TO WHAT EXTENT SHOULD LITIGANTS IN PERSON BE TREATED DIFFERENTLY?

- *Re Barton v Wright Hassall LLP [2018] UKSC*

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by

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1. The number of litigants in persons ('LiPs') is increasing, raising a range of issues for the judiciary and practitioners alike. These issues tend to coalesce around the same central question: to what extent should a LiP be treated differently to a represented party?

2. The Supreme Court attempted to answer this question in *Barton v. Wright Hassall LLP* [2018] UKSC 12. This talk considers the background to *Barton*, the decision itself, and its unresolved issues. It also reviews other developments relating to LiPs, and ends with some practical guidance.

BACKGROUND TO *BARTON*

3. A series of Court of Appeal decisions earlier this decade considered the proper approach where a LiP fails to comply with the Rules or Practice Directions.

4. *Tinkler v. Elliot* [2012] EWCA Civ 1289 concerned a LiP who had delayed in applying to set aside a final injunction made in his absence. In finding against the LiP, Maurice Kay LJ stated that:

> "[….] *the fact that a litigant in person 'did not really understand' or 'did not appreciate' the procedural courses open to him for months does not entitle him to extra indulgence.*" [32]

5. *R (Hysaj) v. Secretary of State for the Home Department* [2014] EWCA Civ 1633 was one of three appeals heard together following *Mitchell v. News Group Newspapers Limited* [2013] EWCA Civ 1537 and *Denton v. White* [2014] EWCA Civ 906. Each case saw an extension of time being sought for the filing of a notice of appeal. The Court of Appeal gave general guidance in relation to procedural default by LiPs, with Moore-Bick LJ stating that:

> "*Litigation is inevitably a complex process and it is understandable that those who have no previous experience of it should have difficulty in finding and understanding the rules by which it is governed. The problems facing ordinary litigants are substantial and have been exacerbated by reductions in legal aid.*

Nonetheless, if proceedings are not to become a free-for-all, the court must insist on litigants of all kinds following the rules. In my view, therefore, being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules." [44]

6. Similarly, Briggs LJ commented in *Nata Lee Limited v. Abid* [2014] EWCA Civ 1652:

"*I make it clear at the outset that, in my view, the fact that a party (whether an individual or a corporate body) is not professionally represented is not of itself a reason for the disapplication of rules, orders and directions, or for the disapplication of that part of the overriding objective which now places great value on the requirement that they be obeyed by litigants* […] *There may be cases in which the fact that a party is a litigant in person has some consequence in the determination of applications for relief from sanctions, but this is likely to operate at the margins*." [53]

7. *Stobart Group Limited v. Elliot* [2015] EWCA Civ 449 underlined this position. Reflecting on Moore-Bick LJ's comments on *Hysaj*, Tomlinson LJ at [43] noted that:

"*The tide is flowing strongly* […] *towards a less indulgent approach to non-compliance*."

Facts

8. In 2005, Mr Barton instructed Wright Hassall LLP to sue his former solicitors, Bowen Johnsons for negligence dating back to 1999.

9. Following a dispute about fees, Wright Hassall applied to come off the record. Mr Barton contested Wright Hassall's application but lost with costs against him. His appeal against the costs order was dismissed. In parallel – and as a LiP – Mr Barton settled his claim against Bowen Johnsons.

10. Two claims followed.

11. In the first claim, Wright Hassall successfully recovered their costs of acting for Mr Barton during their period of instruction.

12. The second claim saw Mr Barton allege that Wright Hassall had breached various duties to him in his claim against Bowen Johnsons, both in their conduct of the case and in the timing of their application to come off the record. This second claim was issued on 25 February 2013 – recall that, under CPR 7.5, a Claim Form is valid for four months from the date of issue.

13. Wright Hassall instructed Berrymans Lace Mawer ('BLM') on 26 March 2013. Upon their instruction, BLM e-mailed Mr Barton to ask for all future correspondence to be addressed to them.

14. On 17 April 2013, a solicitor at BLM e-mailed Mr Barton stating (inter alia):

> "*I will await service of the Claim Form and Particulars of Claim."*

15. On 24 June 2013 – i.e.: the last day before the expiry of the Claim Form under CPR 7.5 – Mr Barton e-mailed BLM, purporting to serve his Claim Form and Response Pack.

16. On 4 July 2013, BLM wrote to Mr Barton stating that they had not confirmed that they would accept service by e-mail and, absent the same, e-mail was not a permitted

mode of service. BLM argued that his Claim Form had not been served within time, and that his action was thus time-barred.

