CORONAVIRUS AND PERSONAL INJURY CLAIMS: SOME PROCEDURAL POINTS

Tim Trotman
Deans Court Chambers
24 St John Street
Manchester
trotman@deanscourt.co.uk
30 03 20

Duty of Cooperation

1. CPR 1.3 requires the parties to help the court to further the overriding objective and by implication imposes a duty a cooperation on the parties between themselves. Legal representatives will not be in breach of any duty to their client if they agree reasonable extensions of time and such agreement furthers CPR 1.1(2)(e) per Jackson LJ in *Hallam Estates v Baker* [2014] EWCA Civ 661. See further the familiar warning against opportunism in *Denton v T H White* [2014] EWCA Civ 906 at para 43: two activities were singled out, unreasonably refusing to agree extensions of time, and unreasonably opposing applications for relief from sanctions.

ABI Agreement

2. An immediate extension to the personal injury protocol has been developed to take effect from 24 March, for a minimum of 4 weeks, with a review to take place the week commencing 13 April. There is a list of current signatories at https://www.abi.org.uk/products-and-issues/choosing-the-right-insurance/motor-insurance/coronavirus-protocol/

3. As 25 03 20, 11 insurers have signed up – including Aviva, RSA, Zurich, NFU Mutual and Direct Line – and 11 claimant law firms, including Slater & Gordon, Leigh Day, True Solicitors, Stephensons and Bott & Co.

4. The agreement appears to include an acknowledgement that all limitation dates in all personal injury cases of the signatories are frozen.

ABI website states :

Extension to the Personal Injury Protocol in England and Wales

A protocol is agreed and immediately put into effect. This will involve, for a minimum of 4 weeks (until the 20th of April) with a joint review in the week commencing the 13th of April, the following:

1. An agreement that all limitation dates in all personal injury cases are frozen and claimants undertake to respond constructively to defendant requests for extension of time to serve a Defence;

2. An escalation process whereby any issue arising by a party's failure to act in accordance with the agreement in 1. above and which cannot immediately be resolved between the parties is referred to an email and/or telephone 'hotline' specifically established for this situation; and

3. A commitment that the email and telephone hotline will be monitored regularly and referred to senior people within the respective organisations who will be able to make a swift decision as to whether the stance being taken should be adjusted in light of prevailing circumstances

Limitation Amnesty/Standstill Agreement

5. Outside the ABI enclave above, is there a duty on a Claimant to seek an amnesty? The unreported case of *Andrews v South Tees Hospital NHS Foundation Trust* [2007] suggests there is: the Claimant was ordered to pay the Defendant's costs of dealing with an application to extend time for service of proceedings where the Claimant had protectively issued the claim without first asking if a limitation amnesty could be agreed.

6. *Russell v Stone* [2017] EWHC 1555 (TCC)concerned " standstill agreements" in a construction context (agreement text at para 22.) When the running of time is **suspended** the unexpired portion of the limitation period as at the date of the agreement will typically re-commence after the period of suspension ends. When the limitation period is **extended** the limitation period will typically end on the date when the period of extension ends. This will usually be a date later than when the original limitation period was due to end, however this type of agreement can also be used in cases where there is uncertainty or a dispute about when the limitation period will end in order to clarify the limitation position.

In *Russell* the standstill agreements suspended time for the purposes of limitation rather than extending it to 30 November 2016. They preserved the parties' positions so that, on 30 November 2016, the employers position was the same as it was when they signed the first standstill agreement, when they still had three weeks before the limitation period expired. The operative clauses of the agreements referred to time being suspended, and the only mention of extension was in the recitals.

7. In *Russell* Coulson J (as then was)said that if limitation was an issue, and the claim needed further work, or the Pre-Action Protocol process had not been activated or completed, para.2.3.2 of the TCC Guide stated that the claimant could commence proceedings and then seek a stay of, say, six months, in order to follow and complete the Protocol process[1].

