



Neutral Citation Number: [2007] EWCA Civ 497

Case No: A2/2006/2607

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
MR JUSTICE EADY
HQ06X0181

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2007

Before :

LORD JUSTICE DYSON
and
LADY JUSTICE SMITH

Between :

Mr Douglas Carnegie
- and -
Mr Stephen Drury

Appellant

Respondent

Desmond Browne QC and Lorna Skinner (instructed by **The BBC Litigation Department**)
for the Appellant
The **Respondent** appeared in person

Hearing date : 14 May 2007

Approved Judgment

Lady Justice Smith :

1. This is an appeal by Mr Douglas Carnegie brought with the permission of Keene LJ against the decision of Eady J, who granted Mr Stephen Drury a substantial extension of time for service of the claim form and Particulars of Claim upon Mr Carnegie as second defendant in this libel action.

History

2. From 1999 onwards, Mr Stephen Drury was in business as a mediator and also offered mediation training to others. In 2003, the BBC broadcast a programme about Mr Drury and his company Nationwide Mediation Limited. Although he was not pleased with the content of this programme, Mr Drury did not take action. In April 2005, the BBC intended to broadcast another programme about Mr Drury's business in its Watchdog series, which deals with consumer affairs. The programme was critical of Mr Drury's practice; there is now no dispute that it was defamatory. Shortly before it was broadcast, Mr Drury attempted unsuccessfully to prevent the broadcast. The programme went out as planned on 12th April 2005. Soon afterwards, the BBC posted a summary of the programme on its website. On 29th April 2005, Mr Drury informed the BBC that he intended to take proceedings about the programme; he also complained about the website summary but the BBC, by its litigation department, refused to remove or alter the content.
3. In May, July and August 2005, there was correspondence between Mr Drury and the BBC in which Mr Drury sought to set up a 'without prejudice' meeting to discuss settlement of his claim. The BBC declined any such meeting, observing that it had not yet had particulars of the complaint.
4. There was no further contact between Mr Drury and the BBC until 5th April 2006. On that day, Mr Drury sent a letter of claim to the BBC in order to comply with the requirements of the pre-action protocol. On 11th April 2006, the day before the 12 month limitation period expired, Mr Drury sent a letter of claim to Mr Carnegie, who had been the editor of the Watchdog programme. It was addressed to him, care of his employers, the BBC. This letter was also said to be in compliance with the pre-action protocol.
5. On 12th April 2006, Kirwans, solicitors acting for Mr Drury, issued a claim form. It named the BBC as first defendant, Mr Carnegie as second defendant and Mr Paul Moore, a freelance television journalist who had been responsible for producing the programme, as third defendant. A fee was paid and there is no dispute that the claim had been commenced in time. Pursuant to CPR Part 7.5(2), the claimant had four months in which to serve the claim form on the defendants. That period was to expire on 12th August 2006. However, as 12th August was a Saturday, for practical purposes the last day for service was 11th August. If service were to be effected by fax transmission it had to be done by 4pm that day.
6. After the letters to the defendants dated 5th and 11th April, to which I have just referred, there was no communication between the claimant or his solicitors and any of the defendants until 2nd August. On that day, Kirwans wrote to the BBC asserting that the BBC had transmitted libellous allegations and inviting it to put forward its

proposals for settlement not later than 9th August. This letter was not copied or addressed to Mr Carnegie or Mr Moore.

7. On Friday 11th August, the Particulars of Claim, which had been drafted by counsel, were verified by the claimant. At 12.40 pm, Kirwans faxed a letter to the BBC informing it that the claimant intended to serve proceedings on the second defendant, care of the BBC, but went on to ask, in the event that the BBC did not have instructions to accept service on his behalf, that the BBC should provide Mr Carnegie's last known residential address. It is accepted that, until that letter was written, the claimant had not made any attempt to serve Mr Carnegie or to find out how he might do so.
8. At 2.46pm that day, the BBC replied saying that it had no instructions to accept service on behalf of Mr Carnegie or authority to provide his residential address. It appears that Mr Carnegie was away on holiday and would not be back at his desk until 29th August.
9. At 3.50pm, that is ten minutes before the time to do so within the rules expired, Kirwans faxed several documents to Miss Isobel Griffiths of the BBC's Litigation Department. The documents comprised a letter, a single copy of the claim form and a single copy of the Particulars of Claim. The letter stated that the documents were attached 'by way of service on the BBC, Douglas Carnegie and Paul Moore'. Hard copies would follow. It continued:

