Retrospective Validation of Service of Claim Form Under CPR 6.15 Will not Save a Default Judgment from Being Set Aside

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PRACTICES Litigation

The Civil Procedure Rules are designed to discourage parties from playing procedural games to avoid otherwise inevitable consequences of litigation. CPR 6.15 gives the court power to retrospectively validate service of a claim form, even where it was not validly served if there is "good reason" to do so and factors to consider when determining whether there is good reason include whether the defendant had knowledge of proceedings despite not having been properly served. However, in circumstances where a defendant has not been validly served and a judgment in default has been entered, CPR 13.2 mandates that the default judgment must be set aside. In those circumstances, can a retrospective validation of the service save the default judgment? This was considered in *YA II PN Ltd v Frontera Resources Corporation* [2021] EWHC 1380 (Comm), where the judge found that the consequence of that retrospective validation was not to retrospectively impose an obligation to acknowledge service. Instead, the right answer was that the default judgment had to be set aside and a future deadline for acknowledgment of service had to be ordered.

Background

The claimant, YA II PN, had commenced proceedings and sought permission for service out of the jurisdiction which was granted on 15 January 2020. YA II PN subsequently sought to serve Frontera in Texas and it was accepted that the claim pack was handed to a former director of Frontera on 2 March 2020. On 16 April 2020 YA II PN filed a request for judgment in default of an acknowledgement of service or a defence and on 20 April 2020, a judgment was entered in the amount of £2,286,202.87 (the **Default Judgment**). On 28 October 2020, Frontera issued its application to set aside the Default Judgment. YA II PN cross-applied for retrospective validation of the claim form pursuant to CPR 6.15, alternatively for the claim form to be dispensed with pursuant to CPR 6.16 or alternatively for an extension of the validity of the claim form and permission to serve the same on Frontera's London lawyers. The application was heard on 11 May 2020.

The validity of service was dealt with by Butcher, J. and we set out below some of the lessons to be learned from this case, however, in short, the order for service out did not permit service at the address where the attempted service had been effected, nor was it valid service under the applicable law.

Having found that the claim form had not been validly served, he went on to consider whether there was good reason to retrospectively validate service. Applying Popplewell's distillation in *Société Générale v Goldas Kuyumculuk Sanayi* [2018] EWCA Civ 1093 of what factors should be considered when determining whether there is a "good reason" for retrospective validation of service, Butcher J found that there was good reason because *inter alia* the claim form and accompanying documents were in fact provided to Frontera's former director and drawn to the attention of the current CEO of Frontera with a warning that it required a response. It was also

relevant that Frontera's public filings at the time were not up to date which led to the service of documents on a director who was no longer with the company. Also, the method employed for service was permitted under the Hague Convention and there would be no prejudice to Frontera as there were no issues of limitation in play in this case.

However, having found that service could be retrospectively validated, Butcher J had to resolve the dispute between the parties as to what would be the consequences of that retrospective validation of service. Frontera submitted that, as was held in *Shiblaq v Sadikoglu* [2004] EWHC 1890 (Comm), a claim form that has not been validly served cannot trigger a retrospective obligation to serve an acknowledgment. However, in the days before the hearing, YA II PN placed reliance on *Kaki v National Private Air Transport Co* [2015] EWCA Civ 731 which held that validation under CPR 6.15 would have the consequence of validating all subsequent steps. However, it also flagged that there was an alternative authority on this point in *Dubai Financial Group LLC v National Private Air Tronsport Co (National Air Services) Ltd* [2016] EWCA Civ 71 in which the majority of the Court of Appeal held that where there has not been valid service, the defendant has no obligation to acknowledge service, and a default judgment entered in those circumstances is one that can be set aside under CPR 13.2. Butcher J noted that the Court of Appeal in that case had distinguished Kaki because it did not deal with a default judgment. Accordingly, Butcher J considered that he was bound by the majority in *Dubai Financial Group* and held that *"the default judgment must be set aside under CPR 13.2, because it was entered at a point when the time for acknowledgment of service had not expired".*

It is clear in light of this decision that where a default judgment must be set aside according to CPR 13.2 for want of proper service of the claim form, that default judgment cannot be saved by retrospective validation of service, the best outcome you can hope to achieve is to start again.

Service out of the jurisdiction: a cautionary note

The main point of law in respect of service related to the proper interpretation of the order for service out and the effect of CPR 6.40.

The order itself gave permission to serve on two specified addresses, one in the Cayman Islands and one in Texas. No attempt was ever made to serve in the Cayman Islands, but service was attempted in Texas. However, the documents were not served on the address stated in the order.

Frontera argued that this was not permissible. On the face of the order, YA II PN only had permission to serve on a specified address. Crucially, the order did not contain the usual wording used in form PF 6B "or elsewhere in the jurisdiction". YA II PN argued that this was irrelevant, and said that because it had served in accordance with a method permitted by CPR 6.401, service was valid. Butcher J. agreed with Frontera and held that "*CPR 6.40(3)(c) is subject to any restrictions or limitations which may be imposed by the order [for service out of the jurisdiction]. If a place for service has been specified, CPR 6.40(3)(c) does not allow service at another place. If YA II's argument were correct, then an order which had the "or elsewhere in…" wording, and one which did not, would have exactly the same effect, and those words would be unnecessary surplusage. To my mind that is not how the words of formal orders of the court should be understood".*

In light of this, it would be prudent for parties wishing to serve out of the jurisdiction to make enquiries about local options for service and consider how it is going to serve so that any order sought can properly reflect those requirements. It is not sufficient to simply rely on the general rules

in CPR 6.40 for service out of the jurisdiction. If flexibility is required as to the place or method of service, then it is vital to ensure that appropriate sweep up wording is included in the order.

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1 This required YA II PN to show that service was valid under local law. Both parties served expert evidence on Texas law and Federal law and the judge found that service was not in fact valid under local law.