8. That prompts a reminder of Para 11 of the Disease Protocol :

> *"..a claimant who commences proceedings without complying with all, or any part, of this protocol may apply to the court on notice for directions as to the timetable and form of procedure to be adopted, at the same time as he requests the court to issue proceedings. The court will consider* ***whether to order a stay of the whole or part*** *of the proceedings pending compliance with this protocol".* (emphasis added)

9. The Personal Injury Protocol is less direct – para 1.6

> ***1.6*** *The Protocol recommends that a defendant be given three months to investigate and respond to a claim before proceedings are issued. This may not always be possible, particularly where a claimant only consults a legal representative close to the end of any relevant limitation period. In these circumstances, the claimant's solicitor should give as much notice of the intention to issue proceedings as is practicable and the parties should consider whether* ***the court might be invited to extend time for service of the claimant's supporting documents*** *and for service of any defence, or alternatively, to stay the proceedings while the recommended steps in the Protocol are followed.* (emphasis added)

10. The Clinical Disputes Protocol refers to a potential stay :

> *1.6.1 The Protocol provides for a defendant to be given four months to investigate and respond to a Letter of Claim before proceedings are served. If this is not possible, the claimant's solicitor should give as much notice of the intention to issue proceedings as is practicable. This Protocol does not alter the statutory time limits for starting court proceedings. If a claim is issued after the relevant*

[1] Echoed in *Cowan v Forman* a case concerning the sixth month time limit in Section 4 of the Inheritance (Provision for Family Dependents) Act 1975. Mostyn J abhorred the use of Standstill Agreements to extend the six month period. He said that if the parties want a moratorium in order to negotiate the claim should be issued in time and the Court should be invited to stay the proceedings.

statutory limitation period has expired, the defendant will be entitled to use that as a defence to the claim. If proceedings are started to comply with the statutory time limit before the parties have followed the procedures in this Protocol, ***the parties should apply to the court for a stay of the proceedings*** *while they so comply.* (emphasis added)

11. If an Amnesty or Standstill Agreement is to be employed :

    a. The terms should be absolutely clear. Rather than "a further three months", clear dates should be given.
    b. The limitation amnesty should be with all the proposed defendants.
    c. There should be a reasonable period of notice which has to be given in writing to enable the claimant to issue proceedings if the one party withdraws the agreement.
    d. In *Russell* the provision was "*The suspension of time under this agreement shall continue in force until the earlier of: (a) 30 days after the service by any party of a notice stating that the running of time is to recommence; or (b) 28 February 2-"*

12. See special problems with Air Travel/Warsaw Convention/Montreal Convention which will cover many accidents connected with boats and water. It may not be possible to agree extensions of a strict two year period.

13. As to the Foreign Limitation Periods Act 1994: the relevant period may be the limitation period that applies in the country where the accident occurred *Harley v Smith* [2010] EWCA Civ 78 ; and see *Alseran v Ministry of Defence*[2017] EWHC 3289 (QB) considering the Private International Law (Miscellaneous Provisions) Act 1995 s.11(1.)

What if it is necessary to issue as soon as possible, an Amnesty or Standstill Agreement being unavailable?

14. A reminder that the Practice Direction to CPR Part 7 in paragraph 5.1 states that the claim is "brought" for the purposes of the Limitation Act 1980 on the date the

Claim Form was received in the Court Office ; and that the date on which the Claim Form was received by the Court will be recorded by a date stamp either on the Claim Form held on the Court file or on the letter that accompanied the Claim Form when it was received by the Court.

15. In current conditions there may be considerable practical difficulties. It is to be hoped that the Court will continue date stamping but for safety's sake Claimant solicitors will need to collate and preserve evidence about how the Claim Form was sent to the Court including for example a post book entry. By analogy with proving service of the Claim Form it is suggested that the Court will treat whether or not solicitors did enough to send the Claim Form to Court for issue as a question of fact to be decided by evidence. The burden will be on the Claimant to prove that timeous steps were taken : see *Transportes Viana E Fernandes LDL v Baban* [2015] 1WL UK213, and by analogy, *Page v Hewett Solicitors* [2013] EWHC 2845.

Serve Claim Form or extend the time for service of the Claim Form?

16. In the current climate would it be better simply to serve any unserved Claim Forms as soon as possible ? Or apply to extend time to do so ?

