

Whether service of a claim form is a ‘reserved legal activity,’ whether that impacts the validity of service (Ndole Assets v Designer M&E Services UK)

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Dispute Resolution analysis: The Court of Appeal recently considered two thorny issues that arose in relatively unusual circumstances. A claimant in litigation worked with a claims consultant, and that consultant purported to serve proceedings on the defendant. The claims consultant was not a firm of solicitors. The Court of Appeal concluded that the claims consultant had thus been engaged in a ‘reserved legal activity’ under the Legal Services Act 2007 that could only be performed by an authorised person (ie a solicitor) or an exempt person (ie a litigant in person). As a result, in serving proceedings, the claims consultant had likely committed an offence. But, taking a merits-based approach, and in the circumstances, the court did not consider that ‘irregularity’ rendered the service of proceedings invalid. Written by Oliver Browne, partner and chair of the London Litigation & Trial Department at Latham & Watkins.

Ndole Assets Ltd v Designer M&E Services UK Ltd [\[2018\] EWCA Civ 2865](#)

What are the practical implications of this case?

This case is a good reminder that the [Legal Services Act 2007 \(LSA 2007\)](#) prohibits the conduct of litigation, a ‘reserved legal activity,’ unless you are an authorised person—a solicitor for example—or exempt from the prohibition—by virtue of being a litigant in person. The Court of Appeal construed the ‘conduct of litigation’ very broadly. As a result, ensure that anyone involved in the conduct of litigation—up to and including those acting on your behalf in serving proceedings—is authorised.

However, the court took a pragmatic approach to the consequences of the issues with service. In doing so, the court was clearly concerned about the potential repercussions of its decision. The court explained that the case ‘highlights the possibility of two extreme positions—neither of which...can be correct’:

‘(1) It surely cannot be correct that no statutorily unauthorised person can assist at all in the performance of a reserved legal activity. Thus if, as the judge found, service of a claim form was a reserved legal activity it would be an unacceptable absurdity that a person such as a process server (or, indeed, a courier or Royal Mail employee) could not lawfully engage in the performance of an activity such as delivering the claim form.

(2) Conversely, it surely cannot be correct that anyone could undertake a reserved legal activity simply by reason of being an agent of a litigant in person. If that were right, then prohibition of all six of the reserved legal activities set out in the 2007 Act could potentially be circumvented simply on the footing that the person in question (albeit otherwise having no authorisation or exemption under the terms of the 2007 Act) was acting as the agent of the litigant in person.’

The solution in this case was that although an unauthorised person may have committed an offence by assisting in the performance of a reserved legal activity, that would not render service a nullity:

‘To set aside the service would be to confer an uncovenanted advantage on the defendant in circumstances of (in the present case) adventitious technicality.’

What was the background?

Sheldon Construction SRVC (London) Limited (Sheldon) was engaged as main contractor for the design and construction of a mixed residential and commercial development in Hackney. Sheldon engaged Designer M&E Services UK (Designer Services) to design, supply and install the mechanical and electrical elements of the development. Disputes arose and were submitted to adjudication. After the adjudication, a series of transactions took place which vested Sheldon’s cause of action against Services in Ndole Assets Ltd (Ndole Assets).

Ndole Assets, as assignee, issued proceedings in the High Court, in the Technology and Construction Court, claiming payment of sums said to be due from Designer Services for repudiation of the subcontract and/or damages for breach of contract. Ndole Assets explained to the court that it would effect service itself. Following issuance of the proceedings, a company called CSD Legal Limited (CSD) wrote to Designer Services, explaining that it acted for Ndole Assets, and enclosing draft Particulars of Claim plus supporting documents.

As the court explained: ‘CSD are not solicitors. They are what are sometimes called claims consultants. They specialise in the field of construction disputes.’ The sole director of CSD was Mr Alexander Dain who

explained in a witness statement that 'CSD is not a firm of solicitors and has never held itself out as a firm of solicitors.'

CSD ultimately purported to effect service by way of a letter (sent by courier) to Designer Services at its registered office (copied to Clarke Willmott LLP, Services' solicitors, who had at that point in time not confirmed that they were authorised to accept service). The letter stated: 'Enclosed by way of service on you are the following documents in the above proceedings....' Those documents were the sealed Claim Form, the Particulars of Claim and supporting documents. Subsequently, once Clarke Willmott confirmed that they would accept service, and out of an apparent abundance of caution, CSD sent a further copy of the Claim Form and Particulars of Claim by way of service to them directly.

When Clarke Willmott filed Designer Services' Acknowledgment of Service, they indicated that Designer Services intended to contest jurisdiction and, for the first time, argued that the conduct of litigation was a reserved legal activity and accordingly enquired as to how CSD considered themselves entitled to carry on that activity. That issue became the subject of the Court of Appeal's judgment, following a decision of Coulson J (who found that service was lawful and refused to strike out the proceedings).

What did the court decide?

As explained above, there were two key issues before the court.

First was ascertaining whether service of proceedings constituted a 'reserved legal activity' under the [LSA 2007](#). Answering that question required the court to consider precisely what was intended by the relevant legislation. The court was clear that the purpose of the legislative restrictions were to impose effective control on rights of audience and conduct of litigation (with a permitted exception being to enable a litigant to appear in person). Having reviewed the relevant legislation, the court concluded that service of proceedings indeed constituted the conduct of litigation: a reserved legal activity that can only be performed by a statutorily authorised person or by an exempt person. That did not happen in this case: proceedings were served by a claims consultant that was neither authorised nor exempt.

The court then had to consider the effect of its findings on service. The court was clearly influenced by the facts that the claimant here, and the claims consultant, acted in good faith and believed that what they were doing was not unlawful and that the defendant and its solicitors had received the relevant proceedings. The court concluded that although an offence may have been committed under the [LSA 2007](#) and although service of proceedings had been irregular, service was still effective:

'In my view, nullity is not to be taken as the statutorily intended consequence...there is no reason why so draconian a consequence should be intended to be visited on the client or principal, who ordinarily will have been entirely ignorant of the point...It follows that service in this present case is to be taken as valid unless the court were to decide to set it aside. I can see no reason whatsoever for so ordering. To do so could appeal to no sense of the merits.'

Case details

- Court: Court of Appeal, Civil Division
- Judge: Davis, McCombe and Peter Jackson LJJ
- Date of judgment: 21/12/2018

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