IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2021] EWHC 3631 (QB)

Case No. QA-2021-000073

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 10 December 2021

Before:

MR JUSTICE COTTER

B E T W E E N :

ALEXANDER ASLANI — Appellant / Claimant

- and -

EUGENIA TABERNA — Respondent / Defendant

MR TOM POOLE QC appeared on behalf of the Appellant / Claimant.

THE RESPONDENT / DEFENDANT appeared in Person (assisted by a McKenzie Friend)

J U D G M E N T

(VIA CLOUD VIDEO PLATFORM)

MR JUSTICE COTTER:

1 The Appellant appeals against the order of Senior Master Fontaine made on 4 March 2021, whereby she set aside her earlier order of 25 November 2020 permitting alternative service upon the Respondent under CPR 6.1(5). The Honourable Mr Justice Spencer granted permission to appeal on 6 October 2021. The Respondent, is residing in Argentina. She attends today remotely, and has been assisted, very ably by Ms Ochi, a McKenzie Friend who I also gave permission to address the court as an advocate.

2 The application which led to the order of 25 November was in the context of a defamation claim brought by the Appellant against the Respondent in relation to Instagram posts about the Appellant, an internationally renowned plastic surgeon based in Spain. The posts suggested that he was negligent, unprofessional and unethical. The Respondent had received a surgical procedure from the Appellant in November 2018 at his Spanish clinic. The Appellant seeks an injunction, damages, relief under the Defamation Act 2013, and costs in relation to what is alleged to be defamation through the social media posts.

3 When the Appellant treated the Respondent in 2018 at his Spanish clinic, he had on his file a residential address for the Respondent within the jurisdiction of this Court. He also had her email address. The Appellant's former solicitors engaged with the Respondent in the spring of 2020 in relation to the allegations of defamation. On 2 July 2020 a letter before action was sent.

4 The Appellant changed solicitors and the last email sent by his current solicitors to the Respondent was sent on 24 July 2020. There was no response to that email. The Appellant then made an initial application for leave to use alternative methods of service on the Respondent, that application being made on 23 September 2020. It is necessary to read it. It was verified by a statement of truth:

> "Whilst the applicant believes that the defendant's address is located and situated at Flat 10, 1 Princess Louise Close, London W2 1OH (and that is certainly the defendant's last known address), the applicant wishes to ensure that every possible step is taken to ensure service is properly effective. There has been recently no reply to correspondence sent to the defendant at that address, and also via email, albeit that it appears that the defendant is active on her emails as explained below.
>
> Therefore, the order is sought in the terms of the draft order attached hereto to ensure proper effective service via an alternative method that the applicant believes is more likely to be safely received by the defendant."

The words "and also via email" are important, and I shall return to them in due course.

5 Within the application, the Appellant continued:

> "The applicant knows with certainty that the above email address was in use as recently as 26 June 2020. The applicant knows this, because the applicant's previous adviser received an email from the defendant via the above email address on 26 June 2020."

6 Proceedings were issued on 30 September 2020. After consideration of the application to which I have referred, the Master ensured that an email was sent to the Appellant's solicitors which said:

> "Some further explanation must be provided as to why the order is sought. I see no reason why the defendant cannot be served at the address which is stated to be her usual and last known address, with a copy sent by email. Please provide further evidence."

The Appellant's solicitors then replied to that email stating that they were content to proceed in that manner, so they did not need a decision on their application.

7 The Appellant's solicitors then tried to serve at the address in Princess Louise Close, London. However, this proved not to be possible for the reasons set out in a statement dated 26 October 2020 made by the process server. There had been four attempts to gain entry into the block of flats. All had failed. So, on 27 October, a second application for alternative service via email was made, setting out the failed attempts and asking for an order for alternative service via email.

8 At this point it is necessary to turn to the relevant provisions of the CPR. CPR 6.9 states:

> "(1) This rule applies where ..."

and (a) to (c) set out forms of service -

> "... do not apply and the claimant does not wish to effect personal service under rule 6.5(2).
>
> (2) Subject to paragraphs (3) to (6), the claim form must be served on the defendant at the place shown in the following table."

