



Service for the iPod generation

Dispute Management – May 2010

A briefing from our Dispute Management team

The digital age is proving difficult for the legal profession, no sooner have we mastered e-conveyancing than the panoptic world-wide-web throws up yet another challenge necessitating discussion, regulation and formalisation.

Three recent decisions have opened a new debate on the service rules and their interpretation, specifically relating to service via social networking websites. Since Facebook opened its doors to the general public in 2005 (having previously been reserved for the US college community) social networking has become the biggest ever internet phenomenon.

It comes as no surprise therefore that the impact of social networking has extended as far as litigation. However, to think that we may soon be serving proceedings by posting a link on someone's 'wall' is a little concerning. Whilst we are not quite there yet, the recent Commonwealth decisions suggest that service via Facebook, or even Twitter, may in some circumstances be considered good service.

The Commonwealth influence

As far back as December 2008 the Australian Capital Territory Supreme Court gave permission for proceedings to be served via Facebook in the case of [MKM Capital v Corbo & anor \[2008\]](#). In this case the claimant had brought possession proceedings against the defendants following their default on loan repayments. The claimant obtained judgment in default but could not trace the defendants to serve it upon them. The claimant had however identified that they both had active Facebook accounts and applied for permission to serve the papers via the social networking site.

The Judge required that two criteria be satisfied before permission was given:

1. that all other alternatives had been exhausted; and
2. that it could reasonably be assumed that the Facebook accounts were set up and maintained by the defendants.

The claimant satisfied the criteria and in relation to (2) showed that the defendants used the e-mail accounts which the Facebook accounts were registered to, that they shared the same dates of birth and that they were 'friends' on the site.

The Judge was satisfied that the claimant had exhausted all reasonable avenues to trace the defendants and granted it permission to serve the judgment via Facebook. This however was on the condition that it was sent to their personal message inbox on the site rather than posted on their 'wall' which was publicly accessible.

Subsequently, on 16 March 2009, the Wellington High Court permitted alternative service via Facebook in [Axe Market Gardens v Axe \[2009\]](#). The claimant in this case was also having difficulties locating the defendant but could show that he had a Facebook account and that he had recently accessed the internet.

The UK interpretation

Having clearly taken their antipodean precedents into account the High Court ruled, in October 2009, that an injunction could be served via the Twitter social networking site.

However the case itself centred around the micro-blogging site. Injunctive relief was sought by Donal Blaney, a prominent right-wing blogger and owner of Griffin Law, who was being impersonated on Twitter. The defendant was anonymous and there was no easy means of identifying him. On this basis Lewison J allowed service of the order on the defendant via

Twitter. This decision came as quite a surprise given that there was already an established procedure for identifying anonymous internet posters, set down in the [Norwich Pharmacal](#) case.

Implications

Service via an internet site may seem attractive as a cheap alternative but, given the evidential burden placed on the party serving the proceedings, it should not be looked on as an easy option.

Furthermore, as it very clearly falls short of the requirements of Rule 6, service via a social networking site could easily be challenged by the receiving party and leaves the serving party open to protracted litigation.

The difficulty with service via social networking sites is that, without compelling the site provider to disclose the details, you have no way of proving whether the recipient regularly accesses the site and whether the proceedings have actually been brought to their attention.

Service via a social networking site may also give rise to claims of infringement of the right to privacy. If proceedings are served on Twitter, or on someone's 'wall' on Facebook they can readily be seen by that person's respective 'followers' or 'friends' and the litigation becomes public.

Conclusion

Now the ball has started rolling it is only a matter of time before the UK courts consider service via social networking sites in detail. Whether they decide to further develop the principle or to rein in the idea is yet to be seen. Today it is 'Blaney's Blarney Orders' on Twitter, tomorrow it could be ASBO's on Bebo, who knows?

What you can however be sure of is that, if the courts develop the on-line service principle, there will be an 'app' specifically dedicated to it in the not too distant future!

More information

For further information regarding any of the issues raised in this article, please contact Joanna Corbett-Simmons in our Dispute Management team.



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