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Property Law Briefing

"May" I serve by email? The CPR vs Party Wall Act 1996

The Party Wall Act 1996 contains provisions that deal with service of documents by email (s.15(1A)-(1C)). The provisions are similar to the CPR in that they require the recipient to have stated a willingness to receive the notice or document by email (see CPR 6APD para 4.1).

Despite this similarity in the space of two days appeals before the Court of Appeal and the Supreme Court reached different outcomes as to whether there was effective service by email of a third surveyor's award (*Knight v Goulandris* [2018] EWCA Civ 237) and a claim form (*Barton v Wright Hassall LLP* [2018] UKSC 12).

In *Barton v Wright Hassall LLP* by a 3-2 majority, the Supreme Court rejected Mr Barton's appeal on the question of whether it should order that the steps he had taken to bring a claim form to the attention of the defendant should be treated as good service under CPR 6.15(2).

The CPR deals with service of a claim form in CPR 6.3. Rule 6.3(1)(d) says that a claim form may be served by fax or other means of electronic communication in accordance with Practice Direction 6A. The Practice Direction requires that the receiving party has indicated in writing that it is willing to accept service by electronic means (para 4.1(1)). If a party uses a method not permitted by CPR 6.3 to serve a claim form there is a discretion in CPR 6.15(2) for the court to order that steps already taken by a litigant to bring a claim form to the attention of the defendant is good service.

Mr Barton had emailed his claim form on the last day for its service to the defendant's solicitors. The solicitors had previously indicated that they were instructed to accept service *in an email* but had not indicated that they were willing to accept service *by email*. Service was therefore not effected by a method permitted by CPR 6.3. Mr Barton's claim would be time barred if the court did not exercise its discretion in his favour under CPR 6.15(2).

Lord Sumption gave the majority's reasons and referred to the Supreme Court's previous decision on CPR 6.15(2) in *Abela v Baadarani* [2013] 1 WLR 2043. The test to be applied was whether in all the circumstances, there was good reason to order that steps taken to bring the claim form to the attention of the defendant was good service. The majority held that that there was not a "good reason". Mr Barton had not attempted to serve in accordance with the rules (para 21) and had left it to the last moment to serve his claim form (para 23).

The minority's reasons were given by Lord Briggs. He first considered the purpose of the service rules and identified three objects: (1) to ensure that the contents of the claim form are brought to the attention of the person to be served (2) to notify the recipient that the

claim has been commenced and (3) to ensure that recipients and their solicitors have the opportunity to put in place the necessary administrative arrangements for monitoring and dealing with incoming electronic communications. The minority considered that if these three objects were satisfied then *prima facie* there was a good reason for validating service. On the facts of the case the underlying purpose of the rules had been achieved and Mr Barton's innocent and understandable mistake did not tip the balance against validation.

All members of the Supreme Court agreed that the Rules Committee should look at the issues raised by the appeal.

A day earlier, in *Knight v Goulandris* [2018] EWCA Civ 237, the Court of Appeal dealt with the provisions in the Party Wall Act 1996 for the service of documents. The court decided that a Party Wall Act award sent by email had been validly served with the consequence that Mr Goulandris' appeal against it was out of time. There was no dispute that the email had been received and read by Mr Goulandris but he had not previously indicated that he was willing to accept service by email.

The Party Wall Act 1996 contains provisions in that deal with service by electronic means. Like CPR 6APD these provisions require the recipient to have stated a willingness to receive the notice or document by email.

Sections 15(1A)-(1C) were introduced by the Party Wall etc Act 1996 (Electronic Communications) Order 2016. When passing the 2016 Order Parliament had assumed that the Party Wall Act 1996 as enacted did not permit service by electronic means. The Court of Appeal did not take this assumption as its starting point. Instead Patten L.J. started from the permissive language used in s.15(1) and the rule at common law that a notice is served if it comes to the attention of the receiving party.

