Neutral Citation Number: [2019] EWCA Civ 985

Case No: A3/2018/2096

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BUSINESS AND PROPERTY COURTS,
Business List, (CHD)
His Honour Judge Hodge QC
(Sitting as a High Court Judge)
CH2018000086

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/06/2019

Before :

LORD JUSTICE BEAN
LADY JUSTICE ASPLIN
and
LADY JUSTICE NICOLA DAVIES

- -

Between:

Woodward and Another	**Appellant**
- and -	
Phoenix Healthcare Distribution Limited	**Respondent**

- -
- -

Mr David Berkley QC and Mr Christopher Snell (instructed by **Lexlaw Solicitors and Advocates**) for the **Appellant**
Mr Andrew Onslow QC and Ms Hannah Glover (instructed by **Mills & Reeve LLP**) for the **Respondent**

Hearing date: 16th May 2019

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Approved Judgment

Lady Justice Asplin:

1. The question on this appeal relates to the circumstances in which it is appropriate, on an application for retrospective validation of service pursuant to CPR r 6.15(1) and (2), to allow a potential defendant to take advantage of a mistake on the part of a would-be claimant giving rise to defective service where any new claim would be statute-barred.

2. The Appellants, Sally Woodward and Mark Addison, through their solicitors, Collyer Bristow LLP ("CB"), purported to serve the claim form and particulars of claim in these proceedings on the Respondent's solicitors, Mills & Reeve LLP ("M&R"), by letter and email, before the expiry of the issue of the claim form, without having confirmed that M&R was authorised to accept service. M&R was not authorised to do so. It is common ground that this was not good service. As a result, the claim form expired unserved the following day. By that point the limitation period had also expired. The question is whether the court should exercise its power retrospectively to validate service. Master Bowles did so in a written decision the neutral citation of which is [2018] EWHC 334 (Ch). However, HHJ Hodge QC, sitting as a Judge of the High Court, allowed an appeal from the Master, set aside the claim form and dismissed the action. The neutral citation of his judgment, given ex tempore, is [2018] EWHC 2152 (Ch). This is an appeal from that decision.

The relevant background

3. I take the background facts from the careful judgment of Master Bowles. By the claim form issued on 19 June 2017, the Appellants sought to bring proceedings against the Respondent, Phoenix Healthcare Distribution Limited ("Phoenix") as assignees of Trihealth Ltd and J E and NA Richardson (Chemists) Limited. The causes of action are in breach of contract and misrepresentation and are alleged to have a value in excess of £5 million. They arise out of a contract dated 20 June 2011 which was made between one of the companies and Phoenix for the purchase of a drug. It is alleged that the drug was still under patent and that Phoenix was in breach of contract in selling it when it had no right to do so. In the alternative, it is alleged that Phoenix negligently or fraudulently misrepresented when negotiating the contract that the drug was no longer under patent and was available for sale. It is said that as a consequence of the breach of contract and/or misrepresentations and the refusal to accept return of the drug and provide a refund or credit for the contract price, the companies suffered financial difficulties and the whole group went into administration and was sold out of administration at a much lower price than if the matters complained of had not occurred, leading to loss of profits which would otherwise have been made.

4. The alleged causes of action accrued at the date of the contract and, therefore, the claim was potentially time barred from 20 June 2017. The claim form was issued on 19 June 2017 and, pursuant to CPR r 7.5(1), should have been served by no later than 12.00 midnight on the calendar day four months after that date, being midnight on 19 October 2017.

5. The claim form, particulars of claim and various annexes to it and a response pack were sent by CB to M&R by first class post on 17 October 2017 by way of service and were received on 18 October 2017. The same documents were also sent by email to Mr

Dawson-Gerrard, a partner of M&R at 10.37 a.m. on 17 October 2017. A "read receipt" was received by CB at 10.43 a.m. that day, acknowledging receipt of the email and confirming that it had been read. Having received the email, Mr Dawson-Gerrard satisfied himself that the purported service was ineffective, took the view that he was not obliged to notify the Appellants' solicitors, CB, of their mistake, met with representatives of Phoenix and took instructions from Phoenix not to inform CB of the mistake. The claim form expired at midnight on 19 October 2017.

6. It was not until the following day, 20 October 2017, that M&R wrote to CB stating that service had been defective. The claim form had not been served on Phoenix, M&R were not instructed to accept service and neither M&R nor Phoenix had ever confirmed in writing to CB that MR had been authorised by Phoenix to accept service. M&R contended therefore that the claim form had expired and with it, the proceedings. M&R put CB on notice that it would apply, on behalf of Phoenix, for a declaration that as a result of the expiry of the claim form the court had no jurisdiction to hear the claim. Steps were taken immediately by CB to seek to serve Phoenix by courier, first class post and email at its trading address in Runcorn and the documentation, including the claim form and particulars of claim, was delivered just after 11a.m. on 20 October 2017.

7. An application was issued on the Appellants' behalf on 23 October 2017 seeking an order that the steps taken on 17 October had been good service; alternatively, that, in the light of those steps, service be dispensed with; and in the further alternative, that the court should validate the purported service on Phoenix on 20 October by granting an appropriate extension of time. An application was also issued on behalf of Phoenix, dated 27 October 2017, pursuant to CPR r 11, for an order that the claim form be set aside and a declaration that the court was without jurisdiction to hear the claim on the grounds that the claim form had not been served within the time allowed by CPR r 7.5(1).

