Neutral citation no. [2019] EWHC 112 (Admlty)

Claim No. AD-2017-000034

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES

QUEEN'S BENCH DIVISION

ADMIRALTY COURT

Before Admiralty Registrar Jervis Kay QC

B E T W E E N:-

MRS ALISON LACEY (Widow & Executor of

the estate of DARREN LACEY, deceased)

Claimant

- and –

(1) PALMER MARINE SERVICES LIMITED
(2) THE PORT OF LONDON AUTHORITY

Defendant

Appearances

For the Claimant – Andrew Roy instructed by Slater & Gordon (UK) LLP

For the First Defendant – Nicholas Craig instructed by Thomas Cooper LLP

For the Second Defendant - Stewart Buckingham instructed by Kennedys LLP

Hearing dates: 23rd and 31st October 2018

JUDGMENT

(Handed down 25th January 2019)

The Applications

1. The First and Second Defendants have each issued Application Notices, dated the 11th and 20th September 2018 respectively, seeking an order that the Claimant's Claim Form, dated the 20th March 2018 is struck out on the ground that the time for service had expired before it was served

on them. The Claimant has issued an Application Notice, dated 11th October 2018 seeking an Order that the Defendants' applications are dismissed or, pursuant to CPR Part 6.16 that the service of the Claim Form is dispensed with.

The Background

2. The Claim issued on the 18th March 2018 is brought by Mrs Alison Lacey, as Widow and Executor of the estate of Mr Darren Lacey. On the 12th August 2011 Mr Lacey was serving as an engineer/deckhand onboard the tug "CHIEFTON" ("the tug") which was towing the barge "SKYLINE BARGE 19" ("the barge") on the River Thames to Gravesend. At the material time the tug "STEVEN B" was made fast to the stern of the barge. There was a collision between the tug and the barge as a consequence of which the tug capsized and Mr Lacey lost his life. The claim is brought by Mrs Lacey on her own behalf and on behalf of her children, Jasmine Pettiman born on the 22nd November 1994, Jacob Lacey born on the 25th July 2001 and Joshua Lacey born on the 18th March 2004.

3. On the 22nd December 2016, Messrs Slater & Gordon (UK) LLP ("Slater & Gordon"), the solicitors for the Claimant, sent a letter to the First Defendant stating that it had been instructed in July 2016 and that it was seeking a "limitation amnesty" or that it would be necessary for it to issue a claim. On the 10th January 2017 Messrs Thomas Cooper LLP ("Thomas Cooper"), the solicitors for the First Defendant, acknowledged receipt of the letter from Slater & Gordon and stated that they were taking instructions as to the limitation amnesty. In fact, Thomas Cooper never agreed to the suggested amnesty and there was no further correspondence from Slater & Gordon although Thomas Cooper sent a letter to them on the 10th February 2017 asking for information and sent a letter chasing a response on the 22nd March 2017. On the 27th July 2017 Thomas Cooper sent a letter to Slater & Gordon denying liability.

4. On the 22nd November 2017 Slater & Gordon issued a claim form in rem against the tug although she had been scrapped on about the 26th September 2011. On the same day Slater & Gordon purported to serve the in rem claim on Thomas Cooper together with Particulars of Claim. By a letter dated the 30th November 2017 Thomas Cooper replied that it did not have instructions to accept service and that the claim should be served in accordance with CPR part 61. On the 20th March 2018 Slater & Gordon informed Thomas Cooper that it would abandon the in rem claim and would issue fresh proceedings.

5. On the 20th March 2018 Slater & Gordon issued a claim form on '*an other*' or '*in personam*' basis. The Claim Form was issued almost 7 years after the death of Mr Lacey. The Claim Form was not served but, also on the 20th March 2018, Slater & Gordon wrote to Thomas Cooper stating that it intended to apply for an order dispensing with collision statements in favour of conventional statements of case and invited the views of Thomas Cooper to such a course. On the 23rd March 2018 Thomas Cooper wrote to request a copy of a Draft Particulars of Claim so that the First Defendant could consider the proposal. On the 14th May 2018 Slater & Gordon responded enclosing a draft of the Particulars of Claim. On the 30th May 2018 Thomas Cooper wrote to Slater & Gordon stating that it would oppose such an application.

6. On the 4th June 2018 the Claimant applied to the Court for an order to dispense with the need for collision statements of case. On the 12th June 2018 the court, upon considering the application on paper, made such an order which was sealed on the 13th June ("the June Order"). It appears that the agreement of the Second Defendant was brought to the attention of the Court. Unfortunately, the opposition of the First Defendant to the application was not sufficiently drawn to the Court's attention. If it had been an order dispensing with collision statements of case would not have been made without there being a hearing. Paragraph 1 of the Order provided "*Collision statements pursuant to CPR Part 64 are to be dispensed with in favour of statements of case pursuant to CPR Part 16*". Paragraph 2 of the Order provided "*For the avoidance of doubt, the Claimant is to serve proceedings by 1600 on the 20th July 2018*". This followed the similar wording which had been included in the draft order proposed by the Claimant (differing only in lacking the words "*by 1600 on the . . .*"). The 20th July 2018 was in fact the last day of the 4 month period for service of the Claim Form. As there had not been a hearing the Order provided, in accordance with CPR Part 23.10, that any interested party might apply to have the Order varied or set aside. In fact both the draft order provided and the order itself were in error in referring to CPR Part 64 as the relevant rule is in CPR Part 61.4, This is an error which should be and for present purposes will be treated as corrected under the slip rule.