For an individual, that table sets out usual or last known residence. Hence the comment of the Senior Master. Then CPR 6.9 continues as follow:

> "(3) Where a claimant has reason to believe that the address of the defendant referred to in entries 1, 2 or 3 in the table in paragraph (2) is an address at which the defendant no longer resides or carries on business, the claimant must take reasonable steps to ascertain the address of the defendant's current residence or place of business ('current address').
>
> (4) Where, having taken the reasonable steps required by paragraph (3), the claimant –
>
> > (b) (b) is unable to ascertain the defendant's current address, the claimant must consider whether there is –
> >
> > > (i) an alternative place where; or
> > > (ii) an alternative method by which,
>
> service may be effected.
>
> (5) If, under paragraph (4)(b), there is such a place where or a method by which service may be effected, the claimant must make an application under rule 6.15."

So if having taken the reasonable steps required by para.(3), the claimant is unable to ascertain the current address, there must be consideration of an alternative, and, if an alternative method is identified, then an appropriate application must be made. The rule does not give any guidance as to what may constitute "reasonable steps".

9 Turning to CPR 6.15 it states as follows:

> "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place."

Mr Poole QC points out that CPR 6.15 does not expressly refer back to the requirements of CPR 6.9. What is required under CPR 6.15 is consideration by the court of whether there is good reason to authorise service; this is an issue of fact. If established by an exercise of discretion, the court may then make an order permitting service by an alternative method or at an alternative place. However in my judgment it would be strange indeed if, in the exercise of that discretion, the court did not consider the extent to which a party had complied with the provisions of CPR 6.9, and in particular 6.9(3), as the purpose of the rule is to ensure that proceedings are brought to the attention of the court.

10 I should also refer, as Ms Ochi has set it out in her submissions, to practice direction 6A, paragraph 4. That refers to service by fax or other electronic means, and sets out that where a document is to be served by fax or electronic means:

> "4.1(1) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving –
>
> (a) that the party to be served or the solicitor is willing to accept service by fax or other electronic means ...
>
> 4.2 Where a party intends to serve a document by electronic means (other than by fax) that party must first ask the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means ..."

11 In my judgment, whilst the nature and extent of attempts to gain agreement to service by email may be a relevant, indeed a highly relevant, factor within the determination of whether there is good reason to authorise service by a method or a place not otherwise permitted by the Part, and further, whether the court should permit service by an alternative method, the requirements of 4.1 cannot be a condition precedent for an order under CPR 6.15. This is for the obvious reason that if the only method of service identified by the party seeking to serve is email but the other party refuses to agree to that method, the court must be entitled to order alternative service under CPR 6.15, if it considers in all the circumstances that is what to do (given the requirement for good reason).

12 I return to the facts: on 25 November 2020 the Master made an order for alternative method of service. She did so referring to the statement of Mr Booth, the process server. The order specified the relevant email address which had been used by the Appellant to attempt to contact the Respondent in July, and indeed continues to be the email address used by the Respondent. There was evidence before the Master that the Respondent had been actively using that address as recently as 26 June 2020. Interestingly, the application also contained

within its body an email from the Respondent that gave a mobile number. In accordance with the alternative method of service ordered, the Respondent was served with proceedings on 26 November 2020 by email. The Respondent did not acknowledge service and time for such acknowledgement expired on 11 December.

13 Despite not being required to by the rules or any order, the solicitors for the Appellant wrote to the Respondent on 14 December 2020 giving a warning that unless she engaged with the proceedings, default judgment would be requested. The Respondent did not respond. Default judgment was then entered against the Respondent by order of the Master of 17 December 2020, and a copy of that order was served on the Respondent. Procedural steps then followed with the Master allocating the claim to the multi-track and making provision for an assessment of damages with a hearing on 4 March 2021.

14 The Respondent's first engagement with the litigation process was on 5 February. Thereafter she filed an out of time acknowledgement of service on 17 February 2021, which contained no address. There was no application at that stage to adjourn the assessment of damages listed for 4 March. On 1 March 2021, the Appellant was served with an unsealed application made by the Respondent challenging the court's jurisdiction on the basis that service was not effective. The application stated:

> "The proceedings did not come to my attention until 4 February when I received two emails dated 27 January and 2 February."

I pause to observe that this expressly admits to receiving emails from the Appellant's solicitors apparently with no difficulty relating to spam of those or otherwise. The application continued:

> "The claimant should have taken reasonable steps to ascertain my location, after being informed, as per rule 6.9(3). The claimant has my UK mobile telephone number and should have contacted me and required my current address for the purpose of service, or obtained consent for service by email pursuant to practice direction 6A, para.4. Likewise, he could have contacted me through the same Instagram page but chose not to."

