



Neutral Citation Number: [2022] EWHC 982 (TCC)

Case No: HT-2020-000201

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

7 Rolls Building
Fetter Lane, London

Date: 1 April 2022

Start Time: 14.45 Finish Time: 15.14

Before:

MR JUSTICE WAKSMAN

Between:

SIR ROBERT McALPINE LTD

Claimant

- and -

RICHARDSON ROOFING CO LTD

Defendant

BEN SAREEN (instructed by **Macfarlanes Solicitors**) for the **Claimant**
LOUIS BROWNE QC (instructed by **Manleys Solicitors**) for the **Defendant**

APPROVED JUDGMENT

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MR JUSTICE WAKSMAN:

1. I have to deal today with a short point as to whether the claimant, Sir Robert McAlpine Ltd (SRM) has validly served its particulars of claim on the defendant Richardson Roofing Co Ltd (Richardson) by 5.00 p.m. on 18 March 2022. This was the date ordered by O’Farrell J on 10 November 2021 following two lengthy stays of these proceedings which had been commenced on 2 June 2020.
2. The broad reason for the stays was because the essence of the claim against Richardson was that it was in breach of what I can simply refer to at this stage as a “cladding sub-contract” made in a contract by way of deed on 6 May 2008 in relation to a major 18-storey mixed-use retail and leisure development at Cabot Circus in Bristol. The design and construction work for the cladding was carried out by Richardson between about 29 June and 27 September 2008. Following the Grenfell tragedy on 14 June 2017, the main contractor for the development (BALP) intimated a claim against SRM and, without prejudice to that, instructed SRM to effectively reclad the relevant parts of the development. Those works (which involved I think a different subcontractor) started on 24 August 2020 and are due to end in September 2022. The present proceedings seek to pass on to Richardson the claim intimated by BALP against SRM.
3. There was I think a delay in SRM receiving the necessary information from BALP to enable it in its judgment to formulate a sufficient particulars of claim. In her order of 10 November which was made in response to, I think, the fourth application for a stay, O’Farrell J - having noted that this was a case where a claim was sought to be passed on - said the defendant was entitled to expect the claimant to identify as quickly as reasonably practical the nature of the basis of the claim so the defendant can understand it and understand the case against it. And when she made her order, she was then giving a little over four months for the claimant to carry out further investigations and provide a properly pleaded case.
4. In the meantime, on 23 June 2020 (which was after the claim had been issued but before the claim form had been served), Richardson’s present solicitors, Manleys, sent in a notice of change of legal representative. This is a formal court form N434, and it contains a box at the top identifying the parties and the claim number, and there are various boxes which are either ticked and filled in, or not. Halfway down it says this: “Address to which documents about this claim should be sent...” There is then a box on the left which is not shaded which gives the postal address of the solicitors, and on the right-hand side under the words “If applicable, telephone number, fax number, DX number N/A, your reference.”
5. Let me just dispose of the DX point. Mr Sareen at one stage said that the reason why that was said to be “N/A” was because the solicitors were expressly not willing to accept service by DX. I thought that was a little unlikely, and THE more likely explanation, these days, was that they did not have DX. That has been confirmed by Mr Browne, and I see no reason not to accept what he says.
6. Underneath all of that in a separate box is a shaded area “email”, and then the email address of the solicitors mark.manley@manleys.law is given. Then it is signed and dated in the usual way.

7. In many respects, that is a very similar form, in terms of the way in which the contents are set out, to the acknowledgment of service form, although in terms of its function it is, in my judgment, far from identical. But I will come to that a little later.
8. Slightly earlier, on 18 June, by which point neither the claim form nor the particulars of claim had been served, the first stay application to the court was made by SRM. It was provided to Manleys by email only. That application had followed an earlier notice from Manleys. Having discovered the existence of the claim form, which had not yet been served on them, and as they were entitled to do under the rules, they gave a seven-day notice that the proceedings should be served upon them. So that is what crystallised the stay applicaiton.
9. Following the making of the stay application, and on 9 July, SRM's solicitors wrote to the court in a form which had been specifically approved by Manleys, including expressly the wording of paragraph 2. That letter stated at paragraph 2: "On 18 June by way of a letter from Macfarlanes to Manleys, SRM served the stay application on the defendant", and then it recited the chronology and enclosed a consent order which was subsequently approved by Stuart-Smith J (as he then was) which also included provision for the service of the claim form within seven days. The claim form itself was sent by email without objection at that stage. That fact is not relied upon as such by Mr Sareen for today's purposes.
10. Mr Browne says that if a point was to be taken on jurisdiction, it did not have to be taken then. It only needed to be taken when the time came for an acknowledgment of service which would be following service of the separate particulars of claim. As a matter of technical procedure, that is right, but I do not need to say anything more about the failure to take a point, as it were, at the moment.
11. What then happened was that very shortly before the expiry of the time stipulated by O'Farrell J, I think at about 4.19pm on 18 March, the particulars of claim were sent, again solely by email, to Manleys. They should have also sent at the same time a response pack pursuant to CPR 7.8, but those documents did not accompany the particulars of claim at that stage. For today's purposes, no point is taken on that latter point as such.
12. But Manleys did take the point - attractive or otherwise - that this was not proper service because, while it was by email, it did not comply with the requirements of Practice Direction 6A (to which I will turn in a moment).
13. That was a point that was not accepted by Macfarlanes (the SRM's solicitors). But without prejudice to that position, a week later, on 25 March a further copy of the particulars of claim with a response pack was, on any view, served on Manleys by a hand delivery.
14. As this argument developed, SRM then on 28 February applied for an order for directions in the following form, which was to say that the court should declare that the service alleged to have taken place on 18 March was a valid service or, in the alternative, there should be an extension of time so as to encompass the effective service on 25 March. I am only dealing with the first of those points today.
15. If we then go to Practice Direction 6A at 4.1, it says this:

