

# Legal Update

## Are they being served? The Courts' recent treatment of effective service

Service of Claim Forms can be effected on unknown parties, but there are pitfalls to avoid. As financial institutions and corporates increasingly face threats from unknown parties, particularly in the context of cyber incidents, a number of recent decisions in the Supreme Court and the Commercial Court provide a timely reminder of the importance of effective service, and the steps that the courts will consider sufficient in order for service to have been deemed effective, particularly in situations where the defendant(s) may be unknown or may be seeking to evade service. Parties facing these threats will benefit from a familiarity with the current landscape and rules as we enter the new decade which will undoubtedly see a continued rise in the need to serve unidentified defendants.

*Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6

In *Cameron*, the Supreme Court considered the circumstances in which it is permissible to sue an unnamed defendant.

Ms Cameron was injured in a hit-and-run collision, in which the car was identified, but the driver was not; only the registered keeper of the car, and the insurer of a named driver of the car (not the keeper), could be identified. Accordingly, Ms Cameron applied to the Court to amend her original Claim Form to identify the defendants as the insurer and "the person unknown driving vehicle [registration number] who collided with vehicle [registration number] on [date of accident]".

At first instance, District Judge Wright dismissed Ms Cameron's application and granted summary judgment in favour of the insurer. On appeal, the Court of Appeal reversed that decision, with Lady Justice Gloster holding that the Court had discretion to permit an unknown person to be sued – if justice required it – in circumstances such as Ms Cameron's where the driver could not be identified, because otherwise it would not be possible to obtain a judgment which the car's insurer would be bound to satisfy.

The insurer appealed to the Supreme Court. In giving the Supreme Court's judgment, which reversed the Court of Appeal's ruling and found for the insurer, Lord Sumption identified the critical question to be determined as being what, as a matter of law, the basis of the Court's jurisdiction over the parties was, and in what (if any) circumstances jurisdiction could be exercised on that basis against persons who could not be named.

Lord Sumption considered the distinction between unnamed and unidentified defendants, noting that the first category comprised anonymous defendants who were identifiable but whose names were unknown, such as squatters occupying a property who are identifiable by their location but not by their names; while the second category comprised defendants who were not only anonymous but also could not be identified. The key distinction was that, in the first category, the defendant was described in a way that made it possible – in principle – to locate or communicate

with him/her and to know without further inquiry whether he/she was the same as the person described in the Claim Form, such that he/she could be served with Claim Forms or other originating process, if necessary by alternative service; this would not be the case in the second category.

There are, Lord Sumption noted, well established procedures for service, such as alternative service by email to a website, or where an interim injunction is granted and can be specifically enforced by notice to third parties who would necessarily be involved in any contempt such that the process of enforcing may be enough to bring the proceedings to the defendant's attention.

However, an unknown person could not be identified simply by referring to something that he/she had done in the past: "*the impossibility of service in such a case is due not just to the fact that the defendant cannot be found but to the fact that it is not known who the defendant is. The problem is conceptual, and not just practical*". Lord Sumption noted the essential requirement for any form of alternative service that the mode of service should be such as could reasonably be expected to bring the proceedings to the attention of the defendant.

The Supreme Court also accepted that it may be appropriate to dispense with service, even where no attempt had been made to effect service in any manner, if the defendant has deliberately evaded service and could not be reached by way of alternative service, including in cases where the defendant was unidentifiable but had concealed his identity in order to evade service. However, a party could not be said to have evaded service unless he/she actually knew that proceedings had been or were likely to be brought against him/her, and that the court would have to be satisfied of that before it could dispense with service on that basis. It would, Lord Sumption reasoned, be hard to envisage any circumstances in which it would be right to dispense with service of the Claim Form in circumstances where there was no reason to believe that the defendant was aware that proceedings had been or were likely to be brought.

Also of note from the Supreme Court's ruling was the conclusion that a party who is not just anonymous, but who also cannot be identified, cannot be sued under a pseudonym or description,

unless the circumstances are such that the service of the Claim Form can be effected or properly dispensed with.

*Canada Goose UK Retail Ltd v Persons Unknown* [2019] EWHC 2459 (QB)

In *Canada Goose*, the claimant retail clothing company sought summary judgment on its claim for an injunction against the defendants, who were animal rights protestors, who had protested outside the claimant's London store.

The claimant issued a Claim Form against persons unknown seeking an injunction for alleged acts of harassment, trespass and/or nuisance arising from the protests. It obtained an interim injunction restraining persons unknown from behaving in a threatening way, and restraining more than a specified number of protesters from demonstrating at the store within an inner and outer exclusion zone. The injunction defined protesters as any person who demonstrated or intended to demonstrate against the production, sale or supply of animal products by the first claimant. The order permitted the claimant to serve the *injunction order* (but, importantly, not the Claim Form) on any person demonstrating at the store, and by way of alternative service on two email addresses.

