In Practice

Service abroad following *Maughan v Wilmot*

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When we need to arrange service of an application abroad, we always take a deep breath; it is normally a difficult and lengthy process which can often be ineffective as the respondent in the foreign jurisdiction has not been located or has not accepted service. Every practitioner knows the importance of effecting proper service of documents. The ramifications of failing to take the correct steps can, unfortunately, be significant. This is particularly the case where time is of the essence and there is an urgent need to secure jurisdiction before the other party can act.

Within our domestic boundaries, service by email is becoming a more common, practical and accepted way of service. Whilst the provisions for service by means such as email are clear insofar as their application within the jurisdiction, there is cause to query the authority for cross-border email service.

In cross-border children matters, we frequently see permission of service by email granted to applicants who seek, for example, an immediate return of a child, or notice of a hearing in this jurisdiction to avoid parallel proceedings. But our colleagues from continental Europe look astonished when they are told that we, solicitors, arrange personal service on the parties. In Civil Code jurisdictions it is the court which arranges personal service on the parties through a judicial agent. An increased use of email by the general public and also in the court system has had the – perhaps unexpected – consequence of complicating matters when it comes to service overseas.

On 21 December 2015 Mr Justice Mostyn handed down a comprehensive judgment on the issue of international service by email. His judgment, later published on 13 January 2016, is clear in its finding that the respondent husband, Mr Richard Wilmot, had been validly served with a financial order by email. Following what appears to be a long-running and demanding litigation process, the husband's desire to receive recompense for all child maintenance he had paid, was dashed. Mr Justice Mostyn had little sympathy with the husband's claim that email service was invalid given the husband's clear reliance on email during the case; 'such protests ring very hollow indeed given his [the husband's] extensive use of that medium in this litigation'. The rationale behind the decision, however, is not so straightforward. Mr Justice Mostyn trod a somewhat difficult path between a simple application of the law and a more purposive interpretation.

Background

The husband is English. At the time of the hearing, he worked as a pilot for Turkish Airlines and, naturally, travelled extensively. He did not have a home in the 'seat' of his work in Istanbul. He generally spent his leisure time between his two properties in Somerset and the Isle of Man, as well as elsewhere. Pinpointing his location for the purposes of service would inevitably present difficulties.

A first instance decision on the husband's child maintenance liability was handed down some 2 years ago, on 27 February 2013, by the then Mr Justice Ryder. The final order included a provision allowing for service by email, and two email addresses were provided. No objections were raised. The issue of service outside the jurisdiction was not mentioned. The husband left court prior to the judgment being handed down, saying he was unwell, but later obtained a copy of the judgment (contained in the order of that day).

Then followed a series of hearings during which the husband made numerous, unsuccessful challenges to the order. No mention was made of the electronic service provision, nor did it feature in the husband's application for permission to appeal the order. The application was dismissed by Lord Justice Ryder on 25 July 2013.

During this time the husband's situation worsened. He fell into arrears with the maintenance payments, the wife's (and presumably his own) legal costs mounted up, and the wife took enforcement action in respect of both the arrears of maintenance and unpaid costs order(s).

The husband, undeterred, argued on 8 July 2015 that the original order of 27 February 2013 was not validly served since it was sent to him by email. This was the first time he had raised this point. He extended this argument to include all other orders served upon him this way, and sought an order that the previous orders be set aside. Consequently, the husband sought repayment of all the child maintenance he so far paid. In addition, he requested recompense for the enforcement action taken against him.

At a hearing in front of Mr Justice Mostyn on 29 September 2015, the husband again challenged the service provision. Despite a formal application to set aside not having been made, Mr Justice Mostyn deemed this to be made and fixed a separate hearing to deal with this particular issue.

Legislation

The court has the power to change previous orders, as confirmed in:

- r 4.1(6) of the Family Procedure Rules 2010 ('FPR'): power to vary or revoke an order; and
- s 31F(6) of the Matrimonial and Family Proceedings Act 1984, as amended: power to vary, suspend, rescind or revive any order.

In terms of electronic service, the current law is clear in so far as its provisions for service within the jurisdiction. As a reminder, the key service provisions are as follows:

- Part 6 of the FPR deals with service generally. Practice Direction 6A allows for electronic service within the jurisdiction so long as the receiving party has indicated a willingness to accept service in this manner.
- In respect of service outside the jurisdiction in countries party to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ('the Hague Service Convention'), documents must be served through the authority designated under the Hague Service Convention in respect of that country. Alternatively, if the law of that country permits, service can be effected either through the judicial authorities of that country or the British Consular authority in that country.

In contrast to the clear authority for electronic service within the jurisdiction, Chapter VI of FPR Part 6 and Practice Direction 6B (which deal with cross-border service) omit to mention the power to serve via electronic means if a receiving party is outside England and Wales.

Turkey is party to the Hague Service Convention. Thus, on the face of it, service would usually be validly effected through the Turkish Central Authority or in such manner permitted by domestic law.

Judgment

Mr Justice Mostyn first explores whether or not it is proper for him to exercise his jurisdiction to set aside an order in the circumstances of this particular case.

His view of the husband's conduct of the litigation is clear. He points out that:

- the husband had 'deluged the wife and the court with much correspondence sent by email';
- the husband's own application, which cited an email address for service, was also served by email;

- in the second form of that application, the previous postal address for service (a solicitor's firm), was removed and the address section was left blank thus the husband accepted that the court was forced to send him documents relating to his application by email;
- during the course of proceedings, the husband had digitally signed an application notice and filed this with the court via email;
- only at a very late stage in the proceedings, some two years after the making of the contested order, did the husband raise the invalid service argument as a fresh issue.