It also continued:

> "Even if the court was right by discretion to have granted the order to effect service by email, the claimant failed to take reasonable steps, or any step at all, to draw my attention to the claim form, which is overriding objective of the service rules."

2nd,

> "Once I had established communication with the claimant's solicitors it quickly became apparent from the tone of their correspondence and a clear assertion in a letter dated 18 February 2020, that they believe I had intentionally ignored the claim. I can find no basis for this belief especially given that (1) they failed to take any step to draw my attention to the claim. They should have been alerted to the risk that the lack of response to the correspondence could be due to messages not being received, amongst other possibilities."

The Respondent referred to the history of her correspondence with the Appellant's previous solicitor, and that she had indicated that if proceedings were to be taken she would fiercely defend them. She also indicated that on 8 April 2019 she had left the UK and flown to Colombia.

15 The hearing proceeded before the Master on 4 March 2021. The Senior Master permitted the Respondent to make her application, despite it not being formally issued. The evidence before the Master was the evidence that contained within the application form signed by a statement of truth, the Appellant's first and second applications for an alternative method of service, again signed with a statement of truth, and the statement of Ms Olivia Taylor-James, the Appellant's solicitor. Ms Taylor-James in her statement referred to the first contact being on 5 February with Ms Ochi, who appears today as the McKenzie Friend (and by my leave, also as an advocate). She states that Ms Ochi stated by email:

> "I have a copy of your last email and its attachments dated 2 February 2021, and note the reference to previous correspondence. Unfortunately, these previous correspondences went to spam folder and were not seen by Ms Taberna, who only by chance saw your latest email yesterday."

16 Ms Taylor-James pointed out that it was noteworthy that, the email made no reference at all to previous correspondence, so that it could only be inferred that Ms Ochi had already been given the previous correspondence by the Respondent. This was important, because if other e-mails had indeed gone to spam and been deleted they would not be capable of being retrieved. She also pointed out that Ms Ochi referred to being in possession of Ms Taylor-James' email address "from the bottom of one of your letters". She pointed out that her letters did not contain a specific email address, but the applications dated 20 October and served and served on 20th did have her address at the bottom. Ms Taylor-James noted that the Respondent did not refute or deny having received previous correspondence. She stated:

> "A little later on the defendant told me that Gmail automatically deletes items in the spam folder after 30 days, and that she was not someone who regularly checks her emails, and even when she does log into her emails she does not go through all the messages in her inbox. The defendant stated that unless she was expecting specific correspondence she did not habitually check her emails."

17 Ms Taylor-James had sought to clarify the assertion that the original emails with service of proceedings went into the spam folder and had asked a number of questions. She pointed out that she did not receive a satisfactory or positive response to any of them. She stated that:

> "It is the claimant's position that the defendant has received all of our previous correspondence and has simply chosen not to deal with them, a point which we squarely put to the defendant in our letter of 18 February 2021. Notably, once again, the defendant has never refuted this position."

18 Ms Taberna represented herself before the Master. I have been taken to an extract of the hearing, during which the Senior Master specifically asked the Respondent, "Did you receive the email from the claimant's solicitors?" Ms Taberna said that she received the first email from the previous solicitors and replied to it. Then the Master asked this specific question, "But after that, when the claimant's solicitors were instructed they say they served you by email with the proceedings and you say you did not receive that, but you have just

told me that you do not pay attention. Have you now checked your emails to see if you did receive it?" The answer was, "Now I checked, yes." The Master follows that up with, "And you did receive it?" Answer, "Yes, some of it, it is there, yes…….. If one person sends an email, for example, the last ones, it all becomes a thread." She was then asked, "Well, did you see it on the date it was served, I think that was in December?" The defendant answered, "No, I doubt it. I did not see it, no." She was asked when she first saw the email and she said, "Last week."

19 Ms Taylor-James also referred to the mobile number, which I have indicated was on the original application, and to the fact that on 2 March 2020 there were attempts to ring it by two directors of her firm, each of whom managed to get through to an English speaking operator who stated that the mobile phone was switched off. As a result she asserted the line or account was not apparently disconnected. Mr Poole QC submits that there must have been an ability to ring a mobile in this country, as otherwise the operator would not have been English speaking.