8. Following a number of concessions, Master Bowles was required to determine: whether on a true construction of the correspondence CB had been given written notification that M&R was instructed to accept service of the proceedings; even if there was no such notification, whether M&R and therefore, Phoenix was estopped from denying that it was so instructed so that service on M&R should be regarded as good service; and lastly, in the absence of written notification, or estoppel, whether the purported service upon M&R should be retrospectively validated pursuant to CPR r 6.15(1) and (2).

9. The Master decided that there was nothing in the various exchanges of correspondence which amounted to written notification that M&R was instructed to accept service, whether expressly or implicitly. He also held that on the facts, M&R and their client, Phoenix, were not estopped from denying that the purported service of the claim form upon M&R on 17 October 2017 constituted good service. His decision in relation to those matters was not appealed. Having decided at para 68 of his judgment that M&R was not under a duty, as between the parties, to speak out in respect of CB's mistake, the Master went on to deal with the question of whether the purported service upon M&R on 17 October 2017 should be validated retrospectively at paras 69 – 120 and in the Addendum to his judgment, and made a declaration that it constituted good service. It was his order in that respect which was appealed to HHJ Hodge QC.

10. The Master did not have the benefit of the Supreme Court's decision in *Barton v Wright Hassall LLP* [2018] 1 WLR when the matter was before him, nor when he was writing

his judgment. The *Barton* decision was handed down on 21 February 2018 after the Master had sent his draft judgment to the parties and while arrangements were being made for handing down that judgment. The Master was asked to reconsider his judgment in light of the Supreme Court's decision having particular regard to the fact that he had referred in his judgment to the Court of Appeal's decision, the neutral citation of which is [2016] EWCA Civ 177.

11. Having done so, the Master decided that there was "good reason" to validate service of the claim form retrospectively under CPR r 6.15. His central reasoning is at paras 4 – 9 of the Addendum to his judgment as follows:

> "4. In my judgment, I characterised the Court of Appeal decision in Barton as being one of a number of cases where validation under CPR 6.15 had been refused upon the primary basis that, although de facto service had been effected, there was nothing other than de facto service to constitute good reason for validation. The majority decision in the Supreme Court seems to me to bear this out. The fact that the claimant in Barton was a litigant in person did not, in the view of the majority, provide a sufficient additional factor such as to give rise to a good reason for validation. Likewise, on the facts and on the very limited arguments deployed (see paragraph 22 of the Supreme Court judgment in Barton) the conduct of the defendant's solicitors, in that case, did not amount to the playing of technical games.
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> 5. It is true that Lord Sumption, giving the majority judgment, took the view that the solicitors in Barton were not, even had they had the time to do so, under any duty to advise the claimant of his mistake as to service. The Supreme Court, however, was not asked to consider and did not consider, as I have been asked to, any developed argument, as to the impact and effect of the duty to further the overriding objective, as giving rise to a duty to the court to warn an opposing party of his, or her, mistakes. I do not regard the majority in Barton (and I do not think that the majority in Barton would have regarded themselves) as having given a definitive, or any, answer, in respect of that argument.
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> 6. It is true, also, that, in endorsing the principles to be derived from Abela, Lord Sumption gave, it might be said, new, or greater, weight to the fact that validation might deprive a defendant of a limitation defence than has, perhaps, emerged from the earlier authorities. He was, however, at pains to say that the point was not, necessarily, decisive. As explained by Lord Briggs in his dissenting judgment, the point can, indeed, be put the other way; namely that, in a case where the de facto service fulfils all the objectives of good service, a refusal to validate may provide the defendant with a windfall.
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> 7. In the current case, I consider that the de facto service effected by Collyer Bristow did fulfil all the objectives of good service (see, in particular, paragraphs 83 and 99 of my judgment and paragraphs 28 to 30 of the Supreme Court judgment in Barton) and that, to the extent that something additional is required in order to give rise to a good reason to validate, then that good reason was provided by the failure of Mills & Reeve, contrary, as I find, to its, or its client's, duty to further the

> overriding objective, to warn Collyer Bristow that its purported service was defective, such that good service could have been effected in time. It was that failure which constituted the deliberate playing of a technical game.
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> 8. As I set out in my judgment, I do not think that the undoubted culpability of Collyer Bristow, in overlooking the fact that Mills & Reeve had not indicated that it had authority to accept service, outweighs Mills & Reeves conduct, in failing to draw Collyer Bristow's attention to its mistake. Had Mills & Reeve acted as it should have done, Collyer Bristow's mistake would not have precluded good service being effected in the lifetime of the Claim Form.
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> 9. For the same reason, I do not think that, in this case, the fact, that validation will, or may, deprive Phoenix of a limitation defence, should preclude validation. Had Mills & Reeve acted as it should have done, good service would have been effected in time. In that context, validation does no more than to preclude Phoenix from procuring a windfall."

