Hardwicke
Building

Service - The new CPR 6

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Written by Steven Weddle & Henry Slack

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Introduction

1. Since the CPR came into effect, problems relating to the service of claim forms have arisen regularly. The new Part 6 rules, though related to service of documents generally is particularly relevant to the service of claim forms and attempts to restructure and simplify this crucial area. With this in mind the Ministry Of Justice's 2007 Consultation Paper, the precursor to the new Part 6 rules, set out to try and address some of the problems which had regularly been encountered with the old Part 6.

2. The Paper sought views on the following:
(1) whether, where a claimant knows that the defendant no longer resides at the last known address, he should be required to make reasonable enquiries as to the current address and consider alternative methods of service;
(2) whether the time limit for serving the claim form should relate to the period within which the claimant must dispatch the claim form (rather than from when service is effected); and
(3) whether there should be a consistent approach to determining the deemed date of service applicable to all methods of service.

3. These key questions were considered on the basis that a claimant who fails to comply with service rules runs particular risks. He may be unable to retrieve his position because he cannot bring himself within the restrictive circumstances in which the period of the validity of the claim form for service may be extended, and relevant limitation periods may have run preventing him from issuing fresh originating process.

4. In its old form, Part 6 was divided into four Sections:

   I. General Rules about Service,
   II. Special Provisions about Service of the Claim Form,
   III. Special Provisions about Service out of the Jurisdiction, and
   IV. Proof of Foreign Service.

5. The new Pt 6 is now divided into five Sections:

   I. Scope of this Part and Interpretation,
   II. Service of the Claim Form in the Jurisdiction,
   III. Service of Documents other than the Claim Form in the Jurisdiction,
   IV. Service of the Claim Form, and Other Documents out of the Jurisdiction, and
   V. Service of Documents from Foreign Courts or Tribunals.

6. The most striking feature of the new Part 6 is the drawing of a clear distinction between service of claim forms and service of other documents. Under the old structure, the general rules about service of documents (in Sect. I) apply to service of claim forms, subject to some special provisions (in Sect. II). Under the new structure, Section II (rr.6.3 to 6.19) contains all of the rules relevant to service of claim forms within the jurisdiction, and Section III (rr.6.20 to 6.29) contains the rules relevant to service of other documents within the jurisdiction.

7. This seminar will deal with the structural and practical changes to the rules for service of claim forms and in particular look at changes in rules as to service of claim forms on individuals, the period of validity of the claim form for service, retrospective effect of the alternative service order and other innovations within the new Part 6.

Structural Changes

8. From a structural point of view, the most important change is the separation into two separate regimes of the rules for the service of claim forms within the jurisdiction (Sect. II of Pt 6) and rules for the service of documents in proceedings (Sect. III of Pt 6). The importance of being clear as to what is meant by "claim form" in this context cannot be stressed too highly. Paragraph (c) of r.6.2 states that, in Part 6:

..."claim" includes petition and any application made before action or to commence proceedings and "claim form", "claimant" and "defendant" are to be construed accordingly"

9. One of the things that may be gleaned from this is that a "claim form" **does not** include particulars of claim where the latter document is not contained in or served with the former. (It follows from this that the deemed day of service of separate particulars of claim is calculated in accordance with r.6.26, not r.6.14.) On the other hand, it would seem that "claim form" does include an application notice for a pre-action remedy to be served before service of the claim form.

10. The main advantage of this is that it enables necessary distinctions to be clearly drawn. The main disadvantage is that there is a degree of duplication with a number of provisions in Section II being repeated with necessary modifications or incorporated by reference in Section III. This separation and subsequent duplication with modification means that there is increased scope for confusion and misunderstanding when serving claim forms or other documents.

Service of Claim Forms on Individuals

11. Historically, throughout the 19th and 20th Centuries, alternatives to personal service of the claim form developed such as the service of statutory notice by

sending it through the post or leaving it for the defendant at his last known place of residence or business.

