Impecuniosity – Implications of Diriye v Bojaj and another

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Introduction

The case of Diriye v Bojaj [2021] 1 WLR 1277 is a Court of Appeal case and therefore should be seriously considered. I have often heard this case being cited by barristers and judges in court. So how important is this case in credit hire? In other words what are the implications of this case in credit hire?

In this article. I will deal with the issues in the following order: (a) summarise briefly the decision in Diriye v Bojaj; (b) summary of the references to impecuniosity in Diriye v Bojaj; (c) so what is this case about? (d) consider whether there any changes on law, as far as impecuniosity is concerned; (e) discuss the practical implications of Diriye v Bojaj, as far as impecuniosity is concerned; (f) summary and conclusion.

Summary of Diriye v Bojaj [2021] 1 WLR 1277

"Following a road traffic accident the claimant, a minicab driver, issued a claim for damages against the other driver and her insurer. A deputy district judge made an unless order to the effect that the claimant would be debarred from advancing impecuniosity unless there was a reply to the defence setting out all facts in support of that part of his claim. The claimant posted his reply, using the Royal Mail's "signed for first class" service, which aimed to effect delivery on the next business day after posting but provided that items would only be delivered on receipt of a signature or other proof of delivery. The Deputy District Judge decided that CPR 6.26 did not apply to "signed for first class" and therefore the deeming provisions for first class post were not applicable. That decision was upheld by the judge on appeal.

On the claimant's further appeal—

Held, dismissing the appeal, that on a true construction of the deemed service provisions in CPR r 6.26, the Royal Mail's "signed for first class" service fell within the meaning of "First class post (or other service which provides for delivery on the next business day)", notwithstanding that delivery would not be effected until a signature or equivalent had been provided; that, therefore, a document sent via the Royal Mail's "signed for first class" service would be deemed to have been served on the second business day after posting in accordance with rule 6.26, irrespective of when it was actually signed for and received; that, accordingly, the deemed service provisions of rule 6.26 did apply to the claimant's reply, which was deemed to have been served on the second business day after posting, namely 6 April; that it followed that the period of default for which relief from sanctions was required was two days, rather than the five days found by the deputy district judge; but that, notwithstanding that error, the deputy district judge had properly applied the requisite three-stage test to the application for relief from sanctions and had correctly concluded that there was no basis upon which relief could be granted in the circumstances of the present case; and that, accordingly, the deputy district judge had been right to refuse to grant the claimant relief from sanctions."

Summary of the references to impecuniosity in Diriye v Bojaj

In Diriye v Bojaj [2021 1 WLR 1277], there was reference in paragraph 4 to Umerji v Zurich [2014] RTR 23 where the Court of Appeal stated that *"in this kind of case it is clearly right that a claimant who needs to rely on his impecuniousness in order to justify the amount of his claim should plead and prove it".*

The court also stated in paragraph 52 that it was an *"incorrect notion that a claimant was entitled to advance a rubbishy case in stages, from pleading to witness statement to trial, presumably in the hope that, by the time the trial came on, there was a commercial imperative on the part of the respondents to settle the case".*

So what is this case about?

This case is about issues concerning whether "signed for first class" post was equivalent to first class post and therefore whether the "deeming" provisions under CPR 6.26 should apply. The interpretation of this clarified by how many days (two or five days) the unless order had been breached (there was no issue that the order had been breached). Following on from this, it was also considered whether the judge had correctly applied the three stage "Denton"test (Denton [2014] 1 WLR 3926) on an application for relief from sanctions.

There were references to impecuniosity, as an unless order stated that the reply to the defence must set out "all facts" in support of the assertion of impecuniosity. The reply to the defence self-evidently did not comply with the order, as a bare assertion of impecuniosity was pleaded which did not amount to "all facts" in support of impecuniosity. So, there was a breach of the unless order in substance (inadequate pleading) as well as in form (the reply to the defence was late). The Court of Appeal decided that the application for relief was properly considered. Amongst the reasons to refuse relief, it was cited that the witness statement in dealing with impecuniosity had not improved on the insufficient facts pleaded.

So, whilst there were references to impecuniosity, the case decided whether the "deeming provisions" for first class service applied and whether the lower court properly considered the three-stage test for an application for relief from sanctions. It is in this context that the references to impecuniosity need to be considered.

Any changes on law as far as impecuniosity is concerned?

The case cites that the claimant has to plead impecuniosity and the burden of proof is on the claimant. This is however no new concept, and indeed as recognised in Diriye v Bojaj the need to plead and prove were mentioned in Umerji.