12. The Master's finding that M&R/Phoenix was required to warn CB that its purported service was defective was derived from his view that the entitlement of a party to litigation to take advantage of an opponent's mistakes is qualified by the obligations that litigants owe to the court to give effect to the overriding objective under CPR r 1.3. That view was in turn said to be consistent with: (1) HHJ Hacon's view in *OOO Abbott v Econwall UK Ltd* [2016] EWHC 660 (IPEC) that CPR r1.3 requires a litigator, aware of the real possibility that a genuine misunderstanding had arisen in respect of a significant matter, to take reasonable steps to clear up that misunderstanding (this view being preferable to what was said to be HHJ Pelling's contrary view in *Higgins v ERC Accountants & Business* [2017] EWHC 2190 (Ch)); (2) the fact that the proper approach to CPR r 6.15 requires the court to discourage "technical game playing": *Abela v Baadarani* [2013] 1 WLR 2043; (3) a litigant's duty to avoid unnecessary, expensive and time-consuming satellite litigation: *Denton v T H White Ltd* [2014] EWCA Civ 906; and (4) the rejection of the pre-CPR practice of defendants allowing sleeping dogs to lie until such time as a claimant's delay was sufficient to enable strike out: *Asiansky Television Plc v Bayer-Rosin (a firm)* [2001] EWCA Civ 1792. See paras 95, 100, 101, and 102 – 107 of the Master's judgment.

13. The Master also dealt with the relevance of the delay in serving the claim form until 17 October 2017, two days prior to the expiry of the claim form, at paras 115 – 117. In particular, he found that the decision to delay service of the claim form was wholly reasonable given: (1) the Appellants faced serious difficulties in preparing the particulars of claim due to, among other things, the First Appellant suffering the onset of very serious ill health; and (2) early service of the claim form without complete instructions as to the content of the particulars of claim might have caused difficulties in respect of the service of that document.

14. Turning to the Judge's reasoning, in summary he decided that the Master had erred in principle and arrived at a conclusion which was plainly wrong in holding that there was "good reason" to validate service of the claim form retrospectively under CPR r 6.15 as M&R and Phoenix: (1) were not under a CPR r 1.3 duty to warn CB that its purported

service was defective; and/or (2) had not been "playing a technical game" by remaining silent.

15. In relation to the purported duty to warn deriving from CPR r1.3, the Judge considered that a plain reading of the CPR did not support the existence of such a duty and that the Master had erred in refusing to follow the case of *Higgins* on the basis of what was said in *OOO Abbott v Econwall UK Ltd*. Although the structure of the judgment is, at times, difficult to follow, the Judge's essential reasoning is at [170] – [174], which reads:

> "170. In my judgment, the culture introduced by the CPR does not require a solicitor who has in no way contributed to a mistake on the part of his opponent, or his opponent's solicitors, to draw attention to that mistake. That is, in my judgment, not required by CPR 1.3; and it does not amount to 'technical game playing'.
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> 171. Looking first at CPR 1.3. . .
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> 172. None of that, in my judgment, requires the court to impose on a party a duty to inform an opposing party of an error which has been made, even if there is still time for the opposing party to cure that error.
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> 173. I agree with the view of Judge Pelling that a defendant's solicitors are under no duty to correct errors by the claimant's solicitors even if they know, or suspect, they have been made, at least in a case where they have in no way contributed to those errors. I do not regard Judge Hacon, in Abbott, as taking any different view. Judge Hacon prefaced the observations relied upon by the claimants in the present case with the clear acknowledgment that parties to litigation are plainly not obliged to inform the opposing side of its mistakes, in the sense of steps taken, or positions adopted, which appear not to be in that other side's best interests. Each side must look after itself. I accept Judge Hacon's qualification to that general proposition. The overriding objective does require parties to take reasonable steps to ensure, so far as is reasonably possible, that there is a clear, common understanding between them as to the identity of the issues in the litigation, and also as to related matters, including procedural arrangements. But that requires there to have been a genuine misunderstanding that has arisen between the parties regarding a significant matter.
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> 174. In this case, there is no such significant matter to which the defendant or its solicitors had in any way contributed. If one looks at Judge Hacon's recital of the terms of the relevant correspondence, at paragraphs 11 through to 14 of his judgment, one can see quite readily how the judge found that the defendant's solicitor came to consider that his opposite number had wrongly interpreted the offer that had been made to him to extend time for service. At paragraph 38, Judge Hacon recorded that the defendant's solicitor had discussed the uncertainty of what his opposite number had agreed to with the defendant, his client, and a decision had been made to take no steps to clear up any misunderstanding. The present case is different because the defendant and its solicitors had not contributed to the misunderstanding. It was akin to the case considered by Judge Pelling, where the defendants' solicitors had in no way participated in correspondence which had given rise to any

> misunderstanding. Where the Master, in my judgment, fell into error was in taking the view that it was incumbent upon a litigator, or his client, to dispel a misunderstanding in circumstances where, as the Master had found at paragraph 91, the mistake had not been of the defendant's making, or that of his solicitors, and had arisen in a situation which did not call for a response."

16. The Judge had also held at para 143 that the Master had insufficiently taken into account the fact that the observations in *Denton v White* were addressing inappropriate resistance to applications for relief from sanctions. The Judge referred to the statement of Lord Sumption JSC in the *Barton* case at para 8, that CPR r 6.15 is rather different from CPR r 3.9, the main difference being that the "disciplinary factor" is less important in relation to the rules governing service of a claim form.

17. As to the Judge's finding that the Master had erred or was plainly wrong to find that M&R or Phoenix was "playing a technical game", in short, the Judge's view was that technical game playing did not include M&R and Phoenix allowing the claim form to expire in circumstances where they had not contributed to the error and the purported service did not call for a response. Rather the Judge's view was that technical game playing referred to the taking of arid procedural points contrary to the overriding objective, such as defending an application for relief from sanctions that was bound to succeed. See paras 179 – 181 of the Judge's judgment.

