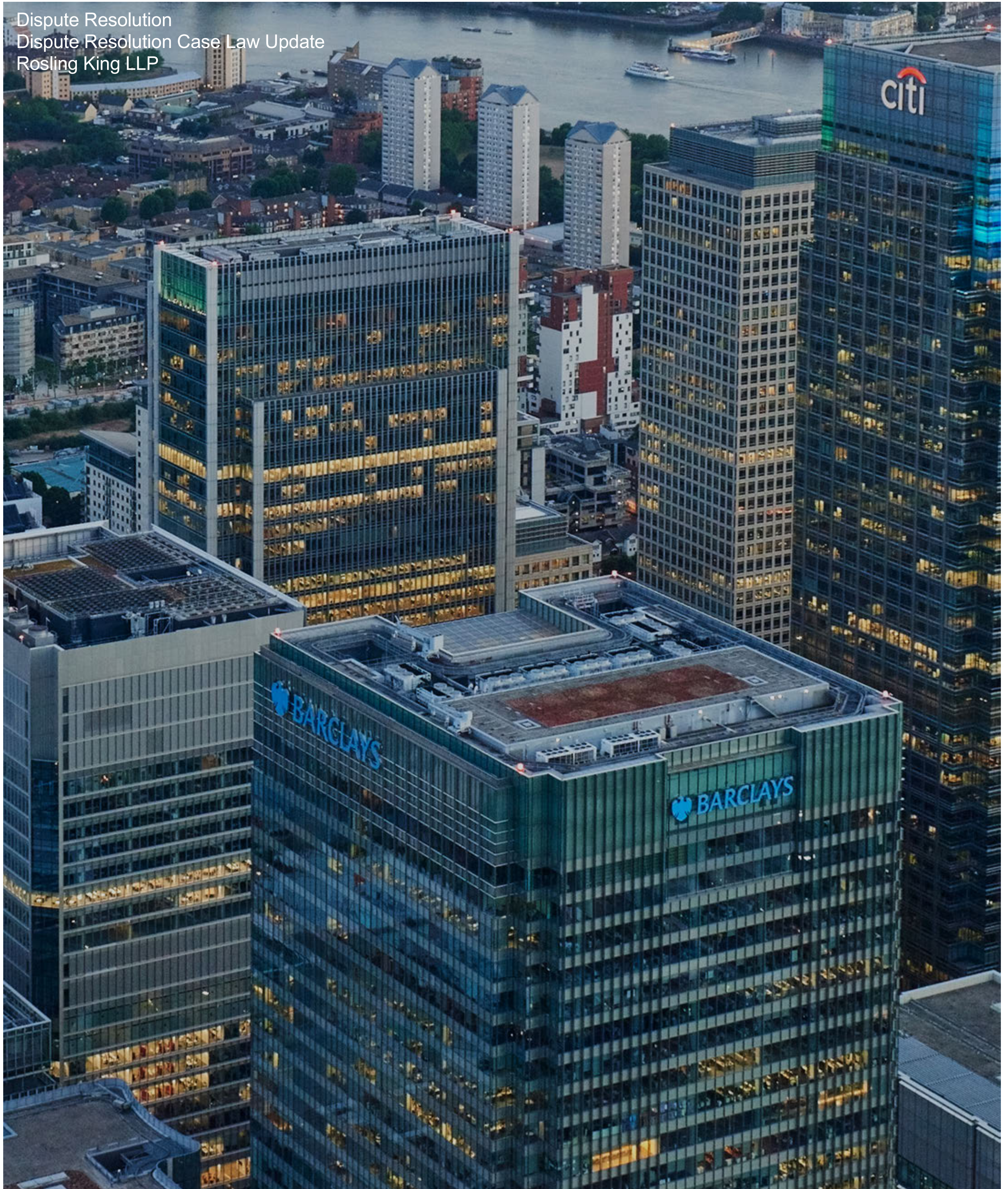
R K

Dispute Resolution

Dispute Resolution Case Law Update

Rosling King LLP



Background

The Claimants, Sally Woodward and Mark Addison (the '**Claimants**'), brought proceedings against the Defendant, Phoenix Healthcare Distribution Limited ('**Phoenix**'), for breach of contract and misrepresentation relating to a contract for the purchase of a drug.