“We confirm that we have no alternative but to serve on both the second and third defendant via yourselves. In the absence of your cooperation to provide their last known residential address and therefore at this late stage we are serving the Claim at their last known place of work”
10. That service was effective only in respect of the BBC. The claim against it is up and running. The BBC has served a defence, admitting that the programme contained defamatory material but pleading, with full particulars, the defence of justification. The BBC has also accepted vicarious liability for the actions of Mr Carnegie.
11. Also, on 11th August, Kirwans posted hard copies of the claim form and Particulars of Claim to the BBC, with copies for Mr Carnegie. The BBC received these documents on Monday 14th August. That day it informed Kirwans by fax that it would be returning the papers sent for Mr Carnegie as it did not have authority to accept them, as previously explained. The papers were returned to Kirwans on 17th August.
12. On 23rd August, two application notices were prepared by Ms Michelle Stewart the solicitor at Kirwans who had immediate responsibility for this case. The first sought a retrospective extension of time for service; the second sought an order authorising service on the second defendant at his place of work. Miss Stewart's witness statement in support described the attempt at service made on 11th August; no other attempt was alleged. Her explanation for the delay in making this attempt was that Mr Drury had not given Kirwans instructions until a late stage due to his financial constraints and his hope that the matter would be settled.

13. Although drafted on 23rd August, these applications were not lodged at the Court for issue. There is some confusion as to when the first attempt to issue the application was made. The written evidence before the judge suggests that it was made quite soon after the papers had been drafted but that, on that first occasion, the application was not issued because the claimant had not attached the correct fee. Mr Drury was later to tell us that this was not correct; he had not attempted to issue the application until some time after 5th October. Be that as it may, it is clear from the documents that, in September, Kirwans wrote to the BBC asking again if they had instructions to accept service on behalf of Mr Carnegie. They replied that they did not. Kirwans wrote again, this time asking for Mr Carnegie's private address; the BBC wrote to say that they could not assist without a court order.
14. On 5th October, Mr Drury spoke to Mr Carnegie on the telephone and, later in the day, set out his version of the conversation in an email. It appears that Mr Drury accused Mr Carnegie of being uncooperative, alleging, in particular, that he had refused to telephone him in response to voicemail messages. It appears that, among other things, Mr Carnegie said that he had only just returned from holiday. Mr Drury alleged that, when he had pointed out that the message on Mr Carnegie's voicemail had said that he would be back at work on 28th August, Mr Carnegie had put the telephone down. Mr Carnegie's explanation for that is that he had been away on holiday until 28th August and had then returned to work but had taken an additional one week holiday ending just before 5th October.
15. It appears that, on some unidentified occasions after 5th October, Mr Drury attempted to issue the application to extend time for service. Neither he nor a solicitor acting on his behalf has ever set out a coherent account of when these attempts were made and why they failed. On Mr Drury's oral account to us, it was at this stage that his first attempt was made and failed due to the problem of the court fee. However, he also told us that his second and third attempts were rejected by court staff, due to the problems connected with the service of the documents. In due course, said Mr Drury, he had an appointment with Master Leslie, who was very helpful and the applications were eventually issued on 6th November 2006. That was nearly 3 months after the time for service had expired. Although, as I have said, Mr Drury has not provided a clear explanation of the difficulties that arose over the issue of the applications, it appears to me that the problem may have arisen because Miss Stewart had stated on the application form that 'the defendants' were to be served with the applications. That was not necessary; these applications could have been made without notice to the defendants. Stating that the applications were to be served on all defendants obviously created a problem as the claimant did not know Mr Carnegie's residential address.
16. Quite how this problem was resolved, I still do not know. However, it appears that Mr Carnegie became aware of the applications and instructed the BBC litigation department to act on his behalf. Mr David Attfield, a solicitor in that department, filed a witness statement in response to the applications. This led to further exchanges of evidence. There was a witness statement from Mr Michael Sandys, a partner in Kirwans, dated 22nd November, a second witness statement from Mr Attfield dated 22nd November and a second statement from Mr Sandys of the same date. Without going into the detail of how the various issues were advanced and refuted and concessions were made, I will summarise the evidential position as follows.