18. The Judge considered that his conclusions were supported by Lord Sumption's view in the *Barton* case that the defendant's solicitors in that case had not played technical games because they were under no duty to give the claimant advice, nor could they properly have done so without taking their client's instructions and advising them that the result might be to deprive them of a limitation defence. As to the Master's view at para 5 of his Addendum that the Supreme Court was not asked to consider any developed argument as to the impact and effect of CPR r 1.3, the Judge reasoned:

> "194. . . .There is nothing to suggest that Lord Sumption would have taken the view that, in refusing to authorise its solicitors to do so, the defendant would have been acting in breach of the overriding objective of the Civil Procedure Rules. I accept that there is no reference in Lord Sumption's judgment to CPR 1.3, or to the argument that has been advanced by Mr Penny to this court, and which succeeded before the Master. Nevertheless, I consider it inconceivable that Lord Sumption would have taken the view that it was inappropriate for the defendant to have refused to authorise the giving of advice of the kind under consideration if he had regarded it as inconsistent with the defendant's duties under the overriding objective."

19. The Judge also rejected an argument arising from a Respondent's Notice that there was in any event "good reason" retrospectively to validate service. In particular, the Judge held that: (1) the Appellants and CB had "courted disaster" by unreasonably delaying service of the claim form until the particulars of claim had been finalised given that it is the service of the claim form, and not of the particulars of claim, that engages the court's jurisdiction and it was open to the Appellants to apply for an extension of time for service of that document under the less stringent regime for such applications; and

(2) there was nothing sufficient to overcome the loss to the defendant of its substantive defence on limitation grounds. See paras 186 – 192 of the Judge's judgment.

Grounds of appeal

20. The grounds of appeal are threefold. It is said that the Judge was wrong to hold that: (i) the Master had erred in finding that Phoenix's conduct in not notifying the Claimants/Appellants before the claim form expired that its solicitors were not authorised to accept service on its behalf was contrary to CPR 1.3; (ii) the Master erred in finding such conduct was "game playing"; and (iii) in any event, the facts did not afford "good reason" to permit alternative service, including that the Appellants had "courted disaster."

Relevant CPR Provisions

21. The provisions of the CPR which are central to this appeal are CPR r 1.3 and CPR r 6.15(1) and (2). CPR 1.3 provides as follows:

> "**1.3 - Duty of the parties**
>
> The parties are required to help the court to further the overriding objective."

It is well known that the overriding objective of the CPR is one of "enabling the court to deal with cases justly and at a proportionate cost" (CPR 1.1(1)) and that dealing with a case justly and at proportionate cost includes, so far as is practicable, the matters set out at CPR 1.1(2) (a) – (f) which include at (b), "saving expense", at (d) "ensuring that the case is dealt with expeditiously and fairly" and at (f) "enforcing compliance with rules, practice directions and orders". Furthermore, CPR 1.2 provides that:

> **"1.2 - Application by the court of the overriding objective**
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> The court must seek to give effect to the overriding objective when it –
>
> (a) exercises any power given to it by the Rules; or
>
> (b) interprets any rule subject to rules 76.2, 79.2 and 80.2, 82.2 and 88.2."

The court must further the overriding objective by actively managing cases (CPR 1.4(1)) and active case management includes the matters set out at (a) – (l) of CPR 1.4(2). They include at (a) "encouraging the parties to co-operate with each other in the conduct of the proceedings".

22. CPR 6.15(1) and (2), which are concerned with service of a claim form by alternative methods or at an alternative place, provide as follows:

> **"6.15.- Service of the claim form by an alternative method or at an alternative place**

> "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.
>
> (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."

Nature of the exercise to be undertaken by this court

23. Before turning to the issues which arise on the appeal itself, it is important to appreciate the nature of the appellate function in a case of this kind. As Lord Sumption JSC pointed out in *Barton* at para 15, an order arising from a decision in relation to the powers in CPR 6.15(1) and (2) is discretionary and is based upon an evaluative judgment of the relevant facts. As he put it "[I]n the ordinary course, th[is] court would not disturb such an order unless the court making it had erred in principle or reached a conclusion that was plainly wrong". A similar view had been expressed by Lord Clarke of Stone-cum-Ebony JSC in *Abela v Baadarani* at para 23. Accordingly, it is not for us, any more than it was for the Judge, to seek to substitute our own exercise of evaluative judgment for that of the Master. It is necessary to determine whether the Master erred in principle or reached a conclusion which was plainly wrong.

Discussion and Submissions

24. In the light of the fact that the decision of the Supreme Court in the *Barton* case is central to the issues which arise on this appeal and to Mr Berkley QC's submissions on behalf of the Appellants, and caused the Master to add an Addendum to his draft judgment, it is the most natural place to begin. Although Lord Sumption emphasised the fact-sensitive nature of the evaluative judgment which is necessary for the purposes of determining whether there is "good reason" under CPR 6.15 and stated that the exercise does not lend itself to over analysis or copious citation of authority, and Lord Clarke of Stone-cum-Ebony JSC in *Abela & Ors v Baadarani & Anr* stated at para 35 of his judgment that "[I]t should not be necessary for the court to spend undue time analysing decision of judges in previous cases which have depended on their own facts", given Mr Berkley's oral submissions, it is important to consider both the factual context and the principles arising from the *Barton* case and that of *Abela*, in some detail.