For the above reasons, Mr Justice Mostyn declined to exercise his jurisdiction to set aside the order of 27 February 2013 and any later orders served in this manner. The major flaw in the husband's case was the obvious delay in making this argument, given the number of opportunities he had previously had to raise this point. If he had brought the challenge promptly after the making of the order, having consistently disputed its validity, then the court's exercise of discretion may well have been different. Mr Justice Mostyn was careful to make it clear that any unconscionable behaviour (extending to accepting/complying with an order before challenging it) would not find favour with the court. In rejecting the husband's argument, he simply concludes:

> 'The husband by his conduct has forfeited the right to advance any argument concerning the validity of the orders which have been in place for such a long time.' [para 10]

The remainder of the judgment helpfully deals with the broader issues arising in this case. Mr Justice Mostyn first considered the purpose of the Hague Service Convention and the historical context in which it was made. Essentially, it provided a mechanism for ensuring that documents were brought to the attention of a recipient in adequate time. Email did not exist in 1965 and the most appropriate manner of serving documents was deemed to be through a central authority in each party state, which would be responsible for the physical delivery of documents.

It is assumed, for the purposes of physical delivery, that the recipient would be present in the country of the receiving central authority. As Mr Justice Mostyn explains, this traditional scenario is somewhat outdated due to the invention of portable electronic devices such as smartphones and laptops on which emails can be accessed regardless of where in the world the recipient is at the time.

Applying this to the husband's situation, the position would be straightforward if he accessed his emails whilst in the jurisdiction and 'received' the order this way. Service would have been validly effected under the FPR.

The position is more complicated if he 'received' the order whilst checking his emails overseas or if it was emailed to him whilst he was in England but he did not access his emails during his time there. Since there are no provisions for these two scenarios, case-law comes into play.

Two key civil cases were considered in the judgment, the first being *Bayat Telephone Systems International Inc and Others v Lord Michael Cecil and Others* [2011] EWCA Civ 135. This authority was offered for consideration by counsel for the husband. In this case, there was deliberation on the issue of electronic service on international businessmen whose work dictates that they have homes in different countries. One of the recipient countries in question was the United States (also party to the Hague Service Convention). It was explained that states which are party to the Hague Service Convention have already given their consent to service under the methods set out in the Convention. However, if service is effected via a different method, to which consent may not have been given (in this case, electronic service under the alternative method specified in r 6.15 of the Civil Procedure Rules ('CPR')), it could represent an interference with the sovereignty of that state. This should only be permitted in exceptional circumstances; it

being held that in this case 'there was no good reason for an order granting permission to serve the Defendants by alternative methods'.

The second, more recent, authority is *Abela and Others v Baadarani* [2013] UKSC 44. Mr Justice Mostyn found the reasoning in this case more persuasive. The Supreme Court reminded the parties of the aim of service, namely to alert a recipient to an application and the nature of the case. Applying this simple rationale, it follows that r 6.37(5)(b)(i) of the CPR allows for service to be effected otherwise than in accordance with the law of a foreign country. However, the limits of this decision were made clear. This case involved service in Lebanon which is not a Hague Service Convention party state or one in which a bilateral service convention or treaty with the UK was in place. The Supreme Court did not go as far as to comment on how this decision may affect service in states party to the Hague Service Convention.

The 'back to basics' approach taken in *Abela* is consistent with the purpose of service as stated in the Hague Service Convention, namely 'to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time'. Throughout his judgment, Mr Justice Mostyn described the changing landscape to which service provisions must adapt. He was particularly persuaded by the earlier comments of Court of Appeal judge Lord Sumption in *Abela*:

> 'The adoption in English law of the doctrine of forum non conveniens and the accession by the United Kingdom to a number of conventions regulating the international jurisdiction of national courts, means that in the overwhelming majority of cases where service out is authorised there will have been either a contractual submission to the jurisdiction of the English court or else a substantial connection between the dispute and this country. Moreover, there is now a far greater measure of practical reciprocity than there once was. Litigation between residents of different states is a routine incident of modern commercial life. . . . The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum.'

In support of Mr Justice Mostyn's decision that service on the husband was validly effected by email outside the jurisdiction, he further relied on r 6.1 of the FPR. This states that service must be in accordance with the provisions in Part 6 save where 'the Court directs otherwise' (r 6.1(b)). He warned, however, that this approach is not to be used unless there is a good reason for doing so:

> 'Plainly, if the other country is a Hague Service Convention country (or it there exists a bilateral treaty about service with that country) the court would want to know why the treaty route was not being followed. The normal answer would I expect by delay or inability to pin down the defendant's location. Those would be good reasons.'

Finally, as per Mr Justice Mostyn's 'belt and braces' approach, he reiterated the relevance of the provision set out in Art 5 of the Hague Service Convention. This confirms the power of the central authority to effect service. Importantly, the final sentence of the Article introduces a wider provision that 'the document may always be served by delivery to an addressee who accepts it voluntarily' (so long as the method is compatible with domestic law). Mr Justice Mostyn found that the husband had voluntarily accepted delivery of all relevant documents, and (despite there being sparse evidence of whether email service was permitted by Turkish law), that the domestic law in Turkey would also be likely to permit service by email. Thus, for all the above reasons, he held that the husband's application must fail.

The difficulty with this decision is that we are placing our jurisdiction in a preferential position in comparison with other Member States which do not accept that service by email is valid service. The trend to modernise or update our legal systems is global. There are several jurisdictions that

have a paper-free legal system, such as Brazil. British Columbia has an online family law system. Within our jurisdiction the courts are moving in the same direction. The e-bundle has been piloted in care cases in Newcastle and our President, in different addresses, has expressed his aim to have an electronic system in the near future. It is probably time for the Hague Conference to consider an addendum to the Service Convention or for the European legislator to contemplate the need to update the way we can serve in this e-era.