant’s solicitor, Bindmans LLP, sent the unsealed claim form to the New Proceedings Email Address with copies sent to the specified individuals at the GLD (at [17]).

The Admin Court issued the claim form on 28 April 2021. On the same day, the Claimant’s solicitor emailed the sealed claim form to the three named GLD individuals, but not to the New Proceedings Email Address (at [21]). One of the named recipients confirmed receipt.

Time for service of the claim form expired on 5 May 2021. On 6 May 2021, the GLD raised the issue of validity of service and the Claimant sent a sealed copy of the claim form to the New Proceedings Email Address that day.

The Claimant applied for an order under CPR 6.15 that would render valid any late service of the claim form (at [2]).

The Defendant applied for an order that the claim form be set aside for want of jurisdiction by reason of the late service of the claim form (at [2]).

(b) The Civil Procedure Rules

CPR 54.7 provides that, in judicial review proceedings, the claim form must be served on the Defendant within 7 days after the date of issue.

CPR 6.3 specifies methods of service of a claim form, including at 6.3(1)(d) electronic communication in accordance with Practice Direction 6A. Paragraph 4.1 of that Practice Direction specifies that where a document is to be sent by email, the party who is to be served (or their solicitor) must have indicated in writing the e-mail address to which the claim must be sent.

CPR 3.10 gives the court wide, general powers to rectify errors of procedure with the result that “the error does not invalidate any step taken in the proceedings unless the court so orders”.

(c) The ruling

The Claimant argued that there was irregular but otherwise valid service of the claim form when the unsealed claim form was served on 27 April 2021 (at [43]). O’Farrell J rejected this submission. On these facts, the Claimant could not rely upon the court’s power in CPR 3.10 to rectify errors of procedure since sending an unsealed claim form did not constitute a “step in proceedings” because on the date it was sent there were no proceedings. Retrospective service prior to commencement of proceedings would lead to procedural chaos (at [45]).

Heron Bros Ltd v Central Bedfordshire Council [2015] EWHC 604 (TCC) (“*Heron*”) could not assist the Claimant (see [46] – [50]). Although in that case the absence of a seal on the claim form amounted to a curable irregularity, the case is distinguishable on its facts. In that case the requirement for service of the claim form came from procurement regulations and not the CPR and the text of those regulations was construed to require service of “the claim form” rather than “the sealed claim form”. Additionally, the court was partly to blame for the late service of the claim form in *Heron*.

The alternative service application

In the alternative, GLP asked the court to exercise its powers under CPR 6.15 to order that the steps taken by the Claimant constituted good service. O’Farrell considered the case of *Barton v Wright Hassall LLP* [2018] UKSC 12 (“*Barton*”) and derived the following principles from it:

1. Service of originating process can be distinguished from other procedural steps because it is the act by which the defendant is subjected to the court’s jurisdiction. For that reason, a “bright line rule” is necessary to determine the exact point, from which time runs for subsequent steps in the proceedings, or to confirm the point at which time stops running for the purposes of limitation.
2. An order under CPR 6.15, validating the non-compliant service of a claim form, may enable a claimant to escape the serious consequences that

would otherwise follow, including the expiry of a material limitation period.

3. For that reason, it is likely to be necessary, but not sufficient, for the claimant to establish that the defendant was aware of the existence and content of the claim form within the specified time for service.
4. When considering whether to exercise the court's power under CPR 6.15, the issue is whether, on the facts of the case, there is good reason to make the order permitting alternative service; there do not need to be exceptional circumstances.
5. The main relevant factors are likely to be: (a) whether the claimant has taken reasonable steps to effect service in accordance with the rules; (b) whether the defendant or its solicitor was aware of the contents of the claim form within the prescribed time limit for service; and (c) whether the defendant would suffer prejudice by retrospective validation of a non-compliant service of the claim form.

Applied to the facts of this case, O'Farrell found that the Claimant had not established good reason for the court to exercise its power. The Claimant did not take any step to serve the sealed claim form by the specified method within the stipulated period. The Claimant's argument that the Defendant would suffer no prejudice was rejected on the basis that the Defendant would be deprived of its limitation defence.

The extension of time application

The court has the power under CPR 7.6 to grant an extension of time for service of the claim form, and under CPR 3.1(2) to extend or shorten the time for compliance with any rule, practice direction or court order.

GLP sought, in the further alternative, an extension of time to serve the claim form to 10 May 2021. This was refused on the basis that, applying the guidance in *Denton v White*, the failure had been serious and significant, and the reason was that there been a careless mistake.

Comment

Unfortunately for GLP, this judgment serves as a cautionary tale for Claimants and their solicitors. The clear message must be to pay the utmost attention to the email address provided for service when serving the claim form.

The claimant's downfall in this case was due in part to the fact that the defect they required to be cured had occurred prior to the sealing of the claim form, and hence at a time when there were not yet any proceedings. The broader

message is that parties will not be able to rely upon CPR 3.10 to rectify any errors (whether relating to the claim form or not) prior to the claim form being sealed, which is the act which brings proceedings into being.

The judgment also provides a helpful summary of the principles applicable in an application for the court to exercise its power under CPR 6.15 to authorise alternative service (at [59] and listed above).

This judgment is the next instalment in a series of related, high-profile cases which the Good Law Project has brought in relation to Covid-19 contracts and governance during the pandemic:

- Earlier this month, I wrote a [case note](#) on *R (Good Law Project) v Minister for the Cabinet Office* [2021] EWHC 1569 (TCC), in which O'Farrell J held that the award of a Covid contract was unlawful because of the appearance of bias.
- Mr Justice Chamberlain handed down judgment in the so-called 'Regulation 50' case (*R (Good Law Project) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin)) on 19 February 2021, in which he held that, when awarding contracts for goods and services during the Covid-19 pandemic, the Defendant had unlawfully failed to comply with his obligations under Regulation 50 of the PCR 2015 and with government policy which required him to publish certain tender and contract documents.
- Judgment is awaited, again from O'Farrell J, in *R (Good Law Project) v Secretary of State for Health and Social Care* HT-2020-0002226/291/292/419, four challenges to the award of nine contracts for the supply of PPE to three economic operators.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.