BIRMINGHAM LAW SOCIETY
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Carl Poole
Civil Procedure Rule Committee
Secretary to the Civil Procedure Rule Committee
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By email to: CPRC@justice.gov.uk

Dear Carl,

This letter has been prepared by the Birmingham Law Society's Dispute Resolution Committee ('DRC'). The DRC is a committee formed of legal practitioners who deal with many different areas of law and come from various sizes of practice. The DRC exists to give a voice to local practitioners and also lobbies on their behalf when appropriate.

The purpose of this correspondence is to recommend to the CPRC two proposals which we consider are important at both a local and national level and which we believe warrant reform (if this is not already in the process of such).

In brief, the two proposals are as follows:

1) Reform in respect of service by email; and
2) Reform of CPR 32.10.

Each proposal is considered separately and in further detail below.

Service by email

Service by email is governed by paragraph 4.2 of Practice Direction 6A of the CPR, which states as follows:

> "*4.2 Where a party intends to serve a document by electronic means (other than by fax) that party must first ask the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means (for example, the format in which documents are to be sent and the maximum size of attachments that may be received)*".

This provision is widely regarded by practitioners as outdated, having failed to keep up with the rapid expansion of technology. This is particularly in an age (especially during the pandemic) where electronic communication is now the primary method of communication. As you will be aware, HMCTS has been moving forward swiftly with its modernisation programme, which in many instances has been accelerated due to Covid-19.

We believe that the primary methods of service under the current rules are cumbersome, inefficient and costly. Most importantly, they also present an opportunity for un-cooperative and opportunistic behaviour, particularly when deadlines are approaching, which has resulted in significant (and unnecessary) satellite litigation.

The issue of service by email recently came before the Supreme Court in the case of *Barton* v *Wright Hassall LLP* [2018] UKSC 12. The case involved the Supreme Court having to consider whether it should retrospectively validate service in circumstances where a litigant in person purported to have served a claim by email, despite not having met the requisite procedural requirements. The Supreme Court ultimately refused to retrospectively validate service, which brought an end to the claim. In *Barton,* Lord Briggs made the following observations:

> *"29… Now that issue and filing is required to be carried out online, by legally represented parties in the Business and Property Courts in London, as the first stage in eventually extending this as the mandatory method for all civil proceedings, it may be questioned for how long these constraints upon service upon solicitors by email will continue to serve a useful purpose, but any relaxation of them is of course a matter for the Civil Procedure Rule Committee…*
>
> *44. It troubles me that the meaning and effect of CPR 6.15 has now been considered by this court, which does not lightly embark upon procedural questions, twice in recent years and that, on this occasion, its meaning has divided the court. While recognising the pressures upon its time during a period of major procedural reform, I hope that the Rule Committee might be able to find time to satisfy itself that this rule, and the provisions in the PD about service by email, still satisfy current requirements, in the context of giving effect to the Overriding Objective, and do so with sufficient clarity.*

Lord Sumption concurred that the matter ought to be considered by the CPRC.

The members of our Committee have experience in both claimant and defendant litigation, and accordingly have been able to consider these matters objectively and have devised what we consider are reasonable and pragmatic solutions.

We consider that the current restraints on service by email are unnecessary, outdated and present an opportunity for tactical game-playing. In our view it is time to change that. The *Barton* case is an example of the injustice that can occur under the current system.

We propose that service by email on a solicitor shall be valid when documentation is sent to:

1) Any email address for the firm which is published by the Law Society or Solicitors Regulation Authority;

2) Any email address which is set out on the letterhead or website of the solicitor; or
3) Any other email address which the solicitor explicitly identifies for service (such as individual email address of a solicitor, as opposed to their firm).

We appreciate that the position is somewhat more challenging when it comes to litigants in person ('LiP'), and that the overarching consideration must be on fairness to LiPs. We propose that service by email on a non-solicitor shall be valid when documentation is sent to:

1) An e-mail address set out on a statement of case, answer to a claim or any other document filed with the court by the party to be served;
2) An email address which is set out on the letterhead or website of the party to be served; or
3) An email address from which the party to be served has sent an email to the serving party within the last 28 days.

We are also clear that it should not be possible to exclude service by email, such as through a disclaimer on a letterhead or in email signatures. We also consider that it should also be made explicitly clear that where a party communicates that they have changed an email address, that the former email address may no longer be relied upon for service.

We consider that the stringent requirements which are set out at paragraph 4.3(b) of PD 6A CPR are no longer necessary. Modern email systems alert the sending party when files are too large and sending parties can seek receipts acknowledging when emails have successfully been delivered and/or read etc. We consider that it is incumbent on the serving party themselves to take reasonable steps to ensure that documentation is validly served, and will not 'bounce back' etc. If they wait until the eleventh hour before serving, do not seek to establish file-size challenges with the other side before sending large files or do not check with the other side that documentation has been safely received, then it is right that the risk lies with the serving party, and ultimately that the document will not be deemed served if they have not taken appropriate steps to protect their position. Accordingly, a further provision may be necessary which makes clear that if the serving party is notified that an email has not been successfully sent, that there has not been valid service. Of course this will require the sending party to select the option to be informed when the email has been successfully delivered.

Rule 32.10 CPR and failure to serve witness statements

The current wording of CPR 32.10 is:

> **"*Consequence of failure to serve witness statement or summary***
>
> *32.10 If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission*"

The sanction created by this rule is ambiguous, as noted by Turner J in *Gladwin v Bogescu* [2017] EWHC 1287 (QB). On its face, the rule once engaged, does no more than prevent a

party from tendering the witness in question for cross-examination. It does not prevent that party from seeking to rely upon the statement itself as hearsay evidence pursuant to the Civil Evidence Act 1995.

In *Gladwin* Turner J held that in such circumstances it would generally be appropriate for the court to exercise its power under CPR 32.1 so as to exclude such evidence:

> "*…to allow a party to rely upon a witness statement rather than to call the witness himself who, as here, is sitting at the back of the court would normally be absurd. It would be akin to the creation of a "worst evidence rule". In these circumstances, it would often be appropriate for the court to exercise its power under CPR 32.1(2) to exclude the evidence of the witness statement even if it would otherwise have been admissible under s 2(4) of the 1995 Act.*"

Although such guidance is welcome, it still places the onus upon the court, potentially on the day of trial, to decide whether or not late-served evidence is admissible at all. It is respectfully submitted that, in the spirit of avoiding uncertainty and encouraging compliance with the CPR, Turner J's "*often appropriate*" measure should become the default sanction, and CPR 32.10 should be amended accordingly (amendments italicised):

> **Consequence of failure to serve witness statement or summary**
>
> 32.10 If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence*, nor may the witness statement or witness summary be relied upon in court,* unless the court gives permission *in accordance with rule 3.9*.

This amendment brings the rule for evidence in Part 7 trials into line with that already in place for Part 8 trials, where CPR 8.6(1) provides that written evidence may not be relied upon without the court's permission if it has not been served in accordance with the timetable set out at CPR 8.5.

The reference to rule 3.9 emphasises that such application should normally be made on evidence rather than in the face of the court. It is further suggested that CPR 8.6(1)(b) be amended in the same fashion for consistency.

We trust that these proposals are of interest and are happy to provide any further assistance if required.

We look forward to receiving your comments and feedback in due course.

Yours sincerely

Sophie Samani
Chair of the Birmingham Law Society – Dispute Resolution Committee