7. On the 4th July 2018 the First Defendant made an application to have the June Order set aside on the basis that it had not consented to dispensing with collision statements of case and required that order to be reconsidered. That was supported by a witness statement of its solicitor, Mr. Severn of Thomas Cooper, which pointed out that the Claim Form had yet to be served upon the Defendants. Initially the hearing was listed to be heard on the 23rd October 2018. On the 12th July

2018 Mr Severn wrote to Slater Gordon suggesting that the Claimant should serve the Claim Form within the time set out in the Order but that the service of the Particulars of Claim should not be served until after the hearing of the application on the 23rd October. By an email dated the 16th July 2018 the solicitors for the Second Defendant, Kennedys, observed that Mr Severn's suggestion made sense to them. However, Slater & Gordon responded that they considered they should serve conventional pleadings in accordance with the Order of the 13th June 2018. Kennedy's responded stating that the Claimant's proposal was inconsistent with the overriding objective as it meant that the parties would have to go to the expense of preparing and serving conventional pleadings before the First Defendant's application had been considered.

8. On the 18th July 2018 Mr Severn sent an email to the court proposing that, as the hearing date was to be later than the date by which the proceedings should be served, the Claimant should serve her claim form by 20th July 2018 but that the Particulars of Claim should not be served until after the hearing of the First Defendant's application. Upon receipt of that email I responded "*My clerk will be in touch tomorrow with a view to bringing the October hearing forward to next week. For that reason the earlier order with regard to service of statements of case is stayed pending that hearing.*" It is to be noted that the whole exchange was copied to Nicholas Haggi-Savva at Slater & Gordon.

9. The Claimant's Claim Form was not served on the 20th July 2018 which was the last day of the 4 month period allowed for service under the CPR. The hearing of the First Defendant's application took place on the 24th July 2018. As a consequence, an order was made setting aside paragraph 1 of the June Order. However, it is to be noted that paragraph 2 of the June Order, which provided that the claim form was to be served by 20th July 2018 was not set aside. At that hearing the question of whether the Claim Form had been served in accordance with paragraph 2 of the Order of the 13th June 2018 was raised. Counsel for the Claimant was not attended by an instructing solicitor and he was not able to respond to the question for that reason. However it became apparent from the other parties present that, in fact, the Claimant had not served the Claim Form within the period allowed by the CPR and specifically stated in paragraph 2 of the June Order.

10. Apparently at 0916 on the 24th July 2018 Mr Haggi-Savva sent an email to the Second Defendant's solicitor stating: "*The Claim Form has not been served, as the Order of Master Kay dated the 13th June 2018 dealing with service of proceedings is currently stayed pending today's*

hearing". He states that he received no response to that email which is not surprising as it was sent on the morning of the hearing. It was not sent to the court and was not brought to the attention of the court.

11. The fact that paragraph 2 of the June Order was not set aside demonstrates that I considered that the service of the Claim Form had not been made in time. Mr Purssell's witness statement of 16th October 2018 has exhibited his attendance note with respect to the hearing on the 24th July 2018 which I consider to be a fair record of what occurred at that hearing. At that time I expressed the view that the situation might be remedied by way of an application in accordance with CPR 7.6.

12. After the hearing on the 24th July 2018 Slater & Gordon sent a Claim Form to the First Defendant by post at its registered address. In the covering letter Slater & Gordon stated:

> "*We have been briefed by Counsel on the outcome of today's application hearing and the comments made by Master Kay in respect of service, in particular of the Claim Form. We note that the parties had made various submissions and suggestions in respect of service of the proceedings last week as the original deadline of 4.00 pm on the 20 July 2018 approached.*
>
> *However, it is out position that, following receipt of Master Kay's email dated 18 July 2018, none of the parties had expected or required service of the Claim Form by 4 pm on 20 July 2018, pending the outcome of today's hearing. This is supported by the fact that no correspondence was subsequently exchanged by any of the parties in respect of service of the Claim Form following receipt of Master Kay's email – with the exception of one small email from Kennedys on Friday, which itself acknowledged was a delayed response to an earlier email sent by the Claimant's solicitors prior to Master Kay's email.*
>
> *It is our position that neither Defendant raised an issue yesterday in respect of the lack of service of the Claim Form on Friday, despite exchanging emails with the Claimant's solicitors in respect of Counsel's details and skeleton arguments.*
>
> *In the circumstances, we invite you to confirm whether any point is being taken by the Second Defendant in respect of the validity of the Claim Form, despite Master Kay's email dated 18 July 2018. If no point is being taken, then we believe an application can be made by consent under CPR Part 7.6 to allow matters to continue and for the parties to maintain their focus on the provision of Collision Statements (as we now know are required) and liability as*

discussed last week. . . . We can confirm that a letter has been sent to the Second Defendant's solicitors in the same terms."