Section 15(1) of the Party Wall Act 1996 provides that:

"A notice or other document required or authorised to be served under this Act may be served on a person—

(a) by delivering it to him in person;

(b) by sending it by post to him at his usual or last-known residence or place of business in the United Kingdom; or

(c) in the case of a body corporate, by delivering it to the secretary or clerk of the body corporate at its registered or principal office or sending it by post to the secretary or clerk of that body corporate at that office."

Patten L.J. said that provisions like section 15 (1) can be interpreted as providing permissible methods of service without precluding other methods being effectual provided that they result in the document being received. The purpose of such provisions is not to prohibit other methods but, when read with s.7 of the Interpretation Act 1978, to create a presumption that documents sent by post (permitted by s.15(1)(b) or (c)) are received in the ordinary course of post.

It is not uncommon for contracts to provide for methods of service using similar language. The contract cases show two lines of thought. Firstly, that the methods of service given are permissive but if a specified method is used the risk of the document not actually coming to the attention of the recipient is shifted from the server to the intended recipient (see e.g. majority in *Ener-G Holdings plc v Hormell*

[2012] EWCA Civ 1059). The second line is that where permissive language is used and then two or more possible methods of service are given any of the methods can be used but the use of a specified method is compulsory (see e.g. *Greenclose Ltd v National Westminster Bank plc* [2014] EWHC 1156).

In *Knight t*he Court of Appeal preferred the first approach. Service by email, if it resulted in the recipient receiving the document, was good service under s.15(1) of the Party Wall Act 1996. In doing so the Court of Appeal relied on the meaning attributed to the word "may" by Woolf L.J. in *Hastie and Jenkinson v McMahon* [1990] 1 WLR 1575 when considering RSC O.65 r.5(1). This provision related to the service of court documents other than originating process and those requiring personal service. It was the forerunner to CPR 6.20. CPR 6.20 is drafted in similar terms to CPR 6.3("may…be served by any of the following methods") i.e. the provision that Mr Barton had fallen foul of.

Given that CPR 6.3 is drafted using the word "may" was the Supreme Court majority wrong in *Barton*? The absence of mandatory language in CPR 6.3 does not mean that the use of a method of service laid down is CPR 6.3 is not compulsory (*Greenclose*) but it does support the minority's view that if the three purposes of the rules which Lord Briggs identified have been achieved then there is *prima facie* a good reason for validating service. Given the narrowness of the decision it is a pity the point was not addressed.

Hopefully, if the Rules Committee heeds the Supreme Court's unanimous plea to look at the issues raised in *Barton* it will look carefully at the use of the word "may" in rule 6.3.

By Zachary Bredemear

Property Damage - Common law remedy for damage to gas pipes

The Court of Appeal recently handed down judgment in *Southern Gas Networks plc v Thames Water Utilities Limited* [2018] EWCA Civ 33. The case concerned the recoverability of Failure to Supply Gas payments (FSG payments) from a water company who negligently damaged the Claimant's gas pipe.

Background

On 17 December 2012, a water main burst under Crofton Road, Orpington. By 29 December, water from the leak had bored a hole into Southern Gas's gas main, affecting the supply of gas to 1,683 homes. Thames Water paid the resultant property damage but disputed its liability for the FSG payments claimed by Southern Gas.

FSG payments are statutory compensation payments which gas undertakers are obliged to pay to their customers when there is an interruption in the supply of gas. After an initial 24 hour grace period, the gas undertaker must pay £30 to each home for each additional 24 hour period of interrupted supply. As a result of the interruption on Crofton Road, Southern Gas was liable to make FSG payments of £190,910 to its customers. Southern Gas claimed that sum from Thames Water under section 82 of the New Roads and Street Works Act 1991 ("the NRSW Act") and in negligence. Thames Water denied a liability to pay under section 82 and that it owed any duty in negligence because the strict liability compensation scheme in the NRSW Act provided a complete code which ousted the common law. Thames Water was successful on those two issues and Southern Gas appealed on both points.