The provision in Part 6 that has caused the most trouble since the CPR came into effect is para.(6) of r.6.5, address for service. That rule states that;

where (a) no solicitor is acting for the party to be served, and (b) the party has not given an address for service, the document must be "sent or transmitted to, or left at" the place shown in the table following that paragraph.

That provision applies to service of documents generally; but it is its application to service of documents in the form of claim forms that has given rise to problems, especially service on individuals. The problems have arisen largely because of the restrictions imposed by r.7.6(3) on the court's discretion to extend the four month period of initial validity of claim forms for service (fixed by r.7.5(2) on applications made after it has expired.

12. Under the new Part 6, para.(6) of r.6.5 and the table as applied to service of claim forms in the jurisdiction now appears in Sect.II as r.6.9 (a rule bearing the title "Service of the claim form where the defendant does not give an address for service"), and is significantly amended.

In its old form, the table distinguished three categories of individual parties "to be served" and stipulated "place" of service accordingly. Under para.(1) of the new r.6.9, this arrangement is clarified and modified as follows:

Nature of Defendant to be Served	Place of Service
1. Individual	Usual or last known residence
2. Individual being sued in the name of a business	Usual or last known residence of the individual; or Principal or last known place of business
3. Individual being sued in the	Usual or last known residence of the

business name of a Partnership	individual; or Principal or last known place of business of the partnership.

The table also makes special provision (in entry 4) for "place" where the nature of the defendant is a limited liability partnership. The same arrangements for service on company and corporations as found in the existing r.6.5 are also included (in entries 5 to 7).

13. The remaining paragraphs in the new r.6.9 (paras (2) to (5)) mark a significant departure from the old rules, or to be more accurate, from the way in which r.6.5(6) has been applied by the courts. The new rules state as follows:

"(2) 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 (1) is an address at which the defendant no longer resides or carries on business, the claimant must take reasonable steps to discover the address of the defendant's current residence or place of business.
(3) Where, having taken the reasonable steps required by paragraph (2), the claimant—
ascertains the defendant's current address, the claim form must be served at that address; or
is unable to ascertain the defendant's current address, the claimant must consider whether there is-
an alternative place where; or
an alternative method by which,
there is a real prospect of effecting service on the defendant.
(4) If, under paragraph (3)(b), there is such a place where or a method by which service could be effected, the claimant must make an application under rule 6.15.
(5) Only where the claimant—

cannot ascertain the defendant's current residence or place of business;
cannot ascertain an alternative address or an alternative method under paragraph (3)(b); and
(c) the court does not make an order under rule 6.15,
may the claimant serve on the defendant's usual or last known address in accordance with the table in paragraph(1)

The new Part 6, r.6.15 referred to in paras (4) and (5) of new r.6.9 plays a role similar to that previously played by r.6.8 (Service by an alternative method).

14. The purpose behind the new Part 6, r.6.9 is clear when one looks at cases in the White Book where the courts have considered the meaning of "last known" residence or place of business. In *Smith v Hughes*[1], the Court of Appeal said that the old r.6.5(6) was plain and unqualified. Nevertheless the old rules did not make it clear whether service by post to a defendant's last known address at which he no longer resided, and the defendant did not in fact receive the claim, was good service.

15. The imposition of an obligation to make reasonable investigations to find out where the defendant actually resides or carries on business can cause problems for claimants. The extent of the reasonable enquiries that they must make before attempting service is not clear and will vary from case to case depending on the information he has, how old the information is and the identity of the defendant.

16. The new Part 6, r.6.9 indicates that the claimant should be required to carry out reasonable enquiries before serving at the last known address, but only if he has "reason to believe" that the address is no longer the defendant's current

[1] One of the several appeals conjoined and reported under *Cranfield v Bridgegrove Ltd* [2003] EWCA Civ 656; [2003] 1 W.L.R. 2441, CA,

address. Again reasonable enquiries will differ on a case by case basis but the new rules set out in more detail what is required of the claimant and codifies in statute what had been discussed at length in case law.