13. However, the following day the Claimant wrote to the First Defendant's solicitors expressing the view that the court had erred with respect to the issue of service of the Claim Form and, on the 31st July 2018 Slater & Gordon wrote stating that they were "*of the view that service of the Claim Form was in time. Master Kay's email of the 18th July 2018 essentially suspended service of statements of case (CPR 2.3(a) includes a Claim Form in this) pending last week's hearing and, following the hearing the Claim Form was served immediately . . . Therefore, as things stand, we are of the view that there is no need for us to make an application*."

14. Against that background the issue narrowed to whether the effect of the court's email dated 18th July 2018 was to extend the time in which the Claimant was permitted to serve the Claim Form. It is to be noted that the Claimant chose not to bring an application for an extension of time pursuant to CPR 7.6 but chose to argue that the time for service of the Claim Form had been extended by the terms of the court's email of the 18th July 2018. Nor has there been an application to appeal the Order of the 24th July or for an order setting aside the paragraph of that Order which re-affirmed the 20th July 2018 as being the date for service of the claim form. However by way of an alternative, the Claimant has put forward arguments that the Court should dispense with the service of the Claim Form altogether.

The Issues

15. It is not in dispute that the Claim Form was served outside its 4 month period of validity. The main issues to be determined at this hearing are: (a) did the Court, by the email message of 18th July 2018, extend the time for service of the Claim Form beyond 20th July 2018? (b) did the Court, by its Order of 24th July 2018, determine that (whatever the Claimant might have understood the effect of the message of 18th July 2018 to be) it had not extended time for service of the Claim Form? (c) if the Claim Form was served out of time, are the circumstances of the case exceptional such that service should be dispensed with under CPR Rule 6.16?

Consideration

Issue 1

16. This involves the interpretation of the email direction made on the 18th July 2018. The Defendants submit that it must be considered in the context of the June Order and the exchange of emails between the parties leading to the direction contained in the email of the 18th July 2018 and the fact that the Claimant had not applied to extend time for service of the claim form. They cited the decisions in *Brennan v Prior* [2015] EWHC 3082, *Triple Point Technology Inc v PYY Public Company Ltd* [2018] EWHC 1398 and *Hashtroodi v Hancock* [2004] EWCA Civ 652. The Claimant relied upon *Secretary of State for Business, Innovation and Skills v Feld* [2014] EWHC 1383 (Ch), *Masri v Consolidated Contractors International Co SAL* [2009] EWCA Civ 36, *Evans v Cig Mon Cymru Ltd* [2008] EWCA 390 and *Grant v Dawn Meats (UK)* [2018] EWCA Civ 2212. The essence of the case for the Claimant is that the direction of 18th July 2018 has to be considered in the light of CPR 2.3 which provides that "*statement of case*" includes the claim form so that the direction extended time not only for the service of pleadings but also for the service of the statement of claim. Mr Roy also submitted that if there is uncertainty or doubt then the construction of the direction should be in favour of the Claimant. With respect to the principles to be applied to the construction of an order I consider that those put forward by the Defendants should guide the present decision.

17. In *Brennan v Prior* Snowden J said:

> "*21. Like any other written instrument or document, a court order is to be interpreted in accordance with the principles that have been summarised in cases such as Mannai v Eagle Star [1997] AC 749. Investors Compensation Scheme v West Bromwich BS [1998] 1 WLR 896, Chartbrook Limited v Persimmon Homes [2009] 1 AC 1101 and Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900. The question is what a reasonable person having all the background knowledge which would have been available at the time to the maker of the of the document would have understood him to be using the language in the document to mean: eg see Lord Hoffman in Chartbrook Ltd v Perimmon Homes Ltd [2009] 1 AC 1101 at para 14.*
>
> *22. The court performs that exercise in interpretation in the light of (i) the natural and ordinary meaning of the words in issue, (ii) any other relevant provisions of the document, (iii) the purpose of the clause in question and the document as a whole, (iv) the background facts and circumstances known or assumed by the maker of the document or by both of the contracting parties at the time that the document was executed, and (v) business common sense, but (vi) disregarding subjective evidence of intention: see per Lord Neuberger in Arnold v Britton [2015] 2 WLR 1593 at para 15.*"

18. Mr Roy cited *Secretary of State for Business, Innovation and Skills v Feld*. In that Mr Recorder Murray, sitting as a High Court Judge, said with reference to the decision in *Investors Compensation Scheme v West Bromwich BS*:

> "*27 In a court order one is concerned with the intention of the court in making the order, and this is closer to the exercise involved in construing the intention of the legislature when enacting a statute than it is to construing the intention of the parties to a contract. On the other hand, it would be a rare and unusual case where a person to whom a statutory provision was to be applied (in a civil or criminal proceeding where the meaning of the statutory provision was at issue) had been involved in the drafting of that provision. But where a court order is to be applied to a person, such as Mr Feld, who had a hand in the drafting the terms of the order, the court should be entitled to have regard, as part of the exercise of construing the order, to what the person could reasonably have been thought to have intended in drafting the order in a particular way, as far as that may be objectively determined on the basis of the evidence presented to the court.*
>
> *28. The interpretation of a court order cannot be entirely assimilated to the exercise of interpreting a contract nor can it be entirely assimilated to the exercise of interpreting a statute. In all three cases, however, the common starting point is the natural and ordinary meaning of the words used in the light of the syntax, context and background in which those words were used. What additional principles and factors come into play as part of the court's exercise of the interpretation will depend on the nature of the writing to be interpreted (contract, court order or statute) and, of course, will be highly dependent upon the facts of the specific case.*"