Ground 1

Section 82 provides that an undertaker shall compensate any person having apparatus in the street in respect of any expenses reasonably incurred in making good damage to that apparatus caused by an event of a kind mentioned in subsection (2). It was common ground that this was such an event but Thames Water contended, and both the trial judge and Court of Appeal agreed, that FSG payments were not "expenses reasonably incurred in making good damage" to the gas pipe.

Ground 2

The trial judge had found that section 82 itself was a complete statutory code based on the "very persuasive" obiter dicta of Lord Justice Buxton in *Yorkshire Electricity Distribution Plc v Telewest Limited [2006] EWCA Civ 1418* ("*Yorkshire Electricity*"). However, Hickinbottom LJ held that *Yorkshire Electricity* did not absolve the court of grappling with the question of whether on its true construction section 82 provides a strict liability scheme in addition to, or displacement of, the rights at common law. In considering the issue afresh, he held that the short answer to it lay in section 82(6) which provides:

"Nothing in this section shall be taken as exonerating an undertaker from any liability to which he would otherwise be subject."

Hickinbottom LJ held that this expressly retains common law remedies that are or might be available to those with a strict liability claim under section 82.

Further, Hickinbottom LJ found no "incompatibility" or "positive inconsistency" between the common law remedy and statutory remedy. He considered that it would have been open to Parliament to consider that the cost of repairing damage to street apparatus should be paid on a strict liability basis, but that a person wishing to recover anything more should prove negligence. Section 82(6) was sufficient evidence that that had in fact been Parliament's intention.

The Defendant further submitted that section 82, as well as containing its own complete code, also forms part of a wider statutory code under sections 18-22, 37 and 209 of the Water Industry Act 1999 ("the WI Act") and sections 81-81 of the NRSW Act. However, Hickinbottom LJ considered that the appeal turned on the construction of section 82. He derived no significant assistance from the very different provisions of the WI Act where Ofwat as regulator is a basic, though not exclusive, instrument through which enforcement is effected (see for example *Nicholson v Thames Water Utilities Limited* [2014] EWHC 4249 in which 1 Chancery Lane's Ivor Collett successfully represented the Defendant).

Comment

To the parties this is plainly an important decision. The FSG payment to each household may be modest but, as this case shows, even a single incident can oblige gas undertakers to pay substantial sums of money. This decision now permits them to pass on that liability. For Thames Water, who had already paid £734,000 in respect of other losses, the decision exposes them to significant additional risk. However, tensions between statutory schemes and common law remedies arise often - for example in cases involving sewerage undertakers, highways cases and tax cases. The decision on the ouster issue is therefore of potentially wider interest. At paragraph 37 Hickinbottom LJ, having considered previous authorities drew the following propositions from them:

i) Where Parliament has legislated for a statutory remedy to apply in certain circumstances, whether that remedy ousts any common law remedy depends on whether on a true construction of the statutory provisions Parliament had intended it to do so;

ii) Where such an intention is not express, the threshold for inferring ouster of common law rights is high, but it is not helpful to approach the question on the basis that there is a presumption against ouster, or on the basis that ouster has to be a necessary implication before common law rights are displaced;

iii) Where the statutory and common law remedies cover precisely the same ground, the common law remedy will almost certainly have been excluded by necessary implication, and where the statutory regime provides a special remedy, it may be inferred that Parliament intended to exclude any common law remedy that might arise;

iv) The identification of some differences between the statutory scheme and the common law remedy will not necessarily lead to an inference that Parliament intended the former to oust the latter.

By Ella Davis

Equity to the rescue! Why it isn't over if the deal isn't binding

Property litigation often involve a dispute about a contract. However, some clients prefer to keep things informal or flexible. If their deals do not result in a binding contract then their lawyers need to understand how equitable doctrines might help their clients. This task is not helped by the fact that the scope of these doctrines is not always clearly delineated and can be highly fact-sensitive. The recent Court of Appeal decision in *Farrar v Miller* [2018] EWCA Civ 172 provides a striking example of the nimble legal footwork sometimes needed.