17. The case advanced on behalf of Mr Drury was that, due to lack of funds, he had not been able to instruct Kirwans to act for him on a normal basis. Kirwans had been advising him in respect of his proposed claim since 2005 and at one stage had agreed to represent him under a conditional fee agreement. However, because he was at the time an undischarged bankrupt and his trustee was seeking an entitlement to any proceeds of the action, he had put off commencing proceedings in the hope that he would obtain his discharge before he had to commence proceedings. In the event, that was not possible. When, in April 2006, it became necessary to commence proceedings, Kirwans were instructed to issue a claim form. When doing so, they put themselves on the court record. However, Mr Drury did not give them instructions to spend any money on taking any further action. He was still hoping that the BBC would settle his claim. Eventually, in late July or early August, when it was clear that action would have to be taken, Kirwans instructed counsel to draft the Particulars of Claim. Also, they wrote to the BBC on 2nd August and then, on 11th August, took the steps I have described in paragraphs 7 to 11 above with the result that the BBC was successfully served but Mr Carnegie was not. Mr Drury and Mr Sandys claimed that they were surprised that the BBC and Mr Carnegie had been uncooperative over service. Mr Sandys said that, in another libel claim in which he had acted, the BBC had been prepared to accept service on behalf of one of their employees. Kirwans had reasonably assumed that the BBC would adopt the same approach in the instant case.

The Hearing

18. The hearing of the application was fixed for 23rd November 2006 before Eady J. The claimant was acting in person. He did not lodge the bundle until a few minutes before the hearing was due to begin. The judge observed that he had had very little time to read the papers in advance.
19. Mr Drury abandoned his application for service at Mr Carnegie's place of work and proceeded only with the application to extend time under CPR Part 7 Rule 6. That provides as follows:
- “(1) The claimant may apply for an order extending the period within which the claim form may be served.
 - (2) The general rule is that an application to extend the time for service must be made -
 - (a) within the period for serving the claim form specified by rule 7.5; or
 - (b) where an order has been made under this rule, within the period for service specified by that order.
 - (3) If the claimant applies for an order to extend the time for service of the claim form after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if -
 - (a) (*not applicable*); or