19. In my judgment the approach taken by Mr Recorder Murray in *Secretary of State for Business, Innovation and Skills v Feld* is consistent with the decisions cited by the Defendants and referred to above. Furthermore, the decision in *Masri v Consolidated Contractors International Co SAL* was concerned with the effect of a specific order which included a penal notice and the observations of Sullivan LJ in paragraph 17 of his judgment must be read in that context. Insofar as it is submitted that paragraph 17 of *Masri* must be held to mean that no extrinsic material is admissible as an aid to construction that appears to me to be contrary to the other authorities on the point none of which were considered in that judgment. In other respects Mr Roy seeks to rely upon aspects of the judgments as being authoritative when they were, in fact, statements or

references to the submissions made by the parties, see for instance his references to paragraphs 28, 31 and 33 of *Feld.* Although I accept that the *private thoughts of the tribunal* should be excluded from consideration that does not, in my view, preclude an exercise which considers what must reasonably be taken to be the objective intention of the court taking account of the relevant background leading to the order being made.

20. Furthermore, insofar as Mr Roy seeks to submit that the Claimant's subjective understanding of the direction is wholly irrelevant or is inadmissible it is, I consider, incorrect. In paragraph 31 of *Feld* Mr Recorder Murray appears to accept the approach of the Registrar, that she should consider the position of a reasonable person in the position of Mr Feld as part of her exercise in construing the order, however he nonetheless observed "*That is a separate exercise from the exercise of determining Mr Feld's understanding of the order for the purpose of determining the degree of his culpability in breaching the order.*" Thus, even if the Claimant's solicitors subjective understanding of the direction is not relevant to the issue of the construction of the direction, it nonetheless appears to me that it is relevant to as to whether an ambiguity, if there is one, should be resolved in favour of the Claimant.

21. In my view the proper approach is to consider what a reasonable person would take to have been the intention of the court in giving the direction contained in the email of 18th July 2018. In these circumstances I consider that it is necessary to consider what a reasonable person in the position of the Claimant and her solicitors should have understood to be the intention of the direction contained in the court's email of 18th July 2018.

22. In order to reach a conclusion it is necessary to have in mind the purpose of the application leading to the June 2018 Order. By that application the Claimant sought an order which dispensed with the need for Part 61.4 statements of case and provided for Part 16 statements of case. In other words 'collision statements of case' were to be dispensed with and replaced by conventional statements of case.

23. CPR Part 61 provides that "*(1) This rule applies to collision claims. (2) A claim form need not contain or be followed by particulars of claim and rule 7.4 does not apply".* By CPR Part 61.1 (2)(d) "*a 'collision claim' means a claim within section 20(3)(b) of the Senior Courts Act* 1981". Section 20(1) of Senior Courts Act 1981 provides: "*The Admiralty jurisdiction of the High Court shall be as follows, that is to say – (b) jurisdiction in relation to any of the proceedings*

mentioned in subsection (3)" and subsection (3) includes: "*any action to enforce a claim for damage, loss of life or personal injury arising out of – (i) a collision between ships; or (ii) the carrying out of or omission to carry out a manoeuvre in the case of one or more of two or more ships . . .*".

24. Part 61.4 collision statements of case are peculiar to the exercise of the Admiralty jurisdiction and procedure in cases where damage or injury has arisen from a collision between vessels. This is because the purpose of the 'collision statements of case' is to incorporate what used to be known as the 'Preliminary Acts' by which each side was required to set out its factual case with respect to how the collision came about without reference to the others party's case. In other words each party is required to plead its factual case 'blind'.

25. The present claim is a collision claim within the Admiralty jurisdiction. In general the collision statements of case are not served with the Claim Form but after it. In these circumstances it seems to me that the rules recognise that the treatment of statements of case (by way of pleadings) and which type of statement of case is to be used as a separate and distinct matter from when or how the claim form is to be served.

26. The June 2018 Order stated; "*1. Collision statements pursuant to CPR Part 64* [61.4] *are to be dispensed with in favour of statements of case pursuant to CPR Part 16. 2. For the avoidance of doubt the Claimant is to serve proceedings by 1600 on the 20th July 2018.*" Thus paragraph 1 is solely concerned with the type of statement of case to be used and makes no reference as to when the Claim Form itself is to be served. On the other hand paragraph 2 of that Order emphasized that the Claim Form was to be served within the 4 month period allowed by the CPR.

27. During the course of the hearings Mr Roy submitted that the Claimant's solicitor needed to serve its particulars of claim with the Claim Form and this demonstrated that the Claimant's solicitors had not appreciated the effect of CPR Part 61.4(2) which provides that CPR Part 7.4 does not apply. Thus they were labouring under an erroneous misapprehension as to the relevant procedure in Admiralty cases which specifically provides that the Particulars of Claim need not be served with the Claim Form. During submissions Mr Roy accepted that the Claimant's solicitor was acting under a misunderstanding as to the effect of the rules in this respect.