17. A few reminders : first the "corresponding date rule." A Claim Form issued on 11 July 2020 would have to be served by (that is dispatched no later than) 11 November 2020: *Dodds v Walker* [1981] 1 WLR 1027[2]. Secondly Claimants should ideally serve an original sealed copy of the Claim Form. The balance of authority is against a photocopy sufficing e.g. *Caretech Community Services Ltd v Oakden* [2017] EWHC 1944. There are some suggestions that serving a copy rather than the sealed original might be an error of procedure remediable under CPR 3.10 (e.g. *Bank of Baroda v Nawany* [2016] EWHC 3089 and *Matthew Cann v Hertz Corporation* [2015] EWHC 2617. In the current climate, one solution might be to serve whatever the Court can send back electronically with the prior written agreement of opponents that they waive any error under CPR 3.10.

[2] The rule is modified somewhat especially in the case of service falling due in February.

18. An in-time application to extend time for service of the Claim Form will obviously be far preferable to an out of time one as to in time applications generally see *Roberts v Momentum* [2003] EWCA Civ 299. See also *Everwarm Limited v BN Rendering Limited* [2019] EWHC 20178 (Alexander Nissen QC.)

> In *Everwarm Limited* the Claimant (Everwarm) had engaged the Defendant (BN) as a sub-contractor. Everwarm contended that assessment showed that BN have been overpaid by £798,468. BN contended that Everwarm owed it £1.96 million. The Claimant obtained an Order in the counterclaim for security for costs (£145,000). An Unless Order was made requiring BN to pay security by 4.00pm on 11/07/19. On 11/07/19 BN applied for an extension of time to 18/07/19. BN paid the requisite sum into Court on 17/07/19.
>
> An application for an extension of time is not an application for relief from sanctions provided that the Applicant files his Application Notice before the expiry of the permitted period. Even in the case of an Unless Order the power to extend time for compliance with a Court Order pursuant to CPR3.1(2)(a) does not distinguish between routine Court Orders on the one hand and "Unless" Orders on the other.
>
> Although Rule 3.1(2) applies however brief the period between the in-time application and the expiry of the time limit, the lateness of the in-time application *"may well be a relevant matter"* (para 40)
>
> The Court should consider the need to enforce compliance with existing orders and to conduct litigation efficiently and at proportionate cost not because those matters are identified within rule 3.9 but because they fall within the overriding objective (para 41.)

19. The benefits of an in time application continue even though the application is heard after expiry of the relevant time limit see *Lachaux v Independent Print* 2015 EWHC 1847.

20. Is it always tactically wise to entrust to a Court extending time for service of the Claim Form ? Failure to achieve such an extension could be fatal. See for example *Foran v Secret Surgery Ltd* [2016] EWHC 1029.

> In *Foran,* it was said that CPR time limits had to be met unless there was good reason. Factual differences between cases did not assist in determining whether there was good reason for an extension of time within r.7.5(2). Each case turned on its own facts, but those facts had to be properly evidenced and carefully scrutinised, as required by CPR PD 7A

21. *Hashtroodi v Hancock* [2004] EWCA Civ 652 is well known and was recently considered in *Viner v Volkswagen Group United Kingdom Ltd* [2018] EWHC 2006 (QB) :

In *Viner, a* deliberate decision not to serve a claim form within the period for service, whether for tactical or commercial reasons, would generally be characterised as incompetent even if there were no limitation issues. The court would be reluctant to exercise its discretion under CPR r.7.6(2) to grant an extension of time. The appropriate approach would be to serve the claim form before the expiry date and apply, if appropriate, for a stay of proceedings.

22. Parties may choose to agree to suspend time after issue and before service. This happened in *Bethell Construction Ltd v Deloitte & Touche* [2011] EWCA Civ 1321 where the parties agreed an extension of time for service of the Claim Form and Particulars of Claim terminable upon 14 days' written notice by either party. (In the event the Claimant's solicitors failed to serve the Claim Form in time and in the Court of Appeal, got into an argument about the difference between a "stay" and an "extension of time".)

23. Where the Court orders a stay the period during which the claim is stayed will be disregarded in calculating the date of service : *Grant v Dawn Meats* [2018] EWCA Civ 2212.