- (b) the claimant has taken all reasonable steps to serve the claim form but has been unable to do so; and,
 - (c) the claimant has acted promptly in making the application.
 - (4) An application for an order extending the time for service-
 - (a) must be supported by evidence; and
 - (b) may be made without notice.”
20. Thus, in the present case, the judge was concerned with the more stringent provisions of Part 7.6(3). He could not make an order unless the claimant had shown that he had taken all reasonable steps to serve the claim form but had been unable to do so and also that he had acted promptly in making the application to extend time. Only if those two conditions were satisfied would the judge have discretion to grant the relief requested.
21. Mr Drury argued that he had taken all reasonable steps and that he had acted promptly. The judge should exercise his discretion to allow the extension as it was important to him to have Mr Carnegie as a separate defendant even though the BBC had accepted vicarious liability for his actions. Miss Skinner for Mr Carnegie argued that Mr Drury had plainly not taken all reasonable steps to serve Mr Carnegie; he had done nothing until the last available day. He had not even found out whether the BBC would accept service for him. Nor had Mr Drury given any consideration as to how else service might be effected if the BBC would not accept it. On the second limb, Miss Skinner argued that it could not be said that Mr Drury had acted promptly in issuing his application for an extension. He had delayed for nearly three months after he knew that service had not been effected in time. Further, even if the judge were to find in Mr Drury’s favour on the two limbs of the test, he should not exercise his discretion to grant the extension. Mr Drury did not need Mr Carnegie as a defendant, given the BBC’s admission of vicarious liability. Granting the extension would have the effect of bringing Mr Carnegie into the action after the limitation period had expired.
22. In the course of the hearing, Mr Drury made an allegation against Mr Carnegie which was claimed to reveal his attitude towards the proceedings. It was alleged that, in response to Mr Drury’s complaints that the allegations in the programme were untrue, Mr Carnegie had said that he did not want to spoil a good story with the truth. That allegation had not been pleaded; nor had it been referred to in any witness statement. Mr Carnegie, who was not present in court, was unable to refute it. It seems to me that it was irrelevant to the issues which the judge had to try. However, the judge referred to this matter towards the beginning of his judgment. Mr Browne QC, who appeared with Miss Skinner for Mr Carnegie before this Court, expressed the view that it was worrying that the judge should do so as it suggested that he might have formed an unfavourable view of Mr Carnegie.
23. The judge found in Mr Drury’s favour on all three issues and granted an extension until 4pm on 23 November 2006.

24. Before considering whether Mr Drury could satisfy the requirements of subparagraphs (b) and (c), the judge set out the evidence which he regarded as relevant. He observed that it was not unreasonable for Mr Drury to send the documents addressed to and intended for Mr Carnegie to the Litigation Department of the BBC in the reasonable expectation that the BBC would place the documents on Mr Carnegie's desk for his attention on his return from holiday. However, immediately after he had given judgment, it was pointed out to him (in the course of an application for permission to appeal) that he had been wrong to think that the documents had been addressed to Mr Carnegie, care of the BBC. They had not. They had been addressed only to the BBC. The judge accepted that he had made a mistake about that and Mr Drury accepted that might have unintentionally misled the judge in that regard.
25. Another factor which the judge took into account was that, between the sending of the documents to the BBC on 11th August and the 5th October, when Mr Drury spoke to Mr Carnegie on the telephone, Mr Drury had tried to find other means of service. This was a reference to an internet search for Mr Carnegie's address and Mr Drury's various attempts to speak to Mr Carnegie on the telephone. The judge may also have had in mind Kirwans' letters to the BBC written in September. The judge set out Mr Drury's email account of the telephone conversation of 5th October. He then mentioned the fact that the application for extension was drafted on 23rd August but not lodged until 6th November. He referred to Mr Drury's explanation for the delay which was that he had not been able to instruct solicitors until early August. He had been hoping to avoid unnecessary costs. Then, at paragraph 9 of the judgment he said:

“It is against that background that I come now to consider whether or not the strict criteria could be said to have been fulfilled, the burden in this context being upon Mr Drury to do so. Has he taken all reasonable steps to serve the claim form, but been unable to do so? I have summarised the essential steps which have been taken, namely sending the letter to Mr Carnegie's place of work, hoping that it would be redirected, as one would ordinarily expect, to his personal desk to await his return, attempts to telephone him, finally making contact and receiving a dusty answer. The application form, having been dated 23 August, was not issued because it was hoped, fondly, that an application to the court might have been unnecessary because either the BBC or Mr Carnegie would, according to Mr Drury's lights, see sense at some point. I make it clear that the BBC were entitled not to act on Mr Carnegie's behalf or to accept service on his behalf; and Mr Carnegie was entitled, if he wished, to keep a low profile in the hope that the claim would go away. It is in the light of that apparent attitude that the reasonableness of Mr Drury's acts and attempts has to be judged.”

26. The judge then referred to the authority of *Anderton v Clwyd County Council* (No 2) [2002] 1 WLR 3174 and the dicta of Mummery LJ to the effect that the court will only rarely grant a retrospective extension of time to serve proceedings. The judge continued:

“It seems to me that the steps which have been taken and which I have attempted to rehearse in summary form can be described as all reasonable steps to serve the claim form. Until he made the application Mr Drury was therefore unable to do so.”