28. When it became clear to both the Defendants that the hearing, then listed in October 2018, would not be heard until long after the time for service of the Claim Form had expired they sought to clarify whether it would be sensible to suspend the need for service of the pleaded cases (ie. the documents setting out the parties' cases or the 'pleadings' in the old terminology) until the hearing of the First Defendant's application had taken place. In those circumstances the solicitors for the Defendants suggested and sought agreement to a procedure which would put off the need for serving the 'pleadings' until the issue arising on the First Defendant's application had been decided.

29. In my view that approach was, in fact, unnecessary because, once the First Defendant had issued its application for reconsideration of the June 2018 Order it should have been clear to a reasonable person that the effect of paragraph 1 the June 2018, with respect to whether Part 61.4 or Part 16 statements of case should be used, was suspended pending that decision. However that 'suspension' would not affect the need to serve the Claim Form in time as it was not raised in or relevant to the First Defendant's application. Even if there had been no further exchange I consider that the effect of listing the First Defendant's application was to suspend the operation of paragraph 1 of the June 2018 Order.

30. However the Defendant's attempt to clarify this aspect was a sensible course to take because: (i) if the requirement for collision statements of case were to be re-imposed then the cost of filing and serving of the conventional pleading would be wasted, and (ii) if the June 2018 Order was followed and 'non collision' statements of the parties' cases were served and filed before the hearing of the First Defendant's application the blind pleading provisions provided for in Admiralty collision cases would be circumvented and rendered nugatory.

31. The language used in the exchange of emails between the parties made it clear that the purpose was to clarify whether it was necessary to serve the statements of each party's case before the hearing of the First Defendant's application:
    a. On the date of the listing of the First Defendant's application, Thomas Cooper wrote, on behalf of Palmers, to the Claimant and to the PLA in the following terms: "*I note that the Claimant intends to serve proceedings in accordance with the Registrar's earlier order. Given the nature of our client's application, we suggest however that the parties agree that the Claimant should serve the Claim Form within the timeframe set out in the Registrar's*

order but that Particulars of Claim should not be served until after our client's application has been heard." The Second Defendant agreed with that proposal.

b. However Slater & Gordon, on behalf of the Claimant, stated in an email dated 18th July 2018 that, "*Counsel and I remain of the view that unless and until the Order of Master Kay dated 13th June 2018 is varied, we are bound to serve proceedings in accordance with the order, ie conventional pleadings. We have no doubt that Master Kay would have considered the possible need for collision statements when making this Order.*"

c. Mr. Purssell of Kennedys immediately responded stating; "*James* [Severn]*'s proposal entailed precisely that: service of the Claim Form in compliance with Jervis Kay's Order, followed by an extension by consent deferring service of Particulars until after the return dated for Palmers' application. However, it cannot make sense (and would be inconsistent with the overriding objective) for the parties to be put to the expense of preparing and serving conventional pleadings pending the resolution of Palmers application*".

d. Also, on the 18th July 2018 Mr Severn, of Thomas Cooper, sent an email to the Court, copied to both the solicitors for the Claimant and the Second Defendant. It stated: "*The hearing of the First Defendant's Application has been listed for 23 October 2018. Given that hearing of the application is later than the date by which proceedings should be served, we proposed that the Claimant serve her Claim Form by 20th July 2018 but that Particulars of Claim should not be served until after the First Defendant's application has been heard. The Second Defendant's solicitor (who reads in copy) has confirmed that the Second Defendant agrees with this approach. We have however been advised at 1125 this morning by the Claimant's solicitor (who reads in copy) that the Claimant intends to serve Particulars of Claim by 20th July 2018 stating "Counsel and I remain of the view that, unless the and until the Order of Master Kay dated the 13 June 2018 is varied, we are bound to serve proceedings in accordance with the order, ie conventional pleadings. If the parties are required to serve conventional pleadings then the benefit to the parties and the Court of Collision Statements will be lost . . . In the circumstances, we respectfully request that in light of the First Defendant's application the Claimant should serve the Claim Form by 1600 on 20 July 2018 but that Particulars of Claim should not be served until after the First Defendant's application is heard on 23 October 2018.*"

32. I consider that the stance taken by the Claimant's email dated the 18th July is difficult to understand or justify. Even if the effect of listing the First Defendant's application did not have the immediate effect of suspending paragraph 1 of the June 2018 Order, as I consider that it did,

the fact is that it must have been obvious to a reasonable litigant that the Defendants' proposals were sensible. It seems that the only logical explanation is that given by Mr Roy at the hearing, that the Claimant's solicitor understood that it was necessary for the Particulars of Claim to be served at the same time as the Claim Form. However, that understanding arose from a misapprehension of the rules relating to Admiralty proceedings. Thus it appears that the Claimant's failure to serve the claim form within the period provided by the rules, or to apply for an extension for time to serve the claim form which was suggested by Mr Purssell of Kennedys on the 11th July 2018, was caused or at least materially contributed to by the failure of the Claimant's solicitor to appreciate the operation of the CPR in relation to Admiralty procedure.

