

Ndole Assets Ltd v Designer M&E Services UK Ltd (Law Society Intervening) [2018] EWCA Civ 2865

The Background

The Legal Services Act 2007 sets out a number of “reserved legal activities”, including conveyancing, conduct of litigation and exercising a right of audience. These activities may only be carried out by persons authorised (by e.g. the Law Society) or by persons who are exempt (e.g. litigants in person). If an individual who is not authorised carries out these activities, then (i) it is a criminal offence, (ii) it is a contempt of court, and (iii) where the act is conduct of litigation, the fees are not recoverable.

The claimant in this case engaged a construction claims consultant to assist it in the litigation. The claim consultant was not authorised to conduct litigation or exempt. The claims consultant arranged for the service of the claim on the defendant (by courier). The defendant, after the limitation period expired, applied to strike out the claim on the basis that service was “conduct of litigation” under the Act and the court should not uphold service carried out in such a way that it breached the Act.

The Decision

The Court of Appeal held that service of a claim form was conduct of litigation. In doing so, the Court held that the legal community had been wrong to assume that the Court in Agassi had endorsed the guidelines proposed by the Bar Council’s counsel (Anthony Speaight QC), and adopted a fairly wide interpretation of what steps amounted to “conduct of litigation”.

The Court noted that this gave rise to a difficulty. Authorisation to conduct litigation (or exemption) was a personal right: it could not be delegated to a third party. But there are clearly individuals involved in the service process which are not authorised or exempt (such as the postman). If there is no ability to delegate at all, then companies would in practice also not be able to act as litigants-in-person. The Court reconciled this difficulty by concluding that there were different degrees of agency, and distinguishing between the person taking legal responsibility for the act and the people merely carrying out the administrative activity of carrying it out. Regrettably, the Court did not clarify how these types of acts were to be distinguished in practice.

Having concluded that service of a claim form was conduct of litigation, the Court went on to consider the consequences. It held, in particularly strong terms, that there was no basis for concluding that service in breach of the Act was a nullity, and that there was nothing that would justify the exercise of a discretion to strike out the claim form.

Consequences

There are a number of practical consequences of this decision.

First, the scope of acts that are “conduct of litigation” are less clear than they were believed to be before. The Court indicated that it would interpret the definition of “conduct of litigation” broadly. It is clear that



the so-called Agassi-guidelines are not correct . However, the range of acts that would fall within the definition are unclear. The first instance judge (Coulson J) held that the scope of “conduct of litigation” was extremely broad – he indicated that he would have included the production of witness statements on the list. That may be an overly broad approach but practitioners need to be careful to ensure that they do not cross any lines, and the legal professional bodies will need to revisit the guidelines they provide as to what practitioners must and cannot do.

Second, solicitors should be careful to ensure that all acts that might be critical in the litigation process are carried out by fully qualified solicitors. The Court held that legal part of the act cannot be delegated to an unauthorised/non-exempt person. If an act is delegated to a trainee or secretary, then that individual may be committing a crime under the Legal Services Act 2007.

Third, company litigants-in-person may get some comfort from the knowledge that the court is prepared to uphold their ability to act in person. In practice, however, the minefield created by this judgment gives another reason for engaging a solicitor to conduct the litigation.

Fiona Sinclair QC & Gideon Shirazi acted for the successful respondent.

- Lynne McCafferty QC

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