Deemed day of Service and Period of Validity for the Claim Form

17. Under the old regime CPR r.7.5(2) stated that, as a general rule, a claim form must be served within four months after the date on which it was issued by the court. Rule 6.7(1) stated that a document (including a claim form) served in accordance with the rules as to service shall be deemed to have been served on a particular day after service.

18. Which day depended on the method of service adopted by the serving party. For example, if a claimant served a claim form by sending it by first class post, or by leaving it at a permitted place (e.g. an individual defendant's last known address), then the deemed day of service is respectively, *"the second day after it was posted"*, or *"the day after it was left at the permitted address"*.

19. It follows from this that, if the four month period for service fixed by r.7.5(2) expired on (say) Thursday, June 12 (a date which the claimant's solicitor has carefully noted in his diary), and the claim form was posted to the defendant on Wednesday, June 11 and was received by the defendant the next day, the effect of r.6.7(1) would be to make the deemed date of service Friday, June 13, and the service would be one day out of time (and this would be so despite the fact that the defendant may have actually received the claim form on the Thursday, the day on which the four month period expired). This was confirmed by the Court of Appeal in *Godwin v Swindon Borough Council*[2] *[2001]*.

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[2] *[2001]* EWCA Civ 1478; [2002] W.L.R. 997, CA, a case in which the method of service adopted for service of a claim form was first class post. (In that case the Court proceeded on the basis that the calculation of the deemed day of service, that is to say, of "the second day after it was posted", was affected

20. The calculation of the deemed day of service is important for a number of reasons. It is relevant to establishing whether or not the claimant has served the claim form within the four month period during which it is valid for service fixed by r.7.5(2). If it turns out that it is not served in time then the claimant will be in difficulty because the circumstances under which an application under r.7.6 are restricted and if the relevant limitation has expired before he had a chance to rectify matters he will lose his claim.

21. Under the new Part 6 service of claim forms is set apart from service of other documents. r.6.7 is replaced by r.6.14 for claim forms and r.6.26 for other documents. The former is markedly different to the old r.6.7 and there is fundamental change to the manner in which the four month period of validity of the claim form for service is calculated.

22. Put briefly r.7.5 has been amended so as to provide that the claimant is required not to serve the claim form within four months after the date on which it was issued, but instead to **dispatch** the claim form for service within that period. It reads as follows:

Method of Service	**Step Required**
First class post, document exchange or other service which provides for delivery on the next business day	Posting, leaving with, delivering to or collection by the relevant service provider

by the fact that the second day was a Saturday and the effect of para. (4) of r.2.8 (Time) was to shunt the deemed day forward to the following Monday, the point being that, according to r.2.8(4), where a specified period is five days or less, and includes a Saturday or a Sunday, that day does not count. In the subsequent case of *Anderton v Clwyd County Council (No.2)* [2002] EWCA Civ 933; [2002] 1 W.L.R. 3174, CA, the Court held that r.2.8(4) was not engaged in these circumstances.)

Delivery of the document to or leaving it at the relevant place	Delivering to or leaving the document at the relevant place
Personal service under rule 6.5	Completing the relevant step required by rul 6.5(3)
Fax	Completing the transmission of the fax
Other electronic method	Sending the e-mail or other electronic transmission

The claimant must complete the step required in the table in relation to the particular method of service chosen, before 12.00 midnight on the calendar day four months after the date of the issue of the claim form.

23. The new dispatching for service provides a particular advantage for claimants. The risk that the claimant will fail to comply with r.7.5 because, between the time when he dispatched the claim form for service (e.g. by first class post) and the time when it was deemed served, the time limit expired, is removed. The crucial time is now the "dispatch" date. This follows for all forms of service and provides greater certainty for the claimant.

24. An upshot of the above must be that limitation arguments as put forward in the case of *Cain v Francis [2008]*[3] will be rendered otiose as long as the claimant makes the dispatch step before midnight on the calendar day four months after the date of the issue of the claim form.