Proceedings

17. Mr Barton went before a District Judge. His primary case was that his e-mail of 24 June 2013 complied with the CPR because BLM's prior e-mail correspondence with him amounted to an "*indication*" that BLM would accept service by e-mail. In the alternative, he relied on: (a) CPR 7.6, under which the time for compliance with CPR 7.5 can be extended; and (b) CPR 6.15(2), under which otherwise non-compliant service can be validated.

18. The District Judge dismissed Mr Barton's application on all bases, but allowed him permission to appeal on the question of whether his purported service by e-mail should be validated.

19. HHJ Godsmark QC dismissed the first appeal. He rejected the argument that Mr Barton had been lulled into a false sense of the position by BLM's prior e-mail correspondence, and declined to accept that Mr Barton was entitled to special indulgence as a LiP.

20. The Court of Appeal upheld HHJ Godsmark's order, with Floyd LJ reaching largely the same conclusions as the Circuit Judge.

Supreme Court

21. Mr Barton's appeal was dismissed by a 3 – 2 majority. Lord Sumption gave the lead judgment, with Lord Wilson and Lord Carnwath agreeing. Lord Briggs and Lady Hale dissented.

22. Two aspects of the Supreme Court's decision merit particular attention.

23. Firstly, the Court offered specific guidance on the test for validation under CPR 6.15(2). What constitutes a 'good reason' for validating non-compliant service will turn on the facts, but Lord Sumption suggested that the main factors will be:

(a) Whether the claimant took reasonable steps to serve in accordance with the Rules;

(b) Whether the defendant or his solicitor knew of the contents of the Claim Form when it expired; and

(c) Any prejudice that the defendant would suffer from the validation. [9] – [10]

24. Secondly, Lord Sumption commented generally about non-compliance by LiPs. Citing *Hysaj* and *Nata Lee Limited*, he stated at [18] that:

> "*Their lack of representation will often justify making allowances in case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties* […] *The rules provide a framework within which to balance the interests of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any disadvantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side* […] *Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take*." [Emphasis added]

25. Lord Sumption went on to find that neither CPR 6.3 nor the accompanying Practice Direction 6A were sufficiently 'inaccessible' or 'obscure'. Neither justified Mr Barton's assumption that BLM would accept service by e-mail. Mr Barton made no attempt to serve in accordance with the Rules and BLM had done nothing to suggest that service outside the Rules would be accepted [20] – [22]. Significantly, Lord Sumption added that:

"*Even on the assumption that they* [BLM] *realised that service was invalid in time to warn him to re-serve properly or begin a fresh claim within the limitation period, they were under no duty to give him advice of this kind.*"

26. Lord Sumption also dismissed Mr Barton's submission that the outcome in the lower court was incompatible with his Article 6, ECHR right to a fair trial. Lord Sumption considered that the Rules were sufficiently clear and accessible, served a legitimate purpose, and that it was the Limitation Act 1980 that prevented Mr Barton's claim; not the CPR. A reasonable limitation period did not contravene Article 6 [24] – [25].

27. Lord Briggs's dissent (adopted by Lady Hale) focused on CPR 6.15 rather than the court's general approach to LiPs. He considered that service of the Claim Form had three functions, namely:

    (a) Most important, it was to ensure that the contents of the Claim Form (or other originating document) are brought to the attention of the intended recipient;

    (b) To notify the recipient not merely that a claim had been formulated but that it had formally been commenced on a particular date;

    (c) The specific provisions of Practice Direction 6A concerning service by e-mail provided an additional purpose: to ensure that the recipient or their solicitors could make administrative arrangements for service by e-mail.

28. Lord Briggs considered that where all three of these purposes were fully achieved, there could be a prima facie 'good reason' to validate service under CPR 6.15 [28] – [30]. There would not need to be a further 'good reason' but rather a weighing of all the circumstances to see whether the claimant's culpability should displace the prima facie 'good reason' constituted by achievement of the three purposes. On this analysis, Lord Briggs would have validated Mr Barton's attempt to serve by e-mail [38] – [43].