A workplace accident occurred in October 2013. In June 2016 the Claimant issued proceedings under CPR Part 8 (as liability had been admitted). He simultaneously applied for a stay which was granted until 07.10.16 extended to 30.11.16. The Claim Form was served on 06.03.17. The Defendant argued that the stay did not affect the obligation to serve the Claim Form within four months. The CA disagreed : when the stay was lifted or expired the parties were placed **in the same position as when the stay was imposed.** As the stay had expired on 30.11.16 the Claimant has four months less 13 days before the stay from 30.11.16 in which to serve the Claim Form. Service at any time on or before 17.03.17 was within the extended four month period

Serving the Claim Form but seeking a stay

24. If the parties decide to issue and serve the Claim Form, they may then agree to ask the Court to stay the proceedings. However there is no such thing as a "de facto" or an "implied stay" and the parties cannot impose a stay by express agreement in the absence of an Order of the Court: *UK Highways A55 Ltd v Hyder Consulting UK Ltd* [2012] EWHC 3505 TCC.

Extending time for service of the Particulars of Claim and Medical Report

25. There are two potential traps. The first is illustrated by CPR 2.8(3)(iii). If the Claim Form is served on 2 October the last day for service of the Particulars of Claim is 16 October. Therefore if the Claim Form was issued say on 09.06.19 and was served on 02.10.19, the last day for service of the Particulars of Claim would have been 09.10.19. The second trap relates to the fact that the time for service of the Particulars of Claim is probably governed by the normal rules for service of documents under CPR 6.26. If proceedings are issued on 10.06.19 and the Claim Form is served on 02.10.19, if Particulars are to be served by post within time they would have to be sent two business days before 10.10.19 (assuming that 10.10.19 is a weekday). There is thus less time than if they were served with the Claim Form in which case sending them on 10.10.19 would be just in time. As is well known although Particulars of Claim must be served no later than the latest time for serving a Claim Form (CPR 7.4(2)) the general power to extend time in CPR 3.1(2)(a) remains applicable: *Totty v Snowden* [2001] EWCA Civ 1415. Hence the opportunity to escape from the Rule 3.9 framework if in time application is made to extend time to serve the Particulars of Claim: again, *Roberts v Momentum Services Ltd* [2003] EWCA Civ 299.

26. Suppose it is not possible to obtain a medical report in the normal way because Coronavirus problems ? One option is to proceed and serve Particulars of Claim without a medical report. In *Mark v Universal Coatings & Services Ltd* [2018] EWHC 33206, Martin Spencer J described an alternative to serving what he characterised as an early but uninformative Schedule of Loss and "anodyne" medical report with the Particulars of Claim. This is to state in a covering letter when the Particulars of Claim are served that these will follow ; and then leave it to the Court to case manage the claim and make provision for service of these documents in due course. It is always open to the Defendant to ask the Court to require the Claimant to serve a Schedule and medical report but in more complicated cases there is , arguably no point, because they will be uninformative at the early stage.

27. An alternative is for the Court to order a remote examination by video link and such might have an application in the case of e.g. skin lesions or burns.

Agreed extensions of time for procedural steps

28. The time specified by a rule or by the Court for a person to do an act may be varied by the written agreement of the parties. This includes a written agreement to agree an extension of time for the service of a Claim Form: *Thomas v Home Office* [2006] EWCA Civ 1355.

> *Thomas* held it was open to the parties to agree under Part 2 r.2.11 to extend time for the service of a claim form under Part 7 r.7.5. (2) Any agreed extension and any extension of that extension had to be in writing as required by Part 2 r.2.11 of the Rules. The written agreement of the parties did not have to be in a single document and could be constituted by an exchange of letters. An oral agreement that was then confirmed in writing by both sides was also within the concept of a written agreement. An oral agreement between two solicitors subsequently recorded in a letter sent by one solicitor to the other, but not answered by the other, could not be said to constitute a written agreement of the parties. What was required was a document or exchange of documents intended to constitute the agreement or to confirm or record the agreement. It was not sufficient for one solicitor merely to communicate to a third party what had allegedly been agreed. Nor was it sufficient for each side to note their oral agreement, unless the notes were exchanged

29. Subsequent variations of the variation must also be in writing. If an Order contains a sanction attracting CPR 3.8 and/or if it is part of a case management timetable it cannot be varied by agreement between the parties (CPR 2.11). However CPR 3.8 itself (as is well known) now contains an additional provision : the time for doing an act which would otherwise fall within CPR 3.8 may be extended by prior written agreement of the parties for up to a maximum of 28 days provided always that any such extension does not put at risk any hearing date[3].