25. In *Barton*, a litigant in person, Mr Barton, issued a claim form and particulars of claim in the county court and elected to serve them himself. After correspondence with the defendant in accordance with the Pre-Action Protocol, Mr Barton sought an extension of time to serve the claim form and particulars of claim which was refused. The defendants then instructed solicitors, Berrymans Lace Mawer ("Berrymans"), who sent an email to Mr Barton asking him to address all future correspondence to them. There was further email correspondence, the detail of which is not relevant. The final email in that chain of correspondence from Berrymans, which was dated 17 April 2013, concluded "I will await service of the claim form and particulars of claim". There were no further communications until 24 June 2013, the last day before the expiry of the claim form. At 10.50 a.m. on that day, Mr Barton emailed Berrymans attaching the

claim form, particulars of claim and a response pack amongst other things "by means of service upon you." He received an automatic reply with a number to contact if it was urgent. He did not do so.

26. In fact, there was no substantive reply until 4 July 2013 when Berrymans wrote to Mr Barton and the court stating that they had not confirmed that they would accept service by email and in the absence of confirmation it was not a permitted mode of service, that the claim form had expired unserved and that the action was statute barred.

27. Mr Barton applied for an order under CPR r 6.15 validating service retrospectively. The district judge decided that good reason had not been shown for the court to exercise its discretion to grant the order and the judge dismissed Mr Barton's appeal, concluding that on the facts there was no reason why the claim form could not have been served within the period of its validity, rejecting the suggestion that he had been lulled into a false sense of security by the email correspondence with the solicitors and refusing to accept that he was entitled to greater indulgence because he was unrepresented. The Court of Appeal affirmed the judge's decision on the basis that although the defendant's solicitors had been aware of the claim and had received the claim form before it had expired, the claimant had done nothing other than attempt service in breach of the rules through ignorance of their content. See paras 12 – 14 of *Barton*.

28. In the Supreme Court, Lord Sumption JSC, with whom Lords Wilson and Carnwath JJSC agreed, held that both the judge and the Court of Appeal had identified the critical features of the facts of the case and reached a conclusion which they were entitled to reach: see para 15. Accordingly, the appeal was dismissed. Lord Briggs JSC, with whom Baroness Hale of Richmond PSC agreed, would have allowed the appeal.

29. Lord Sumption addressed the exercise of discretion under CPR 6.15(2) and distilled the general principles which can be derived from the earlier decision of the Supreme Court in relation to CPR 6.15 in the *Abela* case (which he described as very different from the one before him) at [8] – [10] in the following way:

> "8. The Civil Procedure Rules contain a number of provisions empowering the court to waive compliance with procedural conditions or the ordinary consequences of non-compliance. The most significant is to be found in CPR 3.9, which confers a power to relieve a litigant from any "sanctions" imposed for failure to comply with a rule, practice direction or court order. These powers are conferred in wholly general terms, although there is a substantial body of case law on the manner in which they should be exercised: see, in particular, *Denton v TH White Ltd (De Laval Ltd, Part 20 defendant) (Practice Note)* [2014] 1 WLR 3926 (CA), esp at para 40 (Lord Dyson MR and Vos LJ), *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] 1 WLR 4495 (SC(E)). The short point to be made about them is that there is a disciplinary factor in the decision whether to impose or relieve from sanctions for non-compliance with rules or orders of the court, which has become increasingly significant in recent years with the growing pressure of business in the courts. CPR rule 6.15 is rather different. It is directed specifically to the rules governing service of a claim form. They give rise to special considerations which do not necessarily apply to other formal documents or to other rules or orders of the court. The main difference is that the

disciplinary factor is less important. The rules governing service of a claim form do not impose duties, in the sense in which, say, the rules governing the time for the service of evidence, impose a duty. They are simply conditions on which the court will take cognisance of the matter at all. Although the court may dispense with service altogether or make interlocutory orders before it has happened if necessary, as a general rule service of originating process is the act by which the defendant is subjected to the court's jurisdiction.

9. What constitutes "good reason" for validating the non-compliant service of a claim form is essentially a matter of factual evaluation, which does not lend itself to over-analysis or copious citation of authority. This court recently considered the question in *Abela v Baadarani* [2013] 1 WLR 2043. That case was very different from the present one. The defendant, who was outside the jurisdiction, had deliberately obstructed service by declining to disclose an address at which service could be effected in accordance with the rules. But the judgment of Lord Clarke of Stone-cum-Ebony JSC, with which the rest of the court agreed, is authority for the following principles of more general application:

(1) The test is whether, "in all the circumstances, there is good reason to order that steps taken to bring the claim form to the attention of the defendant is good service" (para 33).

(2) Service has a number of purposes, but the most important is to ensure that the contents of the document are brought to the attention of the person to be served (para 37). This is therefore a "critical factor". However, "the mere fact that the defendant learned of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under rule 6.15(2)" (para 36).

(3) The question is whether there is good reason for the Court to validate the mode of service used, not whether the claimant had good reason to choose that mode.

(4) Endorsing the views of the editors of *Civil Procedure* (2013), vol i, para 6.15.5, Lord Clarke pointed out that the introduction of a power retrospectively to validate the non-compliant service of a claim form was a response to the decision of the Court of Appeal in *Elmes v Hygrade Food Products plc* [2001] EWCA Civ 121; (2001) CP Rep 71 that no such power existed under the rules as they then stood. The object was to open up the possibility that in appropriate cases a claimant may be enabled to escape the consequences for limitation when a claim form expires without having been validly served.

