Duty bound: What should a solicitor do when confronted by a mistake by the other side?

TWO RECENT HIGH PROFILE CASES THROW A SPOTLIGHT ON THIS QUESTION.

THE SUPREME COURT'S TAKE

In the first case, Barton v Wright Hassall LLP, a claimant litigant in person purported to serve the defendant’s solicitors by email on the last day of the validity period for the claim form, in circumstances where the defendant’s solicitors had not indicated that they were prepared to accept service by that method. The defendant subsequently took the point that the purported service was bad, that the claim had not been validly served in time, and that it was statute barred.

The claimant then brought an application for retrospective validation of his bad service pursuant to CPR 6.15(2), on the basis that there was a "good reason" to do so. One of the "good reasons" for validation was said to be that the defendant’s solicitors had been "playing technical games" by not warning him, when they received his email purporting to effect service, that the method he had used was invalid.

In a leading judgment delivered by Lord Sumption, the Supreme Court dismissed this argument. It held that there had been no time for defendant’s solicitors to warn the claimant that his service had been bad before the expiry of the relevant validity period and that, even if there had been, they were under no duty to advise the claimant of his mistake. Nor could they have done so without first taking instructions from their client and advising it that to do so might deprive it of a limitation defence – something to which no client was likely to have agreed.

So far, so orthodox …

A DISSENETING VIEW

Almost simultaneously, however, Master Bowles at first instance had to consider a near identical issue in Woodward & Anor v Phoenix Distribution Healthcare Ltd.

In Woodward, the claimants’ solicitors purported to serve a claim form on the defendant’s solicitors by post, several days before the expiry of its validity period, in circumstances where those solicitors had not indicated that they were instructed to accept service. The defendant’s solicitors then took a conscious decision not to
point out to the claimants’ solicitors that their attempted service was bad until after the validity period had expired. By that point, the claimants’ opportunity to effect good service had been lost, and the claim was time barred.

Master Bowles was very clear that this conduct did constitute "playing technical games", and as such constituted a "good reason" retrospectively to validate service pursuant to CPR 6.15(2). While he accepted that litigants and their solicitors do not owe duties as between themselves to point out the other side’s mistakes, he stressed that they do owe a duty to the court to assist it in furthering its overriding objective of dealing with cases justly and at proportionate cost. Failure to point out that the claimants’ service was bad while there was still time to rectify it represented a breach of that duty, and that breach of duty was enough to engage the court’s discretion retrospectively to validate service.

CAN THESE DECISIONS BE RECONCILED?

There are small factual differences between the scenarios considered by Lord Sumption and Master Bowles – namely, that in Barton there would have been no time to rectify the claimant’s mistake even if it had been pointed out, and the decision not to do so appears to have been less of a conscious strategy than it was in Woodward. These are, however, very fine distinctions to be drawing in circumstances where such decisions are generally made speedily and under significant time pressure.

Rather than seeking to distinguish the decisions on the facts, the real difference between them does appear to be one of principle: Master Bowles considers that a solicitor’s duty to assist the court in furthering the overriding objective extends to a duty to point out the other side’s mistakes, whereas Lord Sumption, albeit without having had the argument put to him in quite the same terms, does not. Master Bowles’ reasoning is compelling, and he draws a strong analogy between the present circumstances and cases where a party applies for relief from sanctions. It remains to be seen, however, whether higher courts will take it up – particularly in circumstances where CPR 1.1(2)(f) makes clear that one of the key components of the overriding objective is enforcing compliance with the rules.

WHAT NEXT?

It is clear that this is an area of the law where further guidance is needed as a matter of urgency. Master Bowles has granted permission for his decision to be appealed, ostensibly on a leapfrog basis, so it may be that such guidance will soon be forthcoming.

In the meantime, all solicitors face a delicate balancing act as they seek to weigh their duty to their client against their duty to the court. In Woodward, Master Bowles declined to criticise the defendant’s solicitors for their decision not to point out the claimants’ mistake, on the basis that there has to date been relatively little guidance in this area, and that they had simply got their balancing act slightly, and understandably, wrong. It remains to be seen whether courts will be so reticent in future.

FOR FURTHER INFORMATION PLEASE CONTACT

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