The case is concerned with the circumstances in which the Court should exercise its power to retrospectively validate service. Pursuant to CPR r 6.15(1), the Courts can make an order to permit service by an alternative method, or at an alternative place, where it appears there is a good reason to authorise service.

The Claimants solicitors, Collyer Bristow ("**CB**"), served a claim form and particulars of claim on the Defendant's solicitors, Mills & Reeve ("**M&R**"), by letter and email on 17 October 2017. M&R had not confirmed in writing to CB they were authorised by Phoenix to accept service on their behalf. This claim form expired unserved on 18 October 2017, significantly the same date on which the relevant limitation period expired. Woodward subsequently made an application for retrospective validation of service on Phoenix. However, Phoenix issued an application, pursuant to CPR r 11, for an order that the claim form be set aside, as this had not been served within the time frame allowed by CPR r 7.5(1).

In the first instance, Master Bowles retrospectively validated service. However, HHJ Hodge QC, sitting as a Judge of the High Court, allowed an appeal from the Master. The Judge set aside the claim form and dismissed the action. This is an appeal from that decision.

The Decision

The Court of Appeal dismissed the appeal. The Court held that the Defendant's solicitors were not under a CPR r 1.3 duty to warn the other side that its purported service was defective, even in circumstances where the solicitors in question were aware of defective service of the claim form.

The CPR, namely r 1.3, does not require solicitors, who have in no way contributed to their opponent's or opponent's solicitors mistakes, to draw attention to said mistakes, and there is no duty to correct errors even if solicitors knew they had been made. CPR r 1.3 provides that parties are required to help the Court to further the overriding objective in their conduct of litigation. The Court found that such conduct does not amount to "technical game playing" nor is it contrary to the procedure rules. The Court referred to Lord Sumption's judgment in Barton v Wright Hassall LLP [2018] 1 WLR, where he said solicitors for the Defendant were under no duty to advise the Claimants of their mistakes as to service, or warn solicitors for the Claimants of their defects.

The Court of Appeal drew on the judgment in OOO Abbott v Econwall UK Ltd [2016] EWHC 660 (IPEC), where the Judge held that a Defendant's solicitors are under no duty to correct errors made by the Claimant's solicitors, even if they know, or suspect, they have been made, particularly in cases where they have in no way contributed to those errors.

The Court found that technical game playing did not include M&R and Phoenix allowing the claim form to expire in circumstances where they had not contributed to the error. Moreover, the Court found no good reasons to validate service retrospectively.

The Court held that what constitutes a "good reason" to validate non-compliant service of the claim form is a matter of factual evaluation. The Court set out relevant factors to consider, namely:

1. Whether the Claimant has taken reasonable steps to effect service in accordance with the CPR;

2. Whether the Defendant or his solicitors were aware of the contents of the claim form at the time it expired; and

3. What, if any, prejudice the Defendant would suffer by the retrospective validation of a non-compliant service of the claim form.

Commentary

The Court of Appeal concluded that Phoenix's conduct in not notifying Woodward or CB before the claim form expired that its solicitors, M&R, were not authorised to accept service on its behalf was not contrary to CPR r 1.3.

Further, it is also common ground that this did not constitute good service. The facts in this case did not afford "good reason" to permit alternative service, pursuant to CPR r 6.15. The Court was also critical of CB's reasons for delaying service until the end of the claim form's period of validity, and believed that the Claimants had "courted disaster" by leaving service to the last possible moment.

This decision provides a helpful review of the rules on validating service of the claim form retrospectively. Indeed, the Court confirmed that CPR r 1.3 and r 6.15 do not impose a duty on the solicitors for the Defendant to warn the Claimant's solicitors of procedural defects, where they have not contributed to those defects. The duty to warn only arises where there is a genuine misunderstanding regarding a significant matter, which was not the position in this case.

For further information, please contact Georgina Squire or the Partner with whom you usually deal.