30. Practice Direction 29 PD.6.5 distinguishes (a)Rule 2.11 variations by agreement of a date set by the Court for performing an act, (b) Rule 3.8(4) Extensions of Time and certain agreements about disclosure under CPR 31.5, 31.10(8) and 31.13. In these cases the parties need not file a written agreement. In all other cases where the parties agree about the change they wish to make the Practice Direction requires

[3] As is well known the standard direction now reads "*The parties may by prior agreement in writing extend time for a direction in this Order by up to 28 days and without the need to apply to Court. Beyond that 28 day period any agreed extensions of time must be submitted to the Court by email including a brief explanation of the reasons, confirmation that it will not prejudice any hearing date and with the draft Consent Order in Word format. The Court will then consider whether a formal application and hearing is necessary. Any retrospective agreement to extend time is to be submitted to the Court in a like manner*".

an application for an Order by Consent involving filing a draft of the Order sought and an agreed statement of the reasons why the variation is sought.

31. See Master Davison in *O'Driscoll v F.I.V.E. Bianchi S.P A.* (unreported but 'noted up' at https://www.7br.co.uk/2020/03/covid-19-court-order-odriscoll-v-f-i-v-e-bianchi-s-p-a/) The normal rule under CPR 3.8(4) was, at his direction, pragmatically displaced as a direct result of the potential practice disruptions that will be caused by COVID-19. The Master granted permission for the parties to agree extensions of up to 56 days by consent without further Order from the Court.

32. In Northumbria and Durham, Courts have directed for multi track trials that the parties are at liberty to extend, by consent, any step in the timetable up to a maximum of 90 days. If the extension of time, as agreed by the parties does not adversely affect the Trial date, the court does not need to be notified. If the Trial date cannot be met because of an agreed extension of time or because of any other difficulty related to, or arising from COVID-19, if the parties agree, a letter shall be sent to the court, with a draft order attached.

Signature of documents on behalf of a party

33. Where a document is to be signed as a requirement under the CPR including a Practice Direction that requirement shall be satisfied if the signature is printed by computer or other mechanical means (CPR 5.3). Practice Direction 5A PD.1 adds that where under Rule 5.3 a replica signature is printed electronically or by other mechanical means on any document the name of the person whose signature is printed must also be printed so that the person may be identified. Sophisticated forms of e-signature are proliferating see for example www.signinghub.com which provides an e-book about electronic signatures. Some commentators have suggested that in the present circumstances there should be added to the Statement of Truth under CPR PD22 the words "*This document has been signed at a time when the Claimant and solicitor were in social isolation*".

34. Finally as to the signature of Witness Statements see in force from 6 April 2020 changes to the Practice Direction to Part 32 (with emphasis added):

PRACTICE DIRECTION 22 – STATEMENTS OF TRUTH

1) In paragraph 2.1, in the wording of the statement of truth, at the end insert "***I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth***.".

2) In paragraph 2.2— a) after "as follows" insert "(and provided in the language of the witness statement)"; and b) in the wording of the statement of truth, at the end insert "***I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.".***

3) After paragraph 2.3 insert—

"2.4 The statement of truth must be in the witness's own language.

2.5 A statement of truth must be dated with the date on which it was signed.".

E-Bundles

35. Some guidance is available based on using Adobe Pro:

file:///D:/Coronavirus%203%2020/e%20bundles%20.pdf

https://www.dropbox.com/s/4tev6aynvxv9sb8/EBundlingGuide.pdf?dl=0

Courts currently remaining open

36. https://www.gov.uk/government/news/priority-courts-to-make-sure-justice-is-served?utm_medium=email&utm_source=

TIM TROTMAN
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