***BARTON*: UNANSWERED QUESTIONS**

"Particularly inaccessible or obscure"

29. What constitutes a "*particularly inaccessible or obscure*" Rule or Practice Direction?

30. At [19], Lord Sumption at first seems to suggests that the issue is one of literal accessibility:

> "*Mr Barton contends that CPR rule 6.3 and Practice Direction 6A are inaccessible and obscure. I do not accept this. They are accessible on the internet. Part 6 is clearly headed 'Service of Documents'. Electronic service under rule 6.3 is expressly required to be in accordance with Practice Direction 6A, which is prominently flagged in the table of contents.* ".

However, within the same paragraph, he adds that:

> "*The salient facts in his case are that* [Mr Barton] *was by June 2013 an experienced litigant. He knew, as he accepts, about limitation. He knew that not all solicitors accepted service by e-mail."*

31. The extent of the court's enquiry as to 'accessibility' and 'obscurity' is thus unclear. If the enquiry is one *of literal accessibility*, then it is worth noting that <u>all</u> of the Rules and Practice Directions are readily available for free online, along with a wealth of other legal resources. However, if the enquiry is as to a Rule or Practice Direction's *complexity*, then is the provision's complexity to be assessed objectively or subjectively?

32. Two recent decisions highlight these ambiguities.

33. <u>*Reynard v. Fox*</u> [2018] EWHC 443 (Ch) was decided a month or so after <u>*Barton*</u>.

34. Mr Reynard, a bankrupt LiP, sued his trustee-in-bankruptcy, Mr Fox, for breach of contract and negligence. Mr Reynard argued that Mr Fox had failed to properly assess the merits and value of potential claims, and thus failed to take action. However, Mr Reynard had failed to first obtain the court's leave to bring his claim pursuant to section 304 of the Insolvency Act 1986.

35. The High Court considered (inter alia) whether Mr Reynard's claim should be struck out under CPR 3.4(2)(a) on the grounds that Mr Reynard's Claim Form disclosed no reasonable grounds for bringing the claim or under CPR 3.4(2)(b) on the grounds that it was an abuse of process. More pertinently, the Court also considered Mr Reynard's alternative case: that he should be given permission under s. 304, Insolvency Act 1986 if required because to deny him the same would be unjust given his relative ignorance of insolvency law.

36. With reference to *Barton*, HHJ Matthews rejected this alternative case. He considered that section 304 of the Insolvency Act 1986 was neither 'inaccessible' nor 'obscure' - but did not elaborate on how either attribute was to be assessed [45]. HHJ Matthews did, though add that:

> "*In any event, from the way in which the claimant has written in his letters and pleadings about this case, and the way in which he addressed me at the hearings, it is clear that he is an intelligent and articulate litigant, who has learned a great deal about insolvency law in particular and civil law and procedure in general since he has had the misfortune to be adjudicated bankrupt*." [45]

37. Mr Reynard attempted to revive his application for permission under s. 304 several months later, in August 2018. HHJ Matthews dealt with that application on paper: [2018] EWHC 2141 (Ch). It emerged that, following HHJ Matthews's earlier judgment, Mr Reynard had written to the court, downplaying his intellect and knowledge of insolvency law and procedure, and noting that insolvency work was generally regarded as specialist. Reflecting on said letter, HHJ Matthews stated:

> "*I accept that* [Mr Reynard] *is not a lawyer, and certainly not an insolvency specialist, but do not accept that he is unintelligent or unable to explain himself to the court, and I see no reason why special indulgence needs to be given to him if he chooses to act in person*." [23]

38. Must a LiP be "*unintelligent or unable to explain himself in court*" in order to benefit from a special indulgence? If that is the general threshold post-*Barton,* then it raises some difficult questions:

(a) How can the court safely assess the LiP's 'intelligence'?

(b) How does 'intelligence' rank alongside litigation experience in the court's assessment of overall competence?

(c) Must the court also assess the 'intelligence' and/or litigation experience of any relevant McKenzie Friend?

(d) Do such enquiries incentivise LiPs to downplay their intellect and/or eloquence (as was implicitly the case in *Reynard* itself)?

(e) Where there are LiPs on opposing sides, can the court give each a different degree of indulgence?

39. *Reynard* is to be contrasted with the markedly more generous approach to LiPs adopted by the Intellectual Property and Enterprise Court in *Country Cars of Bristol Limited v. County Cars (SW) Limited and anor* [2018] EWHC 839 (IPEC).

40. In *Country Cars*, the Defendant LiPs failed to file their Acknowledgments of Service and Defences when they served them. Accordingly, they sought (inter alia) relief from sanctions under CPR 3.9.