27. The judge then turned to deal with the second test and said :

“The second hurdle which Mr Drury has to climb is to demonstrate that he has acted promptly in making the application. It was in readiness on 23 August, but it was kept in reserve in the hope that the costs might be avoided. It eventually became clear that this was not going to be possible and the application was issued on 6 November. There was delay plainly; but the background is one which Mr Drury characterises as obstruction. I am not going to adopt his term because, as I have already indicated, people are entitled up to a point not to co-operate with litigants who seek to serve them. I am not going to characterise it as obstruction, but the stance which Mr Carnegie and the BBC have taken is to make life difficult for Mr Drury, no doubt perfectly legitimately (I will make that assumption in their favour), and to drive him into the position where he, as an impecunious litigant, has the burden of making an application to the court which is a hurdle which might conceivably discourage him from going on. Nevertheless, I have come to the conclusion that, bearing in mind these particular circumstances, Mr Drury acted as promptly as can be expected in bringing this application before the court.”

28. Thus the judge found that the strict requirements had been met and he turned to consider whether in the exercise of his discretion the relief should be granted. He weighed up the arguments on each side and decided that it should.

The Appeal

29. In this appeal, Mr Browne QC for Mr Carnegie focused his main attack on the judge’s approach to the two issues arising under CPR 7.6(3)(b) and (c). He submitted that the judge’s approach to both was wrong in law. He also submitted that the judge’s exercise of his discretion was wrong. I for my part would not accept that the judge was wrong in the exercise of his discretion. In my view, this appeal turns on whether or not the judge was right in respect of sub-paragraphs (b) and (c). It is to those issues that I now turn.

30. Mr Browne submitted that the judge had taken the wrong approach to the question of the reasonableness of the claimant’s efforts to serve the claim form. He ought to have taken into account only those efforts that were made during the four month period allowed. Instead, the judge had also taken later efforts into account. These included the internet search and the attempts, eventually successful on 5th October, to speak to Mr Carnegie by telephone. Sub-paragraph (b) is concerned only with the efforts made before the time allowed has expired. To take later matters into account would deprive

the provision of any useful effect. Mr Browne submitted that the judge had plainly erred in taking these later efforts into account.

31. Mr Browne also submitted that the judge had made at least one important error of fact. He had been wrong to think that Kirwans had sent documents to the BBC, addressed to Mr Carnegie. They had not. One set of documents had been faxed to the Litigation Department. There were no documents addressed to Mr Carnegie. Thus, the judge's conclusion that it was not unreasonable for Mr Drury to think that the BBC would leave them on Mr Carnegie's desk was ill-founded.
32. Mr Browne submitted that, on account of these two errors, we should substitute our own view on this question. He said that, where, as here, Mr Drury and Kirwans had done nothing at all about service on Mr Carnegie until the very last day, it could not sensibly be said that they had taken all reasonable steps. There were several things that could reasonably have been done within the four month period. These included attempted personal service or an application for service by an alternative method, for example service at Mr Carnegie's place of work. Also, Mr Drury could have sought an extension of time before the four month period expired, in which case the court would more readily grant relief. We could and should hold that there had been non-compliance with subparagraph (b).
33. Mr Drury submitted that the judge was right. He drew attention to the fact that he is required only to show that he had done all that was reasonable not all that was possible. That is correct. He submitted that it was reasonable for him to leave his attempts to serve until a late stage because he was hoping for a settlement and to avoid incurring any costs. Further, it was entirely reasonable for him and his solicitor to assume that the BBC would accept service on behalf of Mr Carnegie. The BBC had done so in the past. Mr Drury also submitted that no one could have foreseen that the BBC would have refused even to pass the letter to Mr Carnegie by leaving it on his desk.
34. Further, Mr Drury submitted that his attempts at contact with a view to service made after 12th August were relevant and demonstrated that both the BBC and Mr Carnegie were determined to be uncooperative. He argued that he had not been seeking relief for his own shortcomings; he had had to seek the court's help to overcome genuine problems he had encountered, namely the obstructive attitude of the BBC and its unexpected refusal to accept service on behalf of Mr Carnegie or even to pass documents on to him.
35. In oral argument, Mr Drury submitted that, as a litigant in person, it had been reasonable for him to delay making any attempt at service until the last day. The advisory documents issued by the court do not warn litigants in person not to leave service until the last minute. Also, it was reasonable for him to assume that the BBC would accept service on behalf of Mr Carnegie.
36. In my judgment, the judge's decision on this first question cannot stand. In the first place, his error of fact was not without significance. If the judge had realised that the attempt at service made on 11th August had not entailed the sending of any documents addressed to Mr Carnegie at his place of work, he might well have reached a different conclusion. However, much more fundamental is the judge's error in taking into account the steps taken to effect service after the four month period had elapsed. Sub-