Rule 6.15 Alternative Service and Retrospective Effect

25. This rule replaces the old rule 6.8 in relation to claim forms. Service of other documents by an alternative method now comes under rule 6.27, a provision

[3] [2008] EWCA Civ 1451

that incorporates rule 6.15 by reference. Paragraphs (3) & (4) of the new rule follow paragraphs (2) & (3) of the old rules but with some amplification. It is what is now said in paragraphs (1) & (2) in the new rules that has to be particularly noticed. They state 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.
(2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."

Paragraph (1) is the same as paragraph (1) of the old rule 6.8, except that "at an alternative place" is added to "by an alterative method".

26. Paragraph (2) is wholly new. It was inserted in the draft of the new rule at a very late stage. It is just as well that it was because, otherwise, r.6.15 would not have had the effect that the Rule Committee intended it should. It is an inelegant provision (perhaps reflecting the fact that it was drafted in haste.)

27. Its significance is illustrated by *Elmes v Hygrade Food Products plc*[4]. In that case a claimant making a personal injury claim, instead of serving the claim form on the defendant, served it on the defendant's insurers. The Court of Appeal rejected the claimant's submission (made after the time for service had expired) that the court had power to order retrospectively that the erroneous method of service already adopted by the claimant should be allowed to stand as service by an alternative method permitted by the court.

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[4] *[2001] EWCA Civ 121, January 24, 2001, CA, unreported.*

28. Paragraph (2) states that the court may order that *"steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place" is good service.* The clear intention is that the power given to the court by this provision might be used for the purpose of coming to the rescue of a claimant in the same or similar position to the claimant in the *Elmes* case and enable the claimant to avoid/escape the serious consequences that would normally have ensued where there had been mis-service and not only has the period for the service of the claim form fixed by rule 7.5 has run, but also the relevant limitation period has expired.

29. The case of *Nanglegan v Royal Free Hampstead NHS Trust*[5] is a well known case where the Court of Appeal held that the court did not have power to order retrospectively that a claimant's mis-service of his particulars of claim, in the form of service by post on the defendant instead of his nominated solicitor, should stand as permitted alternative service. Rule 6.15 applies to claim forms and not particulars of claim nevertheless as stated earlier rule 6.27 which now refers to particulars of claim incorporates the new rule 6.15 by reference.

30. Rule 6.15 not only appears to allow the court to grant an alternative service order if it appears there is *"good reason"* to do so, but it also allows for the court to make it take effect retrospectively. The power seems to be unfettered at present but one might question where the effect of making an alternative service order retrospectively would allow the claimant relief from a sanction imposed for a procedural failure should that engage the criteria as set out in rule 3.9?

31. The appropriate criteria for the application of the unfettered power is as yet unclear but there is clearly going to be some argument and debate over what that should

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[5] *[2001] EWCA Civ 127; [2002] 1 WLR 1043,CA*

be and how the new rule 6.15 may also trigger considerations/criteria elsewhere within the CPR.

Further Innovations

32. Other further innovations include methods of service which may be used for serving claim forms and/or other documents in proceedings. In particular service by fax or other electronic method (rule 6.20). The other party to be served must express his willingness to be served by such a method. Differences between service by fax on the one hand and service by other means of electronic communication (e-mail) and the circumstances in which such willingness may be implied have been adjusted.

33. The old rules 6PD 3 (2) (a) & (b) set out that a fax number on the writing paper of the legal representative of the party who was to be served, or a fax number, e-mail address or electronic identification set out on a statement of case or a response to a claim filed at court were sufficient written indication for the purpose of the old rule 3.1(1).

34. The new Practice Directions at 4.1(2) indicate the following are sufficient written indications for the purposes of paragraph 4.1(1):

- A fax number set out on the writing paper of the solicitor acting for the party to be served;
- An e-mail address set out on the writing paper of the solicitor acting for the party to be served **but only where it is stated that the e-mail address may be used for service;** or
- A fax number, e-mail address or electronic identification set out on a statement of case or a response to a claim filed with the court.