10. This is not a complete statement of the principles on which the power under CPR rule 6.15(2) will be exercised. The facts are too varied to permit such a thing, and attempts to codify this jurisdiction are liable to ossify it in a way that is probably undesirable. But so far as they go, I see no reason to modify the view that this court took on any of these points in *Abela v Baadarani*. Nor have we been invited by the parties to

> do so. In the generality of cases, the main relevant factors are likely to be (i) whether the claimant has taken reasonable steps to effect service in accordance with the rules and (ii) whether the defendant or his solicitor was aware of the contents of the claim form at the time when it expired, and, I would add, (iii) what if any prejudice the defendant would suffer by the retrospective validation of a non-compliant service of the claim form, bearing in mind what he knew about its contents. None of these factors can be regarded as decisive in themselves. The weight to be attached to them will vary with all the circumstances."

30. Lord Sumption also rejected the claimant's submission that the defendant's solicitors had been "playing technical games". At paras 22 and 23 he reasoned as follows:

> "22. Mr Elgot repeated before us the submission that he made in the Court of Appeal that Berrymans had been "playing technical games", with his client. However, the sole basis for that submission was that they had taken the point that service was invalid. Since they did nothing before the purported service by e-mail to suggest that they would not take the point, this does nothing to advance his case. After the purported service by e-mail, there is nothing that they could reasonably have been expected to do which could have rectified the position. The claim form expired the next day. Even on the assumption that they realised that service was invalid in time to warn him to re-serve properly or begin a fresh claim within the limitation period, they were under no duty to give him advice of this kind. Nor could they properly have done so without taking their client's instructions and advising them that the result might be to deprive them of a limitation defence. It is hardly conceivable that in those circumstances the client would have authorised it.
>
> 23. Naturally, none of this would have mattered if Mr Barton had allowed himself time to rectify any mishap. But having issued the claim form at the very end of the limitation period and opted not to have it served by the Court, he then made no attempt to serve it himself until the very end of its period of validity. A person who courts disaster in this way can have only a very limited claim on the court's indulgence in an application under CPR rule 6.15(2). By comparison, the prejudice to Wright Hassall is palpable. They will retrospectively be deprived of an accrued limitation defence if service is validated. If Mr Barton had been more diligent, or Berrymans had been in any way responsible for his difficulty, this might not have counted for much. As it is, there is no reason why Mr Barton should be absolved from his errors at Wright Hassall's expense."

31. Notably for the purposes of this case, Lord Briggs, who gave the minority judgment, considered that the loss of a limitation defence was irrelevant. He stated as follows:

> "40. In respectful disagreement with Lord Sumption JSC, I do not regard the fact that validation would deprive the defendant of an accrued limitation defence as a factor militating against validation (or for that matter in favour of it). The defendant's solicitors were aware of Mr Barton's attempt to serve them before the expiry of the claim form. The

> acquisition of a limitation defence would have been, in the words of Simon Brown LJ in the *Elmes* case (at 13), a windfall."

32. Mr Berkley also took us to the *Abela* case which was also concerned with the proper exercise of the powers in CPR r 6.15. It was concerned with circumstances in which permission to serve proceedings out of the jurisdiction had been granted pursuant to CPR r 6.36 and r 6.37(5)(b) at a specified address in Beirut and to the extent required, to do so by an alternative method, being personal service of untranslated documents at that address. Attempts to locate the defendant at the address were unsuccessful but a set of the untranslated documents were delivered to a Lebanese attorney who had acted for the defendant in other proceedings commenced by the claimants. The documents were returned, the attorney stating that the defendant would not instruct him to accept service. Unsuccessful attempts were also made to serve the defendant through diplomatic channels. The claimants sought an order that delivery to the Lebanese attorney amounted to good service under CPR 6.15(2). The judge made the order, which was subsequently set aside by the Court of Appeal and reinstated by the Supreme Court.

33. Lord Clarke of Stone-cum-Ebony JSC, with whom Lord Neuberger of Abbotsbury, Lord Reed and Lord Carnwath JJSC agreed, stated that in his view the most important purpose of service was to ensure that the contents of the documents served came to the attention of the defendant and quoted with approval a passage from the judgment of Lewison J (as he then was) at an earlier stage in the proceedings when he had said:

> "The purpose of service of proceedings, quite obviously, is to bring proceedings to the notice of a defendant. It is not about playing technical games. There is no doubt on the evidence that the defendant is fully aware of the proceedings which are sought to be brought against him, of the nature of the claims made against him and of the seriousness of the allegations."

See paras 37 and 38.

34. Although Mr Berkley adopted the detailed skeleton of his predecessor which had set out a detailed catalogue of what were said to be errors about the way in which the Judge approached this matter, and had filed his own supplemental skeleton, in oral submissions Mr Berkley restricted himself to a number of central points. In essence, he submitted that the Master had taken all relevant factors into account in the exercise of his evaluative judgment and did not err in principle in his approach and that accordingly, the Judge was wrong in effect, to substitute his own view for that of the Master in what is a fact sensitive evaluation.

35. He submitted that Lord Sumption had not had the party's duty to assist the court in furthering the overriding objective pursuant to CPR 1.3 in mind separately from any *inter partes* duty when concluding as he did at paras 22 and 23 of *Barton*, and that the Judge in this case had conflated consideration of whether there was an *inter partes* duty to warn the Appellants with a duty under CPR 1.3. Furthermore, Mr Berkley says that, in any event, Lord Sumption's comments in those paragraphs were merely obiter.