33. Against that background Mr Roy has submitted that CPR Part 2.3 states "*In these Rules - statement of case'— (a) means a claim form, particulars of claim where these are not included in a claim form…*" and that since the Court's direction on 18th July 2018 stayed time for service of "*the statements of case*" this must be construed as including a stay with respect to the time for the service of the claim form. However, I do not accept that simply because that definition is included within the rules it follows that the direction made in the 18th July email must be construed as Mr Roy submits. The authorities referred to above demonstrate that a court order is to be construed essentially by means of ascertaining what a reasonable person would understand by the order in the circumstances in which it was made.

34. With respect to the actual wording of the direction contained in my email of the 18th July 2018 it stated (emphasis added): "*My clerk will be in touch tomorrow with a view to bringing the October application hearing forward to next week. <u>For that reason the earlier order with respect to service of statements of case</u> is stayed pending that hearing.*" It was only paragraph 1 of the June 2018 order which was concerned with or referred to whether CPR Part 61.4 or CPR Part 16 '*<u>statements of case</u>*' were to be served. Paragraph 2 referred to the service of 'proceedings' but not to 'statements of case'. In my view it follows that, in construing the ordinary meaning of the words used, a reasonable person would conclude that the intention of the court was only to make a stay in respect of the statements of case referred to in paragraph 1 of the Order.

35. However, as set out above, the direction should be considered in the light of the background factors known to the relevant person and in my judgment consideration of those factors puts the matter beyond doubt:

a. The exchange between the parties and the request made by Messrs Thomas Cooper and my response in the email of the 18th July is clearly intended to consider whether there should be a delay in respect to the service of the statements of case referred to in paragraph 1 of the June 2018 Order and is not extended to whether there should be an extension of time to serve the claim form.

b. Further it is to be noted that, even though CPR Part 2.3 defines statements of case as including a claim form for the purposes of the rules, the treatment relating to service of claim forms and service of other statements of case receive different treatment. Thus, CPR Part 7.5 is concerned with the time for serving a claim form. CPR Part 7.6 sets out the rules whereby a claimant may apply for an extension of time for the service of the claim form. CPR Part 7.5(2) provides: "*The general rule is that an application must be made (a) within the time specified by rule 7.5 . . . .*". Given that the Claimant in the present case has never made such an application it is difficult to see any basis for arguing that the direction contained in the email of 18th July can possibly be construed as extending time for the service under CPR Part 7.5.

c. Finally, in this context, it is worth noting paragraph 19 of *Masri*, namely "*If the ordinary and natural meaning of [the direction] results in unintended consequences the appropriate remedy is not to argue for a strained and artificial meaning of the Order, but to apply to the Court for a variation of the Order.*" The exchange between the solicitors in July 2018 indicates that there was a difference of approach by the parties which should, at the least, have put Slater & Gordon on notice that the direction might not extend the time for service of the claim form. It would have been quite easy for them to have applied to the court for a variation or clarification of the direction. They did not do so and, in those, circumstances it seems to me that they are bound by the result.

d. Insofar as Mr Roy has submitted that there is a doubt about the meaning of the words used in the direction of the 18th July I consider: (i) that the meaning of the words was sufficiently clear to have been understood as referring to the Part 16 or Part 61.4 statements of case and not the claim form; (ii) that the contextual background against which the June 2018 order was made, including the email exchange between the parties, is such that the intention of the July 18th direction was unambiguous and (iii) even if it appeared ambiguous to the Claimant's solicitors that arose because they did not understand that, by CPR Part 61.4(2), CPR 7.4 does not apply to claim forms in collision cases. Thus, if any such ambiguity arose it was from a misunderstanding of the relevant rules which, in my judgment, the Claimant is not entitled to pray in aid.

36. For the reasons set out above I reject Mr Roy's argument that the court made an order extending time for the service of the claim form.

Issue 2

37. Whether the Court, by its Order of 24th July 2018, determined that (whatever the Claimant might have understood the effect of the message of 18th July 2018 to be) it had not extended time for service of the Claim Form? This was an argument put forward by the Defendants. In the light of the decision taken above it is not necessary to consider this aspect however I think that it may be helpful if I express my views as to the effect of the Order of the 24th July 2018.

38. The Order of the 24th July 2018 states that paragraph 1 of the June Order is set aside. Paragraph 2 of the June Order (which had required service of the Claim Form by 20th July 2018) was therefore unaffected. Thus the effect of the 24th July 2018 Order was not to extend the time for service beyond that which was provided for by paragraph 2 of the June 2018 Order. This was in circumstances where no application for such an extension under CPR Part 7.6(2) or (3) had been made.

39. Nevertheless, I made it clear during the hearing on 24th July 2018 that the court would entertain an application under CPR Rule 7.6(3) if one were made. In their submissions Mr Craig, for the First Defendant, and Mr Buckingham, for the Second Defendant, both expressed doubts as to whether such an application could be successful on the basis that the Claimant's solicitors could not satisfy the provisions of CPR 7.6(3)(b) as to having taken all reasonable steps to serve the claim form which restricts the discretion of the court in making an order for an extension of time under that rule. However that issue is of only academic interest because the Claimant has not made an application under CPR Part 7.6(3).

40. As the Order of the 24th July was clear on its terms with respect to paragraph 2 of the June 2018 Order and no appeal has been made against it nor any application for the terms of that Order to be reconsidered it follows that the purported service, which actually took place after the hearing on the 24th July, was made out of time.