41. Under the second *Denton* principle, the Defendants submitted that, as LiPs, they had done what they believed to have been required – namely, serving the Acknowledgment of Service and Defence. At [10], HHJ Hacon accepted that this was a sufficiently 'good reason' for the breach, commenting that:

> "*I can see that it is possible that litigants in person might think that the important thing was to serve that document on the claimants, as opposed to filing it with the court, and they only realised their mistake when new solicitors were instructed* […]"

The Judge made no comments as to the 'accessibility' or 'obscurity' of the relevant Rules, nor the legal knowledge and/or apparent intelligence of the individual LiPs.

Default by LiPs: where are we now?

42. In short: not much further forward.

43. This writer views *Barton* as a largely unhelpful decision. The Supreme Court's guidance adds little to the Court of Appeal's approach to default by LiPs. Regrettably, what little the Supreme Court *has* added seems only to have muddied the waters.

44. Lord Sumption agreed with Lord Briggs that the Rules Committee should review the issues raised by Mr Barton's appeal – "*if only because litigants in person are more likely to read the Rules than the judgments of this court*" [25]. If inconsistent decisions like *Reynard* and *Country Cars* become the norm, then it might prove difficult for the Committee to ignore calls for reform.

OTHER DEVELOPMENTS

CPR 3.1A(5)

45. Since October 2015, the courts have empowered under CPR 3.1A to adopt such procedures in the giving of case management directions as they consider appropriate in any case involving a LiP.

46. CPR 3.1A was not a specific topic in *Barton*, but its interplay with the court's general approach to LiPs was alluded to by Lord Sumption at [18]:

> "*Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court*."

47. One such 'allowance' is specifically provided for by CPR 3.1A(5): where the court takes evidence, it may:

    (a) Ascertain from the unrepresented party the matters about which a witness may be able to give evidence or on which the witness ought to be cross-examined; and
    (b) Put, or cause to be put, to the witness such questions as may appear to be proper.

48. *LXA and anor v. Willcox [2018] EWHC 2256 (QB)* concerned the applicability of these measures when a LiP is absent from a hearing. The Claimants had sued their adoptive

parents (the Defendants) for personal injury and other losses said to arise from sexual abuse during childhood. The Second Defendant was the personal representative of the late First Defendant's estate. The Second Defendant did not attend trial but did request that the court take account of her written evidence.

49. HHJ Robinson considered that, although CPR 3.1A(5) probably envisaged the LiP being present, it was engaged even in their absence if merited by the Overriding Objective [14]. He then went on to summarise more generally the delicate balance for the courts to strike when exercising these inquisitorial powers:

> "*The Judge must be astute to avoid descending into the forensic arena in such manner or to such an extent that it might appear that he has abandoned his role as an impartial arbiter. On the other hand, in seeking to put points to the Claimants and their witnesses the matters properly raised by the unrepresented absent Defendants, there is little point in doing so in such a manner that the exercise is of little or no forensic value*." [15]

Joint guidance

50. In June 2015, the Bar Council, the Law Society, and the Chartered Institute of Legal Executives published *Litigants in Person: Guidelines for Lawyers*.

51. Although little in the document is revelatory, it does contain seem useful pointers:

(a) Lawyers are reminded of their primary duty to the court and are warned not to take unfair advantage of LiPs;

(b) Lawyers should adopt a professional, co-operative and courteous approach at all times. Jargon is to be avoided – or at least, clearly explained;

(c) A represented party may be required to assist the court and the opponent in ways not ordinarily required where both sides are represented – e.g.: in the preparation of bundles;

(d) Unless ordered to do so, an opposing lawyer should not assist a LiP if doing so incurs a cost to his client that the client is unwilling to meet. Where the court

does make such an order, and the lawyer considers that the order places him in avoidable conflict with his duty to his client, the court should be alerted to the same. The court may then reconsider and/or make an interim costs order;

(e) When dealing with McKenzie Friends, remember that:

(i) It is generally not for the LiP to justify his general right to assistance from a McKenzie Friend, but for the court or objecting party to explain why the McKenzie Friend should not be excluded;

(ii) The onus is reversed where the McKenzie Friend's right of audience or conduct of litigation is in issue. In those cases, the LiP must show that it is in the interests of justice for a lay person to address the court on his behalf;

(iii) An opposing lawyer may raise concerns about the commercial relationship between the LiP and the proposed McKenzie Friend – especially where the latter's fees equal or exceed those that a lawyer would charge for equivalent services.

22 October 2018[1]

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