THE COUNTY COURT AT WINCHESTER

Claim No: C10YJ382

The Law Courts
Winchester
Hampshire
SO21 9EL

Friday 3rd March 2017

BEFORE:

RECORDER DAVIDSON

NICHOLAS BATT

CLAIMANT

-v-

LEE ENGLISH

DEFENDANT

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JUDGMENT

(Approved)

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Friday 3rd March 2017

RECORDER DAVIDSON:

1. This is an appeal from a decision of Deputy District Judge Smith made on 9th November 2016 at the Salisbury County Court. The matters before her all related to service of the claim form. It was served by letter dated 11th May 2016 on DAC Beechcroft Claims Limited, whom I refer to as "DAC", who were acting for the defendant.

2. The narrative of relevant events is as follows: Mr Batt, the claimant, was injured in an accident that occurred on 15th January 2013. It was a somewhat unusual road traffic accident, the facts of which are not of any immediate relevance. Aviva Insurance Services, whom I refer to as "Aviva", were the defendant's insurer at the relevant time and they instructed DAC.

3. On 30th October 2013 DAC wrote to the claimant's then solicitors as follows, and it is important that I read out in full both the heading and the first paragraph of that letter:

> *"Dear Sirs,*
>
> *Our Client Lee English – Your Client Mr Nicholas James Batt*
> *Date of Incident: 15 January 2013*
>
> *We are instructed by Aviva Insurance Limited to act on behalf of the defendant."*

Throughout the correspondence which followed DAC consistently referred to their client as being Mr English.

4. By letter dated 6th May 2015 they wrote in these terms, and, again, it is important that I read out the whole of the letter:

> *"Dear Sirs,*
>
> *Out Client Lee English – Your Client Mr Nicholas James Batt*
> *Date of Incident: 15 January 2013*
>
> *We refer to the above matter. Liability for the accident is disputed and your client is put to proof as to how this accident occurred.*
>
> *We are instructed to accept service of proceedings on behalf of Aviva Insurance Limited. Please quote the above reference.*
>
> *Yours faithfully."*

5. Proceedings were issued on 17th January 2016 and served upon DAC by letter dated 11th May 2016. By now, it was Richard Griffiths & Co of Salisbury who were acting for the claimant in place of Lester Aldridge.

6. After service took place on them, DAC took the point that their letter of 6th May 2015 had stated that they were only instructed to accept on behalf of the insurer. They said this:

> *"We refer to the above matter and your letter dated 11th May 2016. We are not instructed to accept service of court proceedings on behalf of Mr Batt. Our instructions..."*

I interpose that that is a typographical error. They meant Mr English.

> *"...relate to Aviva Insurance Limited, which is clearly confirmed in our letter to your predecessors."*

I interpose that that is a reference to the letter of 6th May 2015.

> *"We enclose acknowledge of service confirming that we dispute jurisdiction. Our application to strike out will follow very shortly."*

7. As the letter stated, the acknowledgement of service was, indeed, filed disputing jurisdiction, and on 2nd June 216 DAC issued an application notice seeking the following relief:

> *"The claimant's claim be struck out because the claim form and particular of claim were not correctly served pursuant to CPR 6.7 in that the claimant was not in receipt of the written notification that DAC Beechcroft Claims Limited were instructed to accept service of proceedings on behalf of Mr Lee English."*

8. On 26th July 2016 the claimant cross applied in these terms: The relief sought was quote:

> *"That under CPR 6.15(2) the steps already taken by the claimant represent good service of the claim form and particulars of claim; (2) Under CPR 6.16 service of the claim form, etc, be dispensed with."*

9. When the matter came before the Deputy District Judge she found that the defendant's application notice complied with the requirements of CPR 11, that there had not been good service, and that she would not exercise a discretion to prove the steps already taken as good service. Accordingly, she struck out the claim.

10. The claimant appeals with the permission of the designated civil judge, His Honour Judge Ian Hughes QC. Paragraph 1 of the order giving permission to appeal states as follows:

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"Permission to appeal is granted. The grounds of appeal are certainly arguable. The letter from the solicitors appointed by insurers to act for the defendant, dated 6 May 2015 ought to be the subject of careful scrutiny on appeal."

11. I will say that my first impression was that the outcome of the applications is a little surprising. The defence of the claim was, and is, because the claimant has since commenced separate proceedings in the High Court, being conducted by the insurers, they were served with it within the limitation period allowed, albeit just within. There is no prejudice to them arising out of the events I have described, but the claim has been struck out. On the face of it, that seems odd.

12. Nevertheless, it was incumbent on the claimant to demonstrate that the decision of the deputy district judge was wrong, and, accordingly, my starting point is the relevant provisions of the Rules. Rule 6.7(1) is in these terms:

"6.7-(1) solicitor within the jurisdiction: subject to Rule 6.5(1), where – (b) a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within the jurisdiction the claim form must be served at the business address of that solicitor."

I note that the wording of the Rule is mandatory.

13. CPR 11, so far as relevant, is in these terms:

"11 – (1) a defendant who wishes to – (a) dispute the court's jurisdiction to try the claim or (b) argue that the court should not exercise its jurisdiction may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have. (2) A defendant who wishes to make such an application must first file an acknowledgement of service in accordance with part 10. (3) A defendant who files an acknowledgement of service does not by doing so lose any right that he may have to dispute the court's jurisdiction. (4) An application under this Rule must – (a) be made within 14 days after filing an acknowledgement of service and (b) be supported by evidence. (5) If the defendant – (a) files an acknowledgement of service and (b) does not make such an application within the period specified in paragraph (4) he is to be treated as having accepted that the court has jurisdiction to try the claim."