20 The Respondents' application purported to challenge jurisdiction under CPR 11 on three grounds:

(i) that the claimant did not take reasonable steps to ascertain the defendant's address for service, and there was no good reason for an alternative method of service to have been made;

(ii) service was invalid because the defendant had been out of the jurisdiction since April 2019; and

(iii) the claim has no substantial connection with jurisdiction - i.e. *forum non conveniens*.

The Master only determined the first of the Respondent's three grounds, and for the purposes of this appeal it is necessary only to consider her assessment of that element.

21 At the hearing the Appellant opposed the application, referred to the continuing refusal to provide an address for service, and submitted that service was not defective. It had been effected as per the order, and there had been good reason to believe that the known address was one at which the Respondent no longer resided. The suggestion that she would have voluntarily provided her address was unsustainable.

22 The Senior Master delivered a short judgment. She set out the facts and evidence, including that there were four attempts to serve at the last known address, and that she had been told that the only means of contacting the Respondent was by email. She pointed out that the Respondent submitted that no steps were taken to find out her current address, specifically no email or telephone contact, although the Appellant had both her email address and a UK mobile number. The material part of the judgment is as follows, paras.13 to 15:

> "In my judgment, it is appropriate to set aside the order for alternative service on the basis that further enquiries could and should have been made by either email, telephone, text message, or call to find out whether she had an alternative address at which service could be made. If there had been no response to those requests then the test in rule 6.9(3) would have been satisfied and alternative service could have been effected.

> The defendant's evidence, I accept, is unsatisfactory to some extent in that it does not deal with the issue of why she did not receive the email with the proceedings attached to it. She has said in her submissions today that she was not in a fit state in terms of her mental health to consider all her emails, and so it is not clear what happened to that email.
>
> I am satisfied to the extent required that it is not that she simply ignored that email."

Later on in the hearing when she was asked for permission to appeal, she added:

> "It may well have been that had there been contact with the defendant she would not have provided her address for service either in Argentina or an address in the United Kingdom, but the fact is those steps were not taken."

And at para.19:

> "Of course, if the defendant had not responded at all, then the court would have made the same order that it did make in November."

In my judgment, these comments show that the Master had in her mind that, had there been an email sent and there had been no response, the order would have been made.

23 When considering the judgment, it is important to note that the Master referred to the requirement to contact either by email, telephone or text message or call. She did not find that it was necessary to attempt all of these methods, or indeed to attempt email and telephone. She also made no reference to the use of social media, such as Instagram. Ms Ochi refers to social media as a potential method, but that was not a matter that the Master took into account as set out in her judgment. Ms Ochi says that I should ignore the word "either" within the judgment, as that is not what the Master meant in the context of this case, but I cannot accept that submission. The sentence was plain enough.

24 I turn to the grounds of appeal. The first ground is that the Master asked the wrong question. Mr Poole submits that CPR 6.15 provides that order permitting service by an alternative method or at an alternative place may be given where it appears to the court that there is a good reason to authorise service by such a method or at such a place. It does not specifically require a consideration of the steps taken under 6.9(3). So he submits that the Master, in effect, asked herself the wrong question when determining whether the order should be set aside. What she should have asked herself is whether there was, at the date of her earlier order, erroneous bases of fact and / or material or unforeseen change in circumstances after the order so as to undermine or invalidate the basis upon which she held that there was good reason to authorise the service of the claim. He submits that the analysis does not, and cannot solely be restricted to consideration of 6.9, but must consider these wider issues.

25 I agree that CPR 6.15 contains potentially wider considerations than those set out at 6.9(3) in relation to the steps to be taken. However, the question of whether there has been compliance with CPR 6.9(3) is clearly a factor that the Master was entitled, if not bound, to take into account in the exercise of her discretion as to whether to set aside her earlier order.

26 It is clear that she considered 6.9(3), but she also considered - and I shall turn to that in due course - what had happened in relation to the service via the method that she had ordered.

So her analysis did go wider than the narrow question. However, the extent to which that analysis is one that can withstand scrutiny requires consideration of ground 3, to which I shall turn in a moment.

27 As to ground 2, the submission was that the Master misconstrued what was meant by "reasonable steps", and was wrong to require the claimant to do any more than he had already been done to seek to effect service. The expression "reasonable steps" is not expressly clarified and the reasonableness of the steps must be dependent upon all of the relevant circumstances in any particular case, so fact specific.