Mr Justice Nicklin held that the Claim Form had not been validly served on any of the defendants; no order for alternative service had been made in respect of the Claim Form (as opposed to the injunction order), and there had been no service by any of the methods permitted by CPR r.6.5. Service of the injunction order on protesters at the store did not have the effect of adding them as defendants to the proceedings, because they had not been served with the Claim Form. Consequently, none of the defendants were obliged to file a defence or acknowledgment of service; the Court declined to grant summary judgment against the defendants.

*Gorbachev v Guriev* [2019] EWHC 2684 (Comm)

In *Gorbachev*, Mr Gorbachev issued proceedings against the defendant, Mr Guriev, alleging that Mr Guriev held almost 25% of his interest in a fertiliser business on trust for Mr Gorbachev; this trust was said to arise from a number of oral declarations said to have been made by Mr Guriev during discussions that took place between the two in London in 2005. The value of the claim was almost £1 billion.

Mr Gorbachev had sought to serve the Claim Form on Mr Guriev by way of a process service agent, who had approached Mr Guriev in a London street, recording the events on his mobile phone. After an exchange between the process server and members of Mr Guriev's group, Mr Guriev and his colleagues got into cars. The process server left a bundle of documents including the Claim Form, on the ground next to Mr Guriev's car, before the vehicles departed. Mr Gorbachev asserted that this constituted good personal service of the Claim Form. Mr Guriev, in response, sought a declaration that service of the Claim Form had not been properly effected and that, in consequence, the Court did not have jurisdiction to entertain Mr Gorbachev's claim against him.

Mr Justice Pearce considered a number of issues relating to personal service, in particular noting the case of *Kenneth Allison Ltd v A E Limehouse & Co*<sup>1</sup> in which it was held that if the person upon whom service was being attempted would not accept the document, service could be effected either by handing the document to the person (a "limb 1" case), or by telling the person what the document contained and leaving the document with or near the person (a "limb 2" case). In such cases, the burden was on the claimant to show a good arguable case that service had been effected on the defendant.

In considering the evidence, including the mobile phone video footage, Pearce J denied Mr Guriev's application, concluding that Mr Guriev had been served with the Claim Form on the basis that the process server had correctly identified Mr Guriev, and that there was a plausible evidential basis for concluding both that Mr Guriev realised that this was an attempt to serve papers on him, and that Mr Guriev knew that service of court proceedings was being attempted. In circumstances where the process server was prevented from approaching Mr Guriev, leaving the papers, including the Claim Form, as near to the defendant as was reasonably practicable at the time was a sufficient basis for the Court to conclude that service was good.

*Lonestar Communications v Kaye & Ors* [2019] EWHC 3008 (Comm)

*Lonestar* involved an application by the Claimant to dispense with service of the Claim Form pursuant to CPR r.6.16(1) on one of the defendants, Mr

Marziano, in the context of a claim for damages resulting from the tort of conspiracy and unlawful interference with business arising out of alleged cyberattacks on the business of the claimant in Liberia.

Mr Justice Teare noted the "striking efforts" of the Claimant's solicitors to serve the Claim Form on Mr Marziano, including:

1. Contacting the solicitors for the other defendants in the proceedings, on the basis that Mr Marziano was or had been the Chief Executive those other defendant entities;
2. Serving by messages via the Facebook Messenger service, via LinkedIn and via a Flickr account;
3. Serving to a company connected to Mr Marziano, details of which were obtained from the leak of the Panama papers; and
4. Serving to a company connected to Mr Marziano and mentioned on Mr Marziano's personal website.

Teare J concluded that the failure to respond to the Facebook messages (and the subsequent termination of Mr Marziano's account) and the removal of content from Mr Marziano's personal website, indicated that he was not only aware of the proceedings but was also seeking to evade service. Teare J noted that there were exceptional circumstances and that it was fair and just to make the order dispensing with service.

## Comments

These recent cases reflect the courts' ongoing efforts to grapple with issues of effective service as they become more prevalent, particularly in circumstances where cyber-attacks by unknown individuals and evasion of service are becoming more common.

In particular, the Supreme Court's decision in *Cameron* may reflect a determined effort to push back against the numerous recent claims against unnamed defendants. Unless the defendant can be served or the proceedings will necessarily come to his/her attention (by e.g. the enforcement of an injunction) then such claims may no longer be permitted.

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<sup>1</sup> [1991] 3 WLR 671

Equally, however, the *Lonestar* decision is an example of the courts' flexibility and willingness to embrace mechanisms in order to allow victims of cyber-attacks to pursue effective legal remedies, which should offer encouragement to claimants facing similar issues.

In this evolving landscape, prospective litigants should keep in mind the importance of effective service, having regard to the following:

1. ensuring that they have taken the appropriate steps in seeking to identify any anonymous defendants who they may be seeking to name in a Claim Form, and identifying them appropriately in the Claim Form;
2. ensuring that service of the Claim Form is properly effected, including obtaining an order for alternative service pursuant to CPR 16.15 should that be necessary;
3. recording efforts to serve a defendant, where necessary, and to ensure that the defendant is aware what the documents relate to; and
4. ensuring that efforts to serve by alternative and creative means have been undertaken, as these will likely be viewed favourably by the court.

If you have any questions about the issues raised in this legal update, please get in touch with your usual Mayer Brown contact or:

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