paragraph (b) requires the judge to consider whether all reasonable steps were taken to serve the defendant during the four month period allowed. Attempts made after that time are irrelevant. In my view, the judge erred in taking the later efforts into account.

37. For those two reasons, the judge's decision on sub-paragraph (b) cannot stand and this court must make its own decision. It seems to me that the right approach is to consider what steps were taken in the four month period and then to ask whether, in the circumstances, those steps were all that it was reasonable for the claimant to have taken. The test must, in my view, be objective; the test is not whether the claimant believed that what he had done was reasonable. Rather it is whether what the claimant had done was objectively reasonable, given the circumstances that prevailed.
38. Here, the steps taken were not in my view all that could reasonably have been expected of the claimant. He did nothing until the very last available day. He knew that he did not have Mr Carnegie's residential address. He must have known that, without it, he would have to rely on other methods of service. It seems that he intended to rely on service through the BBC. However, Mr Sandys, (who was acting for the claimant by 2nd August at the latest) made no attempt until 11th August to ask the BBC whether it had instructions to accept service for Carnegie. Such a request could very easily (and at minimal cost) have been appended to Kirwans' letter dated 2nd August. It may be that the BBC would have been able to obtain instructions from Mr Carnegie. But even if they could not or would not, at least, Kirwans and Mr Drury would have known that they had to make other arrangements. They could have applied for an extension of time or for an order permitting service on Mr Carnegie at the BBC. Such applications can be made quickly and without notice. I accept that such an application would have cost something; but it could have been made by Mr Drury personally. If Mr Drury were anxious to avoid making any application, he could quite easily have attempted personal service at or outside Mr Carnegie's place of work.
39. The explanations for Mr Drury's delay are not, in my view, sustainable. First, although he did no doubt hope that the BBC would settle his claim, he had absolutely no reason to believe that it would. It had offered no indication of a willingness to discuss terms. Second, there was no sensible basis on which Mr Sandys could have reasonably believed that, because the BBC had accepted service on behalf of one employee in one case, it would do so again in this case and that it was therefore reasonable for him to wait until the last day. An employer can only accept service on behalf of an employee if the employee agrees that that should be done. It is the employee's choice, not the employer's. Mr Sandys must or ought to have known that. The fact that one employee had agreed to this course does not mean that another will.
40. This court has on more than one occasion stressed that one of the intentions behind the Civil Procedure Rules is that litigation should proceed expeditiously and that time limits should be taken seriously: see for example *Vinos v Marks & Spencer PLC* [2001] 3 AER 784 at 789-790. Also, this court has warned litigants of the dangers of leaving until the last minute the taking of a procedural step governed by a time limit: see for example *Anderton v Clwyd County Council (supra)* at page 3184. If repetition of this warning is necessary, let this case provide it. A litigant is entitled to make use of every day allowed by the rules for the service of a claim form. But it is well known that hitches can be encountered when trying to effect service. A litigant who leaves

his efforts at service to the last moment and then fails due to an unexpected problem is very unlikely to persuade the court that he has taken all reasonable steps to serve the claim in time. Without such a finding, the court will be unable to extend time for it is only if both sub-paragraphs (b) and (c) of Part 7.6(3) are satisfied that the court has any discretion to grant relief. A litigant who delays until the last minute does so at his peril.