Issue 3

41. Whether, if the Claim Form was served out of time, the provisions of CPR Part 6.16 can be exercised and are the circumstances of the case exceptional so that service should be dispensed with under that rule? This was the alternative case put forward by Mr Roy.

42. CPR Part 6.16 provides: "*(1) The court may dispense with service of a claim form in exceptional circumstances* and *(3)An application for an order to dispense with service may be made at any time and (a) must be supported by evidence; and (b) may be made without notice."*

43. On this aspect the Defendants have submitted that CPR Part 6.16 cannot be used to circumvent the effect of CPR Part 7.6(3), citing the judgment of May LJ at paragraph 50 of *Godwin v Swindon BC* [2002] 1 WLR 997, (concerned with CPR Part 6.9 which is now CPR Part 6.16). Therefore, where a claimant has failed to serve a claim form before it expires, its sole resort is CPR Rule 7.6(3) and the Court has no power in such circumstances to dispense with service of the claim form as a means of extricating a claimant from the consequences of late service.

44. That decision specifically considered whether the provisions of CPR Part 6.9 (now 6.16) could be used to circumvent the provisions of CPR Part 7 and it was held that it cannot. At paragraphs 50 May LJ stated:

> "*The heart of the matter, in my view, is that a person who has by mistake failed to serve the claim form within the time period permitted by rule 7.5(2) in substance needs an extension of time to do so. If an application for an extension of time is not made before the current time period has expired, rule 7.6(3) prescribes the only circumstances in which the court has the power to grant such an extension… I do not consider that rules 6.1(b) or 6.9 can extend to enable the court to dispense with service when what would be done is in substance that which rule 7.6(3) forbids. If rule 6.9 did so extend it would be tantamount to giving the court a discretionary power to dispense with statutory limitation provisions… I do consider that rule 6.9 does not extend to extricate a claimant from the consequences of late service of the claim form where limitation is critical and rule 7.6(3) does not avail the claimant.*"

45. Mr Roy did not refer to *Godwin* in his initial skeleton but he properly drew attention to the decision in *Kuenyehia v International Hospitals Group Ltd* [2006] EWCA Civ 21 which he acknowledged suggested that CPR Part 6.16 could not normally be invoked in circumstances where CPR Part 7.6 could not be satisfied. However he submitted that approach does not survive

the decision in *Abela v Baadarani* [2013] UKSC 44 as confirmed by *Kaki v National Private Air Transport Co* [2015] EWCA 731. Although both Defendants raised *Godwin v Swindon BC* in their skeletons Mr Roy does not appear to have directly addressed the point arising from *Godwin* in his Supplementary Skeleton however, in his oral submissions, Mr Roy sought to argue that the decision in *Godwin* was overturned or modified by the decisions in *Abela* and/or *Kaki.*

46. Although Mr Roy sought to argue that the judgment of Neuberger LJ, as he then was, in paragraph 26 of his judgment in *Kuenyehia* supported the Claimant's case in my view the judgment of Neubeger LJ, taken as a whole, is an affirmation of May LJ's approach in *Godwin* and supports the proposition that CPR Part 16.6 cannot be used as a means of circumventing the provisions of CPR Part 7.6(3). Furthermore the decision emphasizes the oft stated importance of complying with time limits especially with regard to the service of the claim form. In addition it makes it clear that prejudice is usually only relevant to assist a defendant and that a claimant cannot rely upon the absence of prejudice to the defendant as being a reason for dispensing with the service of a claim form.

47. In that case the Court of Appeal considered a situation where, on the last day for service of a claim form the claimant's solicitors sent a copy of the claim form by courier to the defendant's solicitors and faxed a copy to the legal department of the defendant. Crane J, on an appeal from Master Eyre, held that the claim form had not been properly served but he dispensed with service on the basis that failure to obtain the consent of the defendant in advance to service by fax was a minor departure from the requirements of CPR Part 6.2(1). The Defendant appealed on the basis that *Godwin* was binding authority and that the relaxations to it found in *Anderton v Clwydd CC* [2002] EWCA Civ 933, *Wilkey v BBC* [2002] EWCA Civ 1561 and *Cranfield v Bridegrove* [2003] EWCA Civ 656 were *per incuriam* and inconsistent with the decision on *Godwin.* The Court of Appeal held that the appeal would be allowed and the order dispensing with service would be set aside as service by fax without prior consent was not a method of service permitted by CPR Part 6.2 nor a minor departure from it and that the power to dispense with service under CPR Part 6.9 (now CPR Part 6.16) where the time limit under CPR Part 7.5(2) had expired should only be exercised in an exceptional case and that the power is unlikely to be exercised except where the claimant has either made an ineffective attempt to serve by a method permitted by CPR Part 6.2 or has timely served the claim form in a manner that involved a minor departure from a permitted method of service. In the course of giving the judgment of the court Neuberger LJ said:

"*26. In our view, the effect of the reasoning of this court, at least in 'post-Anderton' cases, in the decisions to which we have referred, is as follows. First it requires an exceptional case before the court will exercise its power to dispense with service under CPR 6.9* [the predecessor to the current CP6 6.16], *where the time limit for service of a claim form in CPR 7.5(2) has expired before service was effected in accordance with CPR Pt 6. Secondly, and separately, the power is unlikely to be exercised save where the claimant has either made an ineffective attempt in time to serve by one of the methods permitted by CPR 6.2 or has served in time in a manner which involved a minor departure from one of those permitted methods of service. Thirdly, however, it is not possible to give an exhaustive guide to the circumstances in which it would be right to dispense with service of a claim form.*

27. In this case, although the Judge correctly asked the question whether there was a 'minor departure' in the service of the claim form by fax, we consider that he went wrong in two respects. First he gave the wrong answer to that question. Secondly, he did not ask (and therefore probably did not answer) the additional question whether there this was an exceptional case: had he done so, the answer ought to have been in the negative...

