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Is The High Court On Facebook?

This article examines the English High Court's recent foray into the world of social media and considers the potential impact of social media on court procedure and litigation strategy.

The English High Court has recently allowed a commercial claim to be served on a defendant via Facebook and in the process has demonstrated that even the senior courts are willing to take advantage of the offerings of modern technology. Although serving via Facebook is not a novel concept for the English legal system (Hastings County Court allowed service of a document via Facebook in 2011), such a method has never previously been sanctioned by the High Court.

In the case in question ((1) *Ako Capital LLP* (2) *Ako Master Fund Limited v TFS Derivatives Limited*), two investment management organisations brought a claim against their broker, TFS Derivatives, in order to recover allegedly overcharged commissions, which they claimed arose out of the deceitful actions of one of TFS Derivatives' employees. TFS Derivatives then applied to have one of its employees, Mr. Fabio de Baise, added as a defendant to the proceedings. As it was unclear whether Mr de Baise was still at his last known address, TFS Derivatives sought permission to serve the Part 20 claim upon him via Facebook as well as at his last known address. Before granting permission, the Court sought assurances that (a) the relevant Facebook account belonged to Mr de Baise and (b) Mr de Baise habitually checked the account. Evidence was given that Mr de Baise was friends with TFS Derivatives colleagues on Facebook who had seen that Mr de Baise had recently accepted some "friend requests". The Court accepted that this provided sufficient evidence that the account both belonged to, and was habitually checked by, Mr de Baise, and as a result, ordered that service could take place via Facebook by the relevant documents being sent as .pdf attachments to a message to Mr de Baise's Facebook account. Service was deemed to have occurred 14 days after the message was sent.

Whilst this was the English High Court's first order allowing service via Facebook, it was not its first brush with social media. In 2009 the High Court granted an order for service of an injunction using Twitter. In this instance, a claimant with a blog called "Blaney's Blarney" was being impersonated on Twitter

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by a user calling themselves “@BlaneysBlarney”. This Twitter accounts holder used a photograph of the claimant and also included a link to the “Blaney’s Blarney” blog. The claimant sought an injunction against the Twitter user requiring them to cease impersonating the claimant, preserve their account and password and to identify themselves to the claimant’s solicitor. It was because the defendant was anonymous and there was no easy means of identifying them, that the High Court judge allowed service via Twitter, i.e. a Twitter direct message was sent which contained a link to a website which contained the full injunction Order.

The “Blaney’s Blarney” matter represents social media being used as a tool for efficiency in the English court system. Prior to this case, the normal procedure for injuncting an anonymous Internet user was more timely and expensive; an application would have to have been made for a Norwich Pharmacal order to be issued against the relevant website, in this case Twitter. Such an order would have required the website to identify the anonymous user, and the claimant would then be able to instigate proceedings against that person.

Of course, Norwich Pharmacal orders remain relevant even in instances such as these where the respondent is anonymous. For example, if the anonymous user in the “Blaney’s Blarney”’s case had not complied with the terms of the injunction, the claimant could seek a Norwich Pharmacal order against Twitter to identify the user (so that claims could be made against them directly), and to obtain evidence as to whether the user received and opened the original Order (so that contempt proceedings could be launched if necessary).

Although courts in other jurisdictions, such as Australia and New Zealand, have been making meaningful use of the efficiencies that social media allows, it has taken the English courts a little longer to catch up. Regardless, it is now clear that even senior English Courts are willing to make use of social media where necessary.

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