14. Taken in the same order as the learned judge dealt with them, the first issue is whether the defendant is deemed to have accepted the jurisdiction of the court. As presented by the claimant, this point rests of a "black letter law" reading of CPR 11 and the defendant's application notice.

15. The claimant submits that the application notice had to specifically recite, or at least expressly refer to, CPR 11. The learned deputy district judge took a more nuanced and common sense approach. She said, in effect, that the basis for the defendant's application was very clear from the correspondence, and from the acknowledgment of service and from the submissions made at the hearing.

16. It is often said that it is facts, not law, that must be pleaded. I do not see much ground for applying a stricter approach to application notices. At any rate, this was a case management decision by the deputy district judge, which was well within the ambit of her discretion. There is no demonstrated error on her part, and this aspect of the appeal fails.

17. Was service on DAC good service? This is the main issue on the appeal. It is well established that a solicitor who is acting for a client has no general or implied authority to accept service of a claim form. That is clear from the decision of the Court of Appeal in Maggs [2006] EWCA Civ 20, and also the decision in Smith v Probyn [2000] WL 191146.

18. The issue here is not whether DAC had implied authority but whether DAC's statement in their letter of 6th May 2015 that they were instructed to accept service on behalf of Aviva meant that they were so instructed as regards the defendant. The issue was framed in this way in the skeleton argument of Mr Banks-Jones, who has appeared for the respondent on the appeal:

> *"Was it reasonable to infer that DAC were also instructed to accept service of proceedings on behalf of Mr English?"*

19. The deputy district judge dealt with this in the following way, and I quote the material parts of paragraph 6 and 10 of her judgment:

> *"Insurance law is highly complex, and I do not pretend to understand its intricacies, but I do know that insurers and insured are different entities. I accept that there are often joint retainers in relation to instructions that are given to solicitors, and I accept that, ultimately, many claims are subrogated ones, but that does not depart from the fundamental rule that they are separate entities that have, at times, both different perspectives and can part company at any point during litigation. To that extent, they are never, and should never, be considered to be one and the same."*

20. The difficulty is that the context here is that DAC Beechcroft indicated that they did act for the defendant. They did not disguise that. They did not hide it. What they did clearly say was that that they had instructions ultimately to accept service on behalf of Aviva. On reading that, solicitors who were involved in litigation that involved insurers and insured should have been alerted to the fact that there might be an issue, therefore, between the insurers and the insured because it did not say that they had also instructions to accept service on behalf of Mr English.

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21. The deputy district judge was saying that the insurer and the insured are separate legal entities, and therefore to have instructions to accept service on behalf of the insurer meant, on behalf of that legal entity, and that legal entity alone. To my mind, this was a clear error. As the deputy district judge point out, an insurer is usually subrogated to the defence of a claim against the insured. Subrogation, of course, means the substitution of one party for another. This insurer was, indeed, exercising rights of subrogation.

22. I quote from paragraph 5 of the witness statement of Jasminka O'Hora, a partner at DAC, dated 2nd June 2016:

"This firm confirmed that we were instructed on behalf of Aviva to act on behalf of the defendant, Mr English. This is by virtue of the right of subrogation under the motor insurance policy, and is standard matters in insurance matters. It is correct that throughout correspondence Mr English has been named as our client."

23. DAC were taking their instructions from Aviva, who were subrogated to the defence of the claim. It has not been suggested that there were any aspects of that defence that Aviva were not entitled to conduct. In particular, there is no evidence at all that Aviva required specific instructions from their insured to be able to accept service of proceedings for him, and why, I ask rhetorically, would they? Any such restriction would be highly unusual.

24. Thus, whilst there will be cases where insured and insurer are acting separately, this was not one of them, and taken in context the statement in the letter of 6th May 2015, that DAC had instructions to accept service on behalf of Aviva, plainly meant Aviva "standing in the shoes of " the defendant.

25. So as to be clear as to the context of the 6th May 2015 letter, I mention these four matters:

(1) DAC's letter of 30th October 2013 and all subsequent letters said that the defendant was their client, and that they were taking their instructions from Aviva on his behalf;

(2) Aviva were never referred to as DAC's client prior to service of the claim form;

(3) Leicester Aldridge and Richard Griffiths & Co never threatened a claim against Aviva as opposed or in addition to the defendant, and so no question of having to serve Aviva in their own right ever arose;

(4) Contrary to the statement in paragraph 5 of the skeleton deployed by Mr Banks-Jones before the deputy district judge, DAC never said that they had no instructions to accept service on behalf of the defendant.

I am quite sure that Mr Banks-Jones had no intention to mislead the deputy district judge; nevertheless, that incorrect statement was contained in his skeleton.

26. The correct construction of the 6th May 2015 letter is not that DAC were instructed to accept service on behalf of the defendant as well as Aviva. The correct instruction is that they were instructed to accept service on behalf of the defendant because it was exclusively in their capacity as subrogated to the defence of the claim that Aviva were ostensibly acting. I say ostensibly, because whatever may have been happening behind the scenes between Aviva and their insured is, so far as CPR 6.7(1)(b) is concerned, simply irrelevant. It follows that that Rule was engaged, and service on DAC was both mandatory and good service.

27. In the light of those findings the issue whether to order that the steps taken to bring the claim form to the attention of the defendant should stand as good service under CPR 6.15(2) does not arise. If it did, it would be necessary for me to identify some error on the part of the deputy district judge in applying that Rule, and, indeed, CPR 6.16, which was, somewhat optimistically, also raised. She approached this part of her decision in a way that it is not possible to fault, and I would dismiss part of the appeal.

28. Overall, the result of my rulings is that the appeal must be allowed, and the decision of the deputy district judge set aside, and that is what I do.