29. The Judge relied upon the facts that the faxed copy of the claim form was received by the defendant in time, the claimants' solicitors had had prior communications with the defendant at the fax number . . . and that the defendant's in house legal department was contactable on that fax number. We do not consider that any or all of those facts would be sufficient to render the failure to comply with para. 3.1(1) of the Practice Direction a minor departure from r6.2(1)(e), especially when the claimants solicitors had not even attempted to ask the defendant for consent to effect the service by fax as they could so easily have done."

30. Mr Birts argued that, even if this case was not one which involved a 'minor departure', it was one where there had been an ineffective attempt to serve by one of the permitted means within the four-month time limit. In other words, he said that it was a case within [57] of Anderton's case . . . The Judge appears to have rejected that contention, and we consider that he was right to do so. . . .

31. Quite apart from this, we do not consider that this case can be said to be exceptional in any event. The fact that the claimant's solicitors had been in fax communication with the defendant about the case cannot help the claimants. . . . the very fact that there was a well established means of communication with the defendant, when and after the claim was issued, makes it all the harder to justify not using that means to obtain the consent required

by para. 3.1(1)of the Practice Direction well ahead of the final date for service . . . given that the claim form was sent by courier to the defendant's solicitors in London, and the defendant's office was on the outskirts of London, there was no good reason why the claim form could not have been sent by courier to the defendant's offices.

32. Nor are we impressed with the fact that the claim form, or at least a faxed copy of the claim form, was received by the defendant within the four-month period. That cannot make this an exceptional case. Otherwise, the facts of all the cases considered by this court in the five decisions discussed above would have been exceptional, and the claimants would have succeeded in each of the cases, and without difficulty (not the least because they were all 'pre-Anderton' cases). The fact that the offices in question contained the defendant's legal department makes no difference.

33. Despite Mr Birt's contention to the contrary, we do not consider that the claimants can rely on the absence of prejudice to the defendant as a reason for letting the Judge's decision stand. In our view, for the reasons given in Vinos's, Godwins' and Anderton's cases, the time limits in the CPR, especially with regard to service of the claim form where the limitation period may have expired, are to be strictly observed, and extensions and other dispensations are to be sparingly accorded, especially when applied for after the time has expired. While there may be exceptional cases, we consider that prejudice is only relevant in this sort of case to assist a defendant, where the court would otherwise think it right to dispense with service. In other words, prejudice to the defendant is a reason for not dispensing with service, but the absence of prejudice cannot usually, if ever, be a reason for dispensing with service."

48. The remaining question is whether Mr Roy's submission, that *Abela v Baadarani* [2013] UKSC 44 as confirmed by *Kaki v National Private Air Transport Co* [2015] EWCA 731 has the effect of reversing the decisions referred to above, is correct. Firstly, as Mr Craig has pointed out, *Abela* is concerned with the operation of CPR Part 6.15 and not CPR Part 6.16. The two parts deal with different and distinct aspects of the rules. Secondly the decision in *Godwin* is not referred to in *Abela*, there is no discussion of the relevant aspect and the Supreme Court said nothing which throws doubt upon May LJ's decision in *Godwin* with which Pill LJ agreed. Furthermore, although *Kuenyehia* was cited in argument in *Abela*, Lord Clarke does not refer to it in the course of his decision. *Kaki* is also concerned with the same considerations as arose in *Abela.* In my view the fact that that the decision in *Kaki* followed *Abela* does not assist Mr Roy's case. Although there is a very brief reference to *Vinos v Marks & Spencer plc* [2001] 3 All ER 784,

which was an earlier decision of May LJ and is referred to in his judgment in *Godwin* neither that case nor the decision in *Kuenyehia* are referred to or considered in the judgment of Aikens LJ in *Kaki.*

49. In consequence I take the view that the *Abela* and *Kaki* decisions are to be distinguished on the basis that they are concerned with matters which are substantially, if not fundamentally, different from those considered in the line of authorities which include *Vinos, Godwin* and *Kuenyehia.* Furthermore, I cannot see how any weight can be given to a submission that the *Vinos-Godwin* line of authorities are said to be overruled by decisions in which they were not considered let alone expressly disapproved or overruled. In these circumstances I do not consider that Mr Roy's submissions, which attempt to avoid the effect of the *Vinos, Godwin* and *Kuenyehia* decisions have any merit or can be accepted. On the contrary they are decisions of the Court of Appeal by which I am bound.

50. In the light of the decisions referred to I have come to the conclusion that the Defendