[2007–09 Gib LR 123]

SANTOS v. GEORGE ANASTASI (OVERSEAS) LIMITED and PCG GROUP (OVERSEAS) LIMITED

SUPREME COURT (Schofield, C.J.): June 29th, 2007

Courts—Supreme Court—jurisdiction—express extension of time required to contest jurisdiction—extension of time for other purposes (e.g. filing defence) not construed as time to challenge jurisdiction

Civil Procedure—service of process—challenge to service—challenge to service required under CPR, r.11(4) within 14 days of acknowledgment of service—liberal interpretation of CPR permits challenge within 14 days of later date (determined on consideration of facts, e.g. agreement extending time for filing defence) but right to challenge service waived if challenge filed outside time allowed

The claimant brought an action against the defendants claiming damages for personal injury sustained in the course of his work for the first defendant on the premises of the second defendant.

The claimant filed a claim for damages on June 21st, 2006, four days before the expiry of the three-year limitation period. Service of the claim form was due by October 21st—four months after he filed the claim. The claimant sent the claim form both by post and allegedly served it personally on October 20th, but the defendants did not receive it until October 23rd.

On November 1st, the defendants acknowledged the purported service of the claim form by indicating that they would challenge its validity (within the 14-day time-limit provided by the CPR, r.11(4)). Following a request by the defendants, the claimant agreed to an extension of 28 days from November 18th to allow the defendants time to file a defence. The defendants' solicitors then wrote on November 10th, agreeing to the extension of time and discussing elements of the service of the claim form in detail. The claimant's solicitors did not reply until November 23rd when they recognized service as one of the "most pressing matters." The defendants' application to strike out the claim form was filed on December 14th.

As a preliminary issue, the claimant submitted that (a) although postal service of the claim form was defective as it was outside the time allowed, personal service had been effected on October 20th; in any case, the defendants had waived their right to challenge service since they had exceeded the time-limit for applying to strike it out; and (b) the defendants

had submitted to the jurisdiction of the court since on the form for the acknowledgment of service, the box indicating an intention to challenge the jurisdiction of the court had not been marked.

In reply, the second defendant submitted that (a) despite the delay in filing the application, there was merely a presumption of a waiver of the right to challenge service and this had been rebutted through the prominent discussion of service in correspondence between the parties; and (b) there had been an express and effective challenge to the jurisdiction through the request and granting of an extension of time.

Held, dismissing the application to strike out the claim:

(1) The defendants had waived the right to challenge service of the claim form or contest the jurisdiction of the court. The application to challenge service was not filed by November 15th, within 14 days of the acknowledgment of service but the delays in doing so were accepted up to November 23rd. This liberal interpretation of the CPR, r.11(4), gave the defendants 14 days from this date to contest the court's jurisdiction. Having not done so by December 7th, the defendants had accepted any irregularity in service (paras. 16–19).

(2) The defendants had submitted to the jurisdiction of the court by not applying to strike out the claim by November 13th, pursuant to the time-limit of 14 days after the acknowledgment of service provided by the CPR, r.11(4). The agreement extending time for service of the defence amounted to a submission to the jurisdiction of the court, though it could not be construed as an extension of time to contest the jurisdiction since the CPR, r.11(4) required an express extension of time, in the absence of which the CPR, r.11(5) presumed a waiver of the right to contest jurisdiction (para. 4; para. 6).

Case cited:

(1) *Burns-Anderson Independent Network Plc.* v. *Wheeler*, [2005] 1 Lloyd's Rep. 575; [2005] EWHC 585 (QB), followed.

Legislation construed:

Civil Procedure Rules (S.I. 1998/3132, as amended), r.11: The relevant terms of this rule are set out at para. 3.

I. Winch for the claimant;
The first defendant did not appear and was not represented;
S.P. Triay for the second defendant.

1 **SCHOFIELD, C.J.:** Mr. Santos ("the claimant") was a labourer working for George Anastasi (Overseas) Ltd. ("the first defendant") on a site at Europa Point occupied by PCG Group (Overseas) Ltd. ("the second defendant"). In the course of his work, on June 24th, 2003, the claimant fell through some floorboards and was injured. He seeks to recover damages against both defendants. The first defendant was struck off the

Register of Companies on November 23rd, 2006, but the claimant has decided to await the outcome of these applications before taking any action to have it restored to the Register.

2 The claim form and particulars of the claim were not filed until four days before the limitation period expired, that is, on June 21st, 2006. The last day for service of the claim form was, therefore, October 21st, 2006, which was a Saturday. The claimant purported to serve the defendants both by post and personally on Friday October 20th, 2006. It is conceded by the defendants that they received the relevant documents on October 23rd, 2006, but they claim that they were served out of time. I think it is acknowledged by the claimant's solicitor that the service by post was defective. However, he contends that personal service was effected in time. This is disputed by the solicitor for the second defendant and he filed an application pursuant to the Civil Procedure Rules, r.3.4, purportedly on behalf of both defendants, seeking orders, *inter alia*, that the claim form be struck out on the grounds that it was not served in accordance with the CPR. It is agreed between the parties that for me to determine such application would require the hearing of evidence *viva voce*. However, the claimant's solicitor has raised a discrete point as to whether the second defendant should be treated as having waived any objection to service and to the court exercising jurisdiction in the suit. It was agreed that this point should be dealt with by the court as a preliminary issue.

3 Mr. Winch, for the claimant, points out that the defendant relies entirely upon the CPR, r.3.4 in its application and, relying on the authority of *Burns-Anderson Independent Network Plc.* v. *Wheeler* (1), argues that the application should have been made under the CPR, r.11. The relevant part of this rule reads—

"(1) A defendant who wishes to—

(a) dispute the court's jurisdiction to try the claim; or

(b) argue that the court should not exercise its jurisdiction,

may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.

(2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.

(3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.

(4) An application under this rule must—

(a) be made within 14 days after filing an acknowledgment of service; and

(b) be supported by evidence.

(5) If the defendant—

(a) files an acknowledgment of service; and

(b) does not make such an application within the period for specified in paragraph (4),

he is to be treated as having accepted that the court has jurisdiction to try the claim."

4 In this case, the claim form was purported to be served on both defendants on October 20th, 2006. Messrs. Triay & Triay filed an acknowledgment of service on behalf of both defendants (the first defendant still being on the Register of Companies on October 30th) within the 14-day time-limit provided by the CPR, r.10.3. This meant that if the defendants were to dispute the court's jurisdiction, they had, under the CPR, r.11(4), until November 13th to do so. This application to strike out was not filed until December 14th, 2006.

5 In *Burns-Anderson Independent Network Plc.* v. *Wheeler* (1), the learned deputy judge found that service of a claim form on the defendant had not been effected according to the CPR. Nonetheless, he held that the claimant was out of time in challenging the jurisdiction and, in the circumstances, he had waived his right to make such a challenge.

6 In a carefully reasoned judgment which I have no hesitation in following, the High Court held that (a) a request by a defendant for an extension of time in which to file a defence could not be construed as also being a request for an extension of time for making an application to contest jurisdiction. An express extension of the time-limit in the CPR, r.11(4)(a) was required; (b) a request for an extension of time for service of the defence was capable of amounting to a submission to the jurisdiction. Whether it did so or not would depend on the facts; (c) the test of whether there was waiver of irregularity in service by conduct was an objective one. The question was whether a reasonable person in the shoes of the claimant would have understood the defendant's conduct as waiving any irregularity as to service; (d) the CPR, r.11(5) presumed waiver, regardless of the defendant's subjective intention. A defendant who failed to make an application under the CPR, r.11(4) was "to be treated as having accepted that the court has jurisdiction to try the claim." That submission involved a waiver of any irregularities in service of the claim form; and (e) issues as to validity of service raised a jurisdictional question and the proper application was pursuant to the CPR, r.11(5) and not the CPR, r.3.4.

7 In arguing that the defendants had waived any purported irregularity in service, Mr. Winch points particularly to the six-week delay in making this application and also to the acknowledgment of service itself in which there is no tick in the box marked "I intend to contest jurisdiction". This, he argues, reinforces the conclusion that there is submission to the jurisdiction (see *Burns-Anderson* (1)).

8 Mr. Triay, for the second defendant, submits that *Burns-Anderson* is authority for the proposition that there is no more than a presumption of waiver, and that the facts of this case can be distinguished from it. He points to the correspondence between the solicitors, following the purported service, and argues that the claimant can have been under no misunderstanding that service was being challenged. Service has always been an issue and the correspondence makes that very clear.

9 The defendants first responded to service of the claim form by letter of their solicitors, Messrs. Triay & Triay, on November 1st, 2006. In that letter, they raised the question of service in the following way:

> "Your letters identified below have been brought to our attention:
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> (a) PCG Group (Overseas) Ltd., 124 Irish Town, dated October 19th, 2006
>
> (b) George Anastasi (Overseas) Ltd., 124 Main Street, dated October 20th, 2006
>
> (c) PCG Group (Overseas) Ltd., Old Naafi, dated October 20th, 2006
>
> According to our client's records, these letters were delivered on October 23rd. As you are aware, the claim form must be served within four months of the date of issue. The claim form was issued on June 21st, 2006 and accordingly, the claim form should have been served no later than October 20th, 2006. The claim form has therefore been served out of time and we have been instructed to make an application to strike out the claim form and the particulars of claim."

10 The letter went on to discuss the claimant's failure to undergo a medical examination as referred to in pre-action correspondence. The final paragraph of the letter read:

> "In these circumstances, we do not propose to serve a defence at this stage which should otherwise be served no later than November 17th, if proceedings had been served properly and on time. Please confirm by return that pending our clients' applications you will not apply for judgment in default of defence."