35. Further changes include any claim by a tenant against a landlord, the claim form may be served at an address given by the landlord under s.48 of the Landlord and Tenant Act 1987 (rule 6.8). The statutory scheme for service on the solicitor for the appropriate authorized Government department in civil proceedings in which the Crown is the defendant is extended to claims for judicial review (rule 6.10).

36. The period within which a claimant serving a claim form must file a certificate of service is extended from within 7 days of service of the claim form to within 21 days of service of the particulars of claim, and the need to file such a certificate is waived if, within that time, all defendants have filed acknowledgments of service (rule 6.17).

Conclusion

37. Last minute activity is made easier.

38. What were potentially fatal errors can now be relieved – but when and why is not yet clear.

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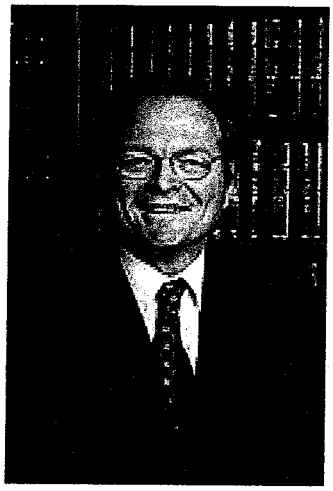

Call : 1977

Qualifications :

BA (Law) Hons
Bar Part II

Professional Associations :
Personal Injury Bar Association

Introduction & Contact Details

A personal injury and clinical negligence practitioner with a practice mainly comprising higher value claims. From 1977 to 1990 he developed a very wide court based practice in personal injury and general tort, crime, contract, family and landlord and tenant. Interesting and varied work with experience in all courts up to, and including, the Court of Appeal giving him an excellent grounding in advocacy, a quality sometimes lacking in dedicated civil practitioners.
Having a sound knowledge of the French language he has been able to undertake work for French clients both in England and France.
He gives regular lectures to both barristers and solicitors on legal and practice topics. In the last year he has talked on Periodical Payments, Motor Claims, Fatal Accidents, Head Injury, Minimising and Maximising Claims, Occupiers Liability, Slippers and Trippers and Accidents at Work.

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Clinical Negligence Law

Cancer diagnosis and treatment, gynaecological problems, general surgery complaints including laparoscopic procedures, orthopaedic surgery, cosmetic surgery and general practice.
Recent cases
Manual manipulation leading to paralysis
Alleged error in stitching after childbirth leading to faecal incontinence – liability disputed
Reported Cases
McBride v Nestle 1997 Kemp I3 – 035 (ankle)
Fuller v Haymills 1997 Kemp I4-016 (ankle, Smith v Manchester award)
Russell v Nathan 1998 Kemp E3 – 027/2 (spinal injury)
Smith v Usherwood The Lawyer March 1999 (leg and psychological)
Puffett v Hayfield C of A Dec 2005
Unreported
Re M, CICB October 2001, Brain injury with secondary injury, award just over £1 million with Court of Protection Costs

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Injury Law

Extensive neurological, orthopaedic and psychological involvement from motor accidents, accidents at work and medical problems. Fatal accidents.
Less usual litigation experience includes
Spectator injury in Ice Hockey cases,
'Consent' in complimentary medicine, particularly acupuncture,
Personal Injury Trusts.
Contributory negligence where the Claimant has Downs Syndrome,
Reflex sympathetic dystrophy or Chronic Regional Pain Syndrome,
Hysterical Conversion Disorder
Failure to have amputation as failure to mitigate
Industrial and nursing sensitisation to chemicals
Salmonella outbreak with over 30 Claimants
Recent cases
Physical and psychological head injury in CICB – just under £1,000,000
Paraplegia settled at £1,000,000
Tetraplegia settled at £1,550,000 with liability disputed
Hip injury requiring replacement – £750,000
Dysexecutive function – recently recovered £450,000
Brain damage settled at £650,000
Brachial plexus lesion - £1,200,000
Bilateral drop foot and brain injury - £1.6 million including periodical payments