“Subject to the provisions of rule 6.23(5) and (6), where a document is to be served by fax or other electronic means –

(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; and

(b) the fax number, email address or other electronic identification to which it must be sent.”

And then subparagraph 2 says:

“The following are to be taken as sufficient written indications for the purposes of paragraph 4.1(1) –

(a) a fax number set out on the writing paper...”

and that does not apply,

“(b) an email 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 email address may be used for service; or...”

which is relevant for today’s purposes

“(c) a fax number, email address or electronic identification set out on a statement of case or a response to a claim filed with the court.”

16. The two points which are taken by SRM today are that first of all there was a previous indication in writing; and second, if that is wrong, then the notice of acting which had on it an email address was a response to the claim for the purpose of 4.1(2)(c). I will deal with each of those in turn.
17. First of all, it is plain from the brief history I have recited there is no explicit indication in writing that Manleys would accept service by email. Simply putting the address in the notice of acting without more is not, in my judgment, such an indication.
18. I pause there to explain that the background here has got to be this. In relation to all provisions in respect of service whether of the claim form or of other documents, it is in my judgment vital that the rules are understood to be clear and to be certain. The reason for that is obvious. An awful lot can hang on whether there has been effective service or not. Indeed, this may be such a case.
19. Secondly, it is said by SRM that as an alternative to or in addition to the notice of acting, the fact that the letter of 9 July said that the notice of the stay application made on 18 June had been “served” - which inferentially, with knowledge of what happened on that occasion, shows that what they were saying was that they regarded the service by email on that occasion as being sufficient - is also an indication in writing.

20. I understand Mr Sareen's point, but the wording is "an indication in writing". It does not say "a statement in writing", and it does not provide any particular form for the indication. But that does not, in my judgment, mean that the indication should not be explicit and clear in terms of what has to be stated, namely that they will accept service by email. Otherwise, what is going to happen? As has already happened here to an extent, one starts to ferret around the correspondence for other documents to try and discern a sufficient indication. That is not how service rules or practice directions, in my judgment, should be dealt with, however unattractive technical points about them sometimes are. What one needs to know clearly and in advance is what is going to constitute as proper service or not.
21. Mr Sareen makes the point that because of the formality that attaches to the notice of acting and its similarity - at least in form - to an acknowledgment of service, as it were, this is a document to which the court should pay particular attention in trying to ascertain whether there has been an indication in writing.
22. I am afraid I do not see that. It is perfectly true that it is a court form and that it contains an email address, but it contains a fax number and telephone number as well, and one cannot really read into that any more than these are the totality of the contact details for the solicitor. After all, the point in relation to this document is not about service. It is about who the solicitor is and how the other side can contact that solicitor, and how the court can contact the solicitor. Of course, it is a very formal document, but that is because solicitors have to be on the record and that has to be formally notified, and that is why there is a special form. The wording at the top "Address to which documents about this claim should be sent..." says very little; because if one goes to the immediate box underneath, there is an address there and there was a postal address there, as well as a telephone number. The fact that the email address is there does not mean that it is a substitute for the postal address. One simply cannot read anything into it at all.
23. As for the reference to the notice to stay being recognised as having been served, as I said, that is actually something one cannot infer until one delves into the documents and finds out how the draft was treated and how something was served by email. Again, that is not the sort of exercise, in my judgment, that one should engage in when trying to work out whether there is an indication in writing. After all, as Mr Browne says, the answer is very simple. What needs to be done in good time before the service deadline - and in this case there was ample time - is to write to the other party and say whether they accept service by email or not. So it is not an unduly onerous requirement.
24. Now in this regard, I was referred to the judgment of Calver J in *Ipsium v Lyall* [2020] EWHC 3508. It is fair to say that at paragraph 15 he was really dealing with an estoppel argument, but it did arise in circumstances where there had been an earlier application which had been sent by email and had been accepted in the usual way, and that was the background to the argument that service by email in relation to the defence should have been by email. Nonetheless, although he was dealing with an estoppel argument which is not being made here, it is important to recognise that he thought it was very clear that there was no unequivocal representation that service by email would be accepted.
25. I am not going to put a gloss on the word "indicate", except that it seems to me - as I have already indicated - it should be explicit and it should be clear.