36. While Mr Berkley accepted that he would face a serious hurdle to surmount were this case on all fours with *Barton*, he drew our attention to what he referred to as "quantitative" and "qualitative" differences between the facts in that case and those

present here including that: (1) the claimant in *Barton* had purported to serve on the last possible day whereas here purported service took place early enough for the error to be rectified had it been pointed out; (2) Berrymans had been commended for their conduct, such as warning the claimant to serve before the expiry of the issue of the claim form, in contrast to the Master's findings as to the conduct of M&R; and (3) there was no indication in *Barton* that Berrymans had been aware of the content of the claim form prior to the expiry of its issue whereas here Phoenix had learned of the existence and content of the claim form.

37. Mr Berkley also urged upon us the fact that the Master had made not only an evaluative judgment, but had also weighed a range of factors in coming to his conclusion on whether there was "good reason". He submitted that the Judge had failed to take into account these factors or substituted his view for that of the Master as to the weight to be attached to them. In particular, he says that the Judge: (1) ignored the fact the defendant had learned of the existence and content of the claim form which Lord Clarke in *Abela* (at para 36) (reiterated by Lord Sumption at para 9(2) in *Barton*) had described as a "critical factor"; (2) failed to take into account that M&R, or Phoenix, had acted contrary to CPR 1.3; (3) wrongly concluded that there was no technical game playing (see paras 179 and 180 of his judgment); (4) had improperly focussed on whether M&R, or Phoenix, was obliged to warn CB of the mistake when the correct question was whether they had taken the risk that their conduct might have been characterised as a breach of the CPR 1.3 duty and/or technical game playing; (5) substituted his view for that of the Master as to the importance of the limitation defence; (6) had wrongly concluded, contrary to the Master, that the Appellants had "courted disaster" by waiting to serve the claim form at the end of the limitation period and that it had not been reasonable to do so (see paras 186 and 187 of his judgment); and (7) had substituted his view as to the parties' respective culpability.

38. Finally, he submitted that the Judge was wrong to disregard the principles in *Denton v White*, and referred us to *Wilton UK Ltd v Shuttleworth and others (No 2)* [2018] EWHC 911 (Ch) where Judge Davis-White QC applied those principles in the context of an application for retrospective permission to bring a derivative claim where there had been improper service of a claim form.

Conclusions:

(i) CPR 1.3 and the limitation defence

39. It seems to me that in the light of the approach taken by Lord Sumption in the *Barton* case both in the passage in his judgment at paras 8 – 10 and at paras 22 – 23, there is no scope for Mr Berkley's argument that the Judge was wrong to hold that the Master erred in finding that Phoenix/M&R's conduct was contrary to CPR r 1.3.

40. The Master in the Addendum to his judgment took the view that the Supreme Court in *Barton* had not been asked to consider the effect of the duty to further the overriding objective as giving rise to a duty to warn the opposing party of its mistakes and proceeded accordingly. As I have already mentioned, he held that there was such a duty, that M&R had indulged in technical game playing, and that the fact that validation would deprive Phoenix of a limitation defence should not preclude such a step and that

validation would do no more than preclude Phoenix from procuring a windfall. It seems to me, therefore, that despite making reference to the Supreme Court decision in the Addendum to his judgment, the Master, in effect, ignored the judgment of the majority, which although perhaps understandable, given the timing of his judgment and the handing down of the judgments in *Barton*, is fatal to the appeal. He also appears to have preferred the judgment of the minority in relation to the effect of limitation upon an evaluative judgment under CPR r 6.15.

41. I place reliance both on the principles set out in the *Barton* case and its factual matrix despite the warnings both from Lord Clarke in the *Abela* case and Lord Sumption in *Barton* that the evaluative exercise which has to be undertaken when exercising the discretion under CPR r 6.15 is highly fact-sensitive and does not lend itself to copious citation of authority to which I have already referred. It seems to me that the facts of *Barton* were all but indistinguishable from the ones with which the Master and the Judge were dealing and the Supreme Court had distilled the appropriate principles to be applied.

42. Although Lord Sumption did not expressly mention CPR r 1.3 or specifically address that duty as opposed to a duty *inter partes* to warn a claimant, I agree with the Judge at para 194 of his judgment that it is hard to imagine that Lord Sumption would have taken the view that it was inappropriate for the defendant to have refused to authorise the giving of advice of the kind under consideration if he had regarded it as inconsistent with the defendant's duties under the overriding objective. It seems to me that those considerations were implicit in paras 22 and 23 of his judgment when coupled with his distillation of the guiding principles when exercising the discretion under CPR r 6.15(2) at paras 8 – 10.

43. At para 8 he made clear that the considerations under CPR r 6.15 are different from those which relate to the provisions of the Civil Procedure Rules empowering the court to waive compliance with procedural conditions or the "ordinary consequences of non-compliance", the most significant of which is CPR r 3.9. He went on to state that the rules governing the service of a claim form are "simply conditions on which the court will take cognisance of the matter at all" and "do not impose duties, in the sense which, say, the rules governing the time for the service of evidence, impose a duty." In addition, he included in the main relevant factors at para 10, any prejudice the defendant would suffer by retrospective validation of non-compliant service. It was in this context that the observations at paras 22 and 23 were made.

44. Lord Sumption made clear that even if there had been time to warn, the defendant's advisers were under no duty to give advice, they could not have done so without taking instructions and it was inconceivable that they would have been authorised to do so, and that a person having courted disaster by waiting until the very end of the limitation period to serve the claim form has only very limited claim to the court's indulgence and by comparison the prejudice in losing an accrued limitation defence is "palpable." It seems to me that the emphasis placed upon the prejudice which would arise and the lack of a duty to warn in such circumstances is entirely inconsistent with a positive duty under CPR r 1.3.