41. In my judgment, the only conclusion properly open to this court in this case, is that the claimant had not taken all reasonable steps to effect service of the claim and has failed to satisfy the threshold condition in sub-paragraph (b). That is, in itself, sufficient to determine this appeal. However, because the point was fully argued, I will deal also with sub-paragraph (c) and will consider whether the judge was entitled to hold that the claimant had acted promptly in making his application for an extension of time.
42. The judge recognised that there was some delay; indeed there was. The claimant knew that his attempt to serve Mr Carnegie had failed by 14th August or 18th August at the very latest. The application for relief was, in my view, drafted with reasonable expedition. However, it was not issued. Mr Browne submitted that delaying for 10 weeks before issuing cannot be described as acting promptly. He drew attention to the absence of any criterion of reasonableness in sub-paragraph (c) but accepted that the prevailing circumstances must be considered when the court decides whether the application has been made promptly. He submitted that the explanations for delay advanced by Mr Drury were wholly inadequate.
43. Mr Drury submitted that he had acted as promptly as could be expected, given the difficulties that he encountered. He submitted that it was reasonable and sensible for him not to attempt to issue until after he had managed to make contact with Mr Carnegie. He was still hoping that, if he could speak to him directly, he would persuade him to accept service by post at the BBC and to waive the time limit which had already expired. After the 5th October, when he realised that Mr Carnegie was not going to cooperate to that extent, he took steps to issue but had difficulties, first over the court fee and then, in some way, over problems in respect of service.
44. It appears to me that the judge has not given any adequate reasons for holding that Mr Drury had acted promptly in making his application. He seems to have been influenced by his impression that Mr Carnegie and the BBC were 'lying low' and making life difficult for Mr Drury.
45. There are two things I wish to say about that. First, there is no duty on an employer to assist a claimant to serve proceedings on an employee; indeed in my view, it would be wrong for the employer to give assistance against the wishes of the employee. Also, a potential defendant is not obliged to help a claimant to serve documents upon him. He should not make life difficult but he need not give any positive assistance and he certainly is not under any obligation to forego his legal rights. I do not consider the judge's impression to be justified that Mr Carnegie and the BBC were uncooperative. In my view, it would have been wrong for the BBC to take any stance other than the one they took. As for Mr Carnegie, apart from a letter of claim, he received no intimation within the four month period that documents were about to be served on him. He was not uncooperative in any way during that period. Nor did he in any way mislead the claimant into thinking that he would accept service in an unauthorised

way; the subject of service never arose. After the four month period had elapsed, Mr Carnegie was entitled to decline to accept service however it was effected; time for doing so had expired. Subject to an order extending time, he was free of these proceedings.

46. The second point I wish to make is that, even if there had been a lack of cooperation by the BBC and Mr Carnegie, it could not excuse or explain Mr Drury's delay in issuing the application to extend time. If Mr Carnegie had ever held out an expectation that he would waive his rights in respect of service, that might justify a delay. But without such indication, the fond belief that Mr Carnegie might after all be prepared to accept service out of time and in an unauthorised manner simply cannot amount to a circumstance that would justify delay. Further, the practical difficulties alone, vaguely explained as they have been, do not come anywhere near explaining so long a delay.
47. In my judgment, the judge was wrong to hold that Mr Drury had acted promptly in making his application. The only possible conclusion on the evidence was that he had not. It will always be difficult to explain a delay as long as occurred here; only quite exceptional circumstances, fully explained to the court, could possibly explain or justify so long a delay in issuing the application. Such circumstances do not exist in this case.
48. For the reasons I have given the appeal must be allowed. The extension of time granted by the judge should be set aside and the service effected under the judge's order must be declared invalid.

Lord Justice Dyson : I agree.