In Diriye v Bojaj, it is stated that a claimant is not entitled to advance a *"rubbishy case in stages, from pleading to witness statement to trial"*. I doubt that a claimant is ever entitled to advance a "rubbishy" case in any matter, not just impecuniosity. It is however worth carefully noting the language of the court here. The court refers to three stages here namely: (i) pleadings; (ii) witness statement and (iii) the trial. Whilst this does not form the reasoning (or "ratio decendi") of the case, these are in my view general comments (perhaps obiter) on the need for a defendant to know the case they are facing in claims generally, though the comments happen to be made in a case concerning impecuniosity.

The three words "pleadings", "witness statement" and "trial" need to be read conjunctively (read together) not disjunctively (read separately). In fact, the words "witness statement" and "trial" are interwoven concepts in civil trials, as generally the witness statement will become the evidence in chief at trial. From my real time experience, courts are very reluctant in the absence of a breached unless order to prevent impecuniosity from being asserted where the pleadings on impecuniosity are not detailed enough. Notwithstanding this, claimants should not take this chance and should always have adequate pleadings, as some judge will take a stricter view. However, from my general experience where the witness statement does adequately address impecuniosity notwithstanding far from perfect pleadings, then a court will hear the claimant's evidence on impecuniosity and will prefer to make an informed decision after hearing all the evidence. It is in this context that the words "pleadings", "witness statement" and "trial" need to be read together. The word "pleading" should not be read in isolation. In Diriye v Bojaj all the way to the trial, the defendant did not know what case they were facing on impecuniosity, as even the witness statement was inadequate in this regard.

In the case of Diriye v Bojaj, a clear unless an order had been flagrantly breached. To make the situation worse, matters were not rectified in the witness statement making it more difficult to obtain relief from sanctions. If the witness statement had been adequate, then the situation may have been different so as far as relief is concerned, though I accept there is a large degree of speculation here.

The need for adequate pleadings should not have come as surprise. In this case however the matter was compounded by a woefully inadequate witness statement, which compounded the difficulties for the Claimant.

This case has not in my view made any change to the law surrounding impecuniosity.

The practical implications of Diriye v Bojaj, so far as impecuniosity is concerned

Diriye v Bojaj was concerned with whether the deemed service provisions for first class post applied in the case. The case was also concerned with a breach of an unless order and whether the relief application was properly considered in this regard.

There are references to impecuniosity and it is emphasised that the defendant needs to know the case they have to meet on this issue. It is however standard practice for unless orders to be made in cases of credit hire for the claimants to provide financial documents and/or provide a reply to the defence asserting the basis of impecuniosity – if not complied with then a claimant will be debarred from asserting impecuniosity. In Diriye v Bojaj there was a breach of the unless order and an application for relief from sanctions was dismissed – in my view the inadequate witness statement had made the relief much harder to obtain.

The case of Diriye v Bojaj emphasises the need for adequate pleadings, and this places more pressure on claimants. This however is not a new development. The issue of what are adequate pleadings for impecuniosity will be outside the scope of this article. The case does not however in my view make any change to the law concerning impecuniosity. It will exert more pressure on claimants to ensure that pleadings are adequate on impecuniosity. However, the nature of courts orders is such that through the means of an unless order, all but the tardiest of impecunious claimants will ensure that there is compliant financial disclosure and/or pleadings are sufficiently particularised so that the defendant knows the case they must meet.

Conclusion and summary

In conclusion and summary: (1) Diriye v Bojaj was on its own facts, where the interpretation of "deeming provisions" for first class post under CPR 6.26 were considered, and it was further considered whether the lower court had properly considered the application for relief from sanctions regarding a breach of an unless order; (2) Dirye v Bojaj emphasised the need for adequate pleadings, though the context was where an unless order had been breached and little had been done to rectify the mistake by producing more details in the witness statement on impecuniosity. If the witness statement was adequate, then how the issue of relief was decided may have been potentially different; (3) in credit hire cases, it is standard practice for the court make unless orders for financial documents to be disclosed for impecuniosity and/or replies setting forth the basis of impecuniosity. Claimants would be wise to observe compliance to avoid a similar fate to their case as Diriye v Bojaj; (4) from my general experience, where there is no breach of an unless order, courts are reluctant to prevent a claimant from asserting impecuniosity even with far from perfect pleadings as the preference usually is to decide a case after hearing all the evidence. Notwithstanding this, it goes without saying that claimants should plead impecuniosity adequately as a particular court on a given day may take a strict view; (5) I do not see the case of Diriye v Bojaj as having made any changes to the law, though it will place more pressure on claimants to ensure that the pleadings are sufficiently pleaded; (6) however with the unless orders for credit hire cases routinely meted out, it will take a particularly tardy impecunious claimant to be debarred from asserting impecuniosity at trial.

I hope this article assists the reader in understanding the potential issues.

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