45. Furthermore, it is inconsistent with the distinction which Lord Sumption drew at para 8 of his judgment between provisions enabling the court to waive compliance with procedural conditions and the rules concerning service of proceedings which are conditions on which the court will take cognisance of the matter at all. As Lord Sumption noted, CPR r 6.15 is "rather different".

46. As I have already mentioned, Mr Berkley sought to draw a distinction between the facts in *Barton* and the present case. He said that there was time to rectify the mistake in this case, had the Appellants been warned, whereas there was not time in *Barton*. Although it is true to say that there was an additional day or two in this case, I cannot see that such fine timing can make a difference. Lord Sumption made clear at para 22 of his judgment that even if there had been time to warn, there was no duty to advise of the error. Of course, depending on the facts, the position may well be different if there is a substantial period before the expiry of the limitation period.

47. It seems to me, therefore, that the Judge was right to decide that the Master was in error in taking little or no heed of the majority of the Supreme Court in relation to the existence and nature of any duty to warn of ineffective service in circumstances where the claim form is served very near the end of the limitation period and the implications in relation to a duty under CPR r 1.3, and in preferring the judgment of Lord Briggs in the minority in relation to the relevance of the loss of a limitation defence in such circumstances.

48. Furthermore, I do not consider that the Court of Appeal's decision in *Denton v White* can have any bearing on the specific issue that arises in this case in the light of the distinction between CPR r 3.9 and r 6.15 drawn by Lord Sumption at para 8 of his judgment in *Barton*. As he pointed out, there is a disciplinary element in the decision whether to impose or relieve from sanctions for non-compliance with the rules or orders of the court. That element is less important in relation to r 6.15 which is directed specifically to the rules governing the service of a claim form and contains the conditions upon which the court will take cognisance of a matter. The Judge was right to note that the comment at para 41 of *Denton v White* that it was "wholly inappropriate" to take advantage of an opponent's mistake was directed at inappropriate resistance to applications for relief from sanctions which are bound to succeed and was made in a different context. Nor does the application of the *Denton v White* principles in *Wilton UK Ltd v Shuttleworth* assist the Appellants: it was agreed by the parties in that case that those were the relevant principles and in any event Judge Davis White QC expressly rejected a submission that the same principles were applicable for retrospective validation of service of a claim form under CPR r 6.15 and retrospective permission to bring a derivative claim under the Companies Act 2006 as an "oversimplification". See paras 126 – 130 and 156.

49. Furthermore, although I do not agree with the Judge's characterisation of the case of *OOO Abbott v Econwall UK Ltd*, a case which was also concerned with the application of CPR r 6.15, upon which the Master relied, as a case in which the defendant had "contributed" to a misunderstanding, I do agree that the Master was wrong to rely upon it. It seems to me that on a fair reading of the facts in the *OOO Abbott* case, the claimants' solicitor had simply misread the defendants' offer for an extension of time for service. However, in my judgment, the absence of a limitation defence in that case is sufficient to distinguish it from the facts with which the Master was concerned.

(ii) Technical game playing

50. I also consider that the Judge was right to decide that the Master had been wrong to decide that there was technical game playing in this case. The only relevant difference between the facts of the present case in relation to the conduct of those in receipt of the defective service and those in *Barton* is that in this case, it is clear from the facts that Mr Dawson-Gerrard, of M&R, quite properly considered the authorities, advised his client and took their instructions, whereas in *Barton* it was only clear that the claimant had received an automatic reply with a number to contact if the case was urgent. There was no evidence that Berrymans appreciated that service was irregular prior to the deadline (although Floyd LJ was prepared to assume that this was the case in the Court of Appeal at para 49), and Berrymans had not met with its clients to seek instructions. I cannot see that this makes any difference, particularly in the light of what Lord Sumption said at para 22 of his judgment about the likely course of events. It is hard to see that taking the point that service was invalid, as in *Barton,* together with acting in a proper professional manner in researching the position, advising the client and taking their instructions can be recast as "technical games." The position is entirely different from that in *Abela* where the defendant had deliberately obstructed service.

51. As the conduct of M&R, or Phoenix, cannot be characterised as a breach of a CPR r 1.3 duty to warn CB of the defect in service and/or technical game playing, it follows that there is nothing in Mr Berkley's submission that M&R, or Phoenix, ran the risk of their conduct being characterised as such in these proceedings.

(iii) Good reason - Courting disaster

52. This ground of appeal was not pursued with any vigour, if at all, before us. In fact, Mr Berkley merely commented that it was not open to the Judge to go behind the Master's finding that on the facts the delay was "wholly reasonable" in the absence of a challenge on the basis of perversity. In fact, the Judge dealt with this matter at paras 43 and 44 of his judgment and decided that it was indeed open to the defendant/Phoenix to challenge the Master's finding as to reasonableness. There is no appeal against that decision. Furthermore, the manner in which the Judge dealt with whether the Appellants courted disaster by waiting until the end of the limitation period to serve the proceedings is consistent with the approach endorsed by Lord Sumption at para 23 of his judgment in *Barton*.

53. For all the reasons set out above, I would dismiss the appeal.

Lady Justice Nicola Davies:

54. I agree.

Lord Justice Bean:

55. I also agree.