28 I return to the analysis of the Master. As I have indicated, it was her view that the Appellant should either have used email, telephone or text message to try to find out whether the Respondent had an alternative address at which service could be used. Further, as I have indicated, she went on to say that if the Respondent had not responded then the court would have made the same order that it did in November. The difficulty with this analysis is that, in the original application it was stated that the Appellant's current solicitors had tried to correspond with the Respondent by e-mail, sending, an email on 24 July with a letter before action, and had received no response. It is not the case that there had been no attempt to correspond by email. There had also been correspondence with the former solicitor. Importantly, a letter before action had been sent and had been ignored.

29 Mr Poole QC submits that the learned Judge probably overlooked the fact that there had been an email, and that it had been ignored. He submitted that this was understandable as the Master thought that there was an obvious solution to the issues before her, which was that Ms Ochi would be a person who would accept service on the Respondent's behalf. Understanding that to be acceptable to the Respondent led the Master to deal with these matters shortly. In any event, it is not possible to reconcile the evidence before the Master, specifically the fact that there had been an attempt to contact the Respondent by email and there had been no response, with the Master's judgment that there should have been an email sent, and that, if there had been no response, it would have been proper to make the original order. As I have indicated, Ms Ochi says that the word "either" should be ignored, but that cannot be right. The fact of the matter is that the Master found that either using email or telephone, and then not receiving a response, would have been enough to constitute reasonable enquiries. In my view, the Master here fell into error by failing to take into account that an e-mail had been sent and no response received.

30 I now turn to ground 3. Ground 3 is that the Master was wrong to proceed on the basis that the Respondent was unaware of the proceedings prior to 4 February 2021. In my judgment, it is not easy to identify exactly what the Master's findings were in relation to the service of the emails. This issue was a highly relevant consideration in the exercise of her discretion to set aside the earlier order ie. whether the Respondent had actually received the proceedings by the alternative matter that she had ordered. As I indicated during an exchange with Ms Ochi, the court is faced frequently with circumstances where an alternative method of service is ordered and a party at a later stage complains that they never had any knowledge of the existence of the proceedings often the letter was not ever passed on to them. Here on the Appellant's case not the position. The Appellant's case before the Master was very straightforward. Proceedings had been sent by email, as ordered, and they have been received and they have been ignored. As I have indicated, there were points during the correspondence leading up to the hearing in which reference was made to the original emails having been lost in a spam folder. However, as I indicated, when specifically asked by the Master, the Respondent indicated that she had, in fact, received the emails, contrary to what she had previously indicated, and had also been indicated on her behalf by Ms Ochi.

31 The Master did not, it seems to me, take into account and expressly weigh into the balance the fact that service as per the order, had been successful in that the email had been received by the Respondent. If a party receives proceedings by an authorised method, and judgment is then entered, if the party wishes then to defend it there is a provision under CPR 13 by which the judgment can be challenged. However, that rule poses materially different considerations to those before the Master in relation to whether or not she should set aside her earlier order for alternative service. The Master did not ask herself if, as appears to be the case, the service was effective ie. the e-mail was received what difference it would have made if there had been an earlier further attempt to send an email, *a fortiori*, the fact that an earlier email had in fact been sent and ignored.

32 In my judgment, the Master had to consider this factor, and it is difficult to assess from the judgment what her view was and the extent to which she did, in fact, weigh this matter up in to the balance. She stated that the Respondent's evidence was, as she set out, unsatisfactory to some extent, and said that it was not clear what had happened to the email serving proceedings. However, it does seem clear that the email had been sent, it had been received and it had not gone into any spam folder. The Master then said, "I am satisfied to the extent required that it was not that she simply deliberately ignored that email." In my judgment there was no evidence to support that finding. It would have been possible to arrive at a finding that she did ignore her emails because she was not in a fit state, but that is a very different finding and, as I have said, brings into play the requirements under CPR 13 to be considered.

33 I regret to say that in this case it is my view that the Master fell into error. Firstly, in that she failed to take into account the fact that there had been an email sent by these solicitors and ignored when she found, that either an email or a telephone call had been. Secondly, the Master failed to make a satisfactory finding as to what had happened to the email serving proceedings and what the response of the Respondent had been required. The finding that the Respondent did not simply deliberately ignore the email is not one, on the evidence that could have been arrived at. Accordingly, for those reasons, the decision must be set aside.

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