I do not think that it can be reasonably argued that service was not a live issue at that stage.

11 Messrs. Hassans for the claimant replied the following day stating that they were perfectly satisfied that there had been good service. They then went on to serve the "Schedule of loss and future loss" and to reply to the questions raised by the other party about the medical examination. They also agreed to an extension of time in which the defence should be filed—by 28 days from November 18th.

12 Messrs. Triay & Triay replied to Messrs. Hassans' letter on November 10th, 2006. They dealt with the question of service, at length, as follows:

> "We are currently not satisfied that the proceedings were properly served in accordance with the provisions of the CPR, r.7.5. On October 20th, 2006, the following letters were received by our client's accountants, Deloitte Ltd., at 124 Irish Town, Gibraltar:
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> (a) A letter dated October 20th, 2006 addressed to PCG (Overseas) Ltd., Old Naafi Store Complex, Waterport, Gibraltar;
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> (b) A letter dated October 20th, 2006 addressed to PCG Group (Overseas) Ltd., 124 Irish Town, Gibraltar;
>
> (c) A letter dated October 20th, 2006 addressed to George Anastasi (Overseas) Ltd., 124 Main Street, Gibraltar.
>
> As the above letters were not left in an authorized place, pursuant to the CPR, r.6.5(6), they have not been properly served. The address of our client's accountant is not the principal office of either defendant, neither is this address a place within the jurisdiction at which either defendant carries on activities, nor is it one which has a real connection with the claim. Moreover, the registered office of the defendants is not situated at the offices of Deloitte LLP but as can be seen from the attached profiles, the registered office of PCG Group (Overseas) Ltd. is situated at 11A–11B, Block 5, Watergardens, Gibraltar and the registered office of George Anastasi (Overseas) Ltd. is 124 Main Street, Gibraltar.
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> The only other letter enclosing a claim form that has been received is a letter dated October 19th, 2006 addressed to PCG Group (Overseas) Ltd., 124 Irish Town, Gibraltar. This letter was sent by post but was not sent to a place authorized pursuant to the CPR, r.6.5(6), nor was it sent to the company's registered office. It was received at the offices of Deloitte LLP on October 23rd, 2006.
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> In the circumstances set out above, we do not consider that the proceedings have been properly served. To enable us to consider this matter further please provide us by return with (a) a copy of the certificate of service that has been filed with the registry pursuant to

the CPR, r.6.14; and (b) witness statements of the persons who attended to purportedly serve our clients."

13 After discussing the conduct of the matter so far, the letter goes on to say:

"In the circumstances described above, we are naturally disappointed that you should not agree to a stay of proceedings and we are of the view that our client is entitled to a stay of proceedings in the event that the proceedings are not struck out. We are nevertheless grateful for the extension of time for the service of the defence for 28 days from November 18th, 2006 which we confirm is required in the event that a stay should not be agreed or ordered by the court."

14 Other matters were then referred to and the concluding paragraph of the letter reads:

"Please also confirm why you have failed to respond to our letter dated August 5th, 2006 and please provide us by return with (a) all of your client's medical records; (b) the medical report; (c) confirmation as to whether your client was re-assessed by the Department of Social Security following his examination on February 4th, 2004, and if so, the outcome of such examination; (d) whether your client is working and if so, particulars of his employment; and (e) your assessment of general damages."

15 It must be borne in mind that this letter was sent but three days before the expiry of the time-limit set in the CPR, r.11(4). Whilst the letter makes it clear that the defendants were still considering a challenge to service, all other pre-trial issues were being progressed.

16 The CPR, r.11(4) time-limit came and went and it was not until November 23rd that Messrs. Hassans replied to the letter of November 10th. They made it clear that the purpose of the letter was to address "the two most pressing matters—namely service and insurance." The letter then puts forward an argument as to why service of the claim form was good and deals with the matter of insurance cover.

17 The ball was then firmly in the hands of the defendants and even if one is generous enough to give them the benefit of the delays up to November 23rd, one would have expected an application under the CPR, r.11(4) within 14 days of that date. And it would be a generous application of the CPR because, given the strict time-limits, one would have expected Messrs. Triay & Triay to have sent a chaser to their letter of November 10th and not have waited until Hassans' reply of November 23rd.

18 Be that as it may, a generous interpretation gave the defendants until December 7th to file the necessary application. Instead, Messrs. Triay & Triay sent a further letter to Hassans on December 12th, setting out the

reasons why they considered that service was invalid and seeking information which Messrs. Hassans had not provided to "enable us to further consider this matter." Two days later, on December 14th, 2006, the current application was filed, pursuant to the CPR, r.3.4.

19 In my judgment, by close of business on December 7th, 2006, even on a generous interpretation of the facts, the defendants were to be treated as having accepted that the court had jurisdiction to try the claim. By that date they had waived any purported irregularity in service.

20 In all the circumstances, the application must fail. I shall hear the argument on the question of costs.

Application dismissed.