Mr Farrar and Mr Miller had done business together for a number of years as property developers. They operated through corporate entities. Mr Miller assumed responsibility for these arrangements. One of their companies owned a piece of land called "Long Stratton". Mr Farrar's case is that there was an oral agreements that this property would be transferred to a new company as part of a joint venture with other parties. Following the 2008 global financial crisis the company holding "Long Stratton" became insolvent. Another company owned by Mr Farrar and Mr Miller acquired the property for £150,000. It was then transferred, allegedly without Mr Farrar's knowledge, to companies in which he had no interest. After planning permission was obtained "Long Stratton" was sold for £5m and Mr Farrar was denied a share of the proceeds.

Mr Farrar's claim in contract was struck out because any agreement was unenforceable by virtue of s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989. Mr Miller was given an opportunity to reformulate his claim. His proposed amendments alleged that there was a constructive trust or proprietary estoppel and that there had been a breach of fiduciary duty.

The main case relied on by Mr Farrar in support of his claim for a constructive trust was *Pallant v Morgan* [1953] Ch. 43. In that case two landowners agreed prior to an auction that only one of them would bid for land and that profits from the land would be divided in a certain way. The defendant succeeded in the auction and reneged on the agreement. Harman J. found the agreement was too uncertain to be enforced but decided that the defendant held the land for himself

and the claimant jointly.

Mr Miller's argument against a *Pallant v Morgan* type constructive trust was that no trust could arise if the parties already owned the property. He relied on *Cobbe v Yeoman's Rowe Management Ltd* [2008] 1 WLR 1752. In that case Mr Cobbe had pursued a planning permission for a property he did not own encouraged by an incomplete, oral agreement he had with the sole director of Yeoman's Rowe. Rejecting Mr Cobbe's claim that there was a constructive trust Lord Scott asked rhetorically,

If the property that is to be the subject of the joint venture is owned by one of the parties before the joint venture has been embarked upon (as opposed to being acquired as part of the joint venture itself), on what basis, short of a contractually complete agreement for the joint venture, can it be right to regard the owner as having subjected the property to a trust and granted a beneficial interest to the other joint venturers?

Lord Scott in *Cobbe* also expressed the view that as a claim for proprietary estoppel was not specifically excepted from the effect of s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 (unlike resulting, implied or constructive trusts) it could not be prayed in aid to render enforceable an agreement that was void under s.2(1).

Despite Lord Scott's views in *Cobbe* the Court of Appeal permitted Mr Farrar's amended allegations of constructive trust and proprietary estoppel to proceed. Kitchin L.J. said that a *Pallant v Morgan* type trust was not limited to pre-acquisition cases but arose whenever the circumstances were such that it would be unconscionable for the owner of a property to deny the beneficial interest of another. Lord Scott's views in *Cobbe* had to be seen in the context that Mr Cobbe had acted speculatively and understood that that his oral agreement was not binding.

Kitchin LJ also side-stepped Lord Scott's view on proprietary estoppel stating that, "This ground of appeal raises a difficult question which may depend upon the facts and which is better determined at trial in the light of the evidence and full argument". Kitchin LJ's judgment nevertheless gives a number of reasons why he considered that there are strong arguments that s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 does not expressly or by necessary implication prevent a proprietary estoppel from arising in the context of an unenforceable agreement.

Turning to the issue of breach of fiduciary duty Kitchin LJ identified that the question of whether or not a joint venture relationship carried obligations of a fiduciary nature was highly fact-sensitive as the question the court must ask is whether the circumstances of the relationship justify the imposition of fiduciary duties. The allegation that Mr Miller was the joint venture party entrusted with the corporate aspect of the parties' joint ventures was sufficient for there to be an arguable case that a fiduciary relationship arose.

By Zachary Bredemear