26. One then comes to Mr Sareen's argument. Before actually relying on 4.1(2), he said that the fact that the court should take a broad interpretation of "indicate" is to some extent supported by what it then expressly says will count as an indication which is given in sub-paragraph 2. In other words, the argument is that if one takes the example of email, since it is said that if an email address is set out on the writing paper of the solicitor where the writing paper itself says that the email address may be used for service, or a response to the claim is made by email, both of these circumstances constitute an indication in writing, that somehow indicates that these are simply examples and there could be other examples as well. However, that rather begs the question as to what is an example of the relevant indication. 4.1(2)(b) certainly does not help, because it is a case where all it is saying is that if the solicitors' ordinary stationary says that the email address may be used for service, there does not then need to be a specific indication from the solicitor that in relation to this case the documents can be accepted by email. Well, that is hardly surprising. But I think one needs to put that there for the avoidance of doubt because it is simply what is on the stationary. In the case of 4.1(2)(c), that begs the question as to what "a response to a claim" means, and I will come to that shortly.
27. Mr Browne made the additional point that in relation to the notice of acting if the party should be taken to be saying that by putting the email address, if it is going to be service by email, then the email should be in the general "address" box. I do not think there is anything in that. As I have indicated, you cannot really read anything from the address details so far as that document is concerned.
28. I do think there is a point of importance which Mr Browne makes which is that on the basis that if you find an indication in writing of accepting service by email, and one interprets that broadly so that these sorts of documents provide that acceptance which would then have to be for all purposes in the litigation, that is of potentially very wide-ranging impact, and it is another reason why one has to look at the expression "indicate in writing" in a sensible and confined way.
29. So in my judgment, it is plain that there has not been an indication in writing within the meaning of 4.1.
30. One then turns to 4.1(2)(c), and the short submission here is that notice of acting is a response to a claim filed with the court. Again, in my judgment, that is not to be taken as an invitation to effectively try to find anything that is sent in respect of a claim, because otherwise again one may be scrabbling around for relevant documents. In my judgment, the point is clear. There is a reference there to "response", and CPR 7.8 refers to a "response pack" which includes a form for defending the claim, a form for admitting the claim and a form acknowledging service. They are responsive documents to a claim. Those are clear and certain.
31. It is not to the point, as Mr Sareen has submitted, that because of the similarity in form between a notice of acting and an acknowledgment of service, effectively if it is good enough for the acknowledgment of service, it is good enough for the notice of acting. I do not agree. Their functions are entirely different, even though the information that is provided therein may be similar, and that is because the acknowledgment of service is a very important procedural step which a defendant at the proper time must take. In fact, of course, it goes further than having address provisions, because that is the time when one has to see whether the defendant accepts jurisdiction or not, and so on. So the mere fact that the form is the same does not take one very far.

32. Of course, it can be said in a broad form that the notice of acting here is a response to the claim. It is not a direct response. In fact, the direct response - if anything - was the application made by the defendant for the claimants to serve the claim form. That was their immediate response to it. But as I say, the only way of looking at that sensibly is to confine it to the response pack. That seems to me to be obvious.
33. If one interprets those parts of the practice direction in that way, then everybody knows where they stand, and the rules will tell them, and they will be aware of the circumstances where the court will treat them as having indicated a willingness to accept service where they have not done so expressly for the first part of the practice direction.
34. Now as I say, it may be thought that the position of the defendants in relation to service - having in fact accepted service of the claim form by email and having in fact known perfectly well what the particulars of claim are because they got them in any event on 18 March, and at least by a method which they had deemed sufficient before - is technical and unattractive. So it may be. The realities of the situation may be relevant for any other applications hereafter. But at this stage, I am simply dealing with the compliance, or otherwise, with Practice Direction 6A. For those reasons, I find that there was no compliance, and therefore there has been no valid service by reference to that practice direction.

This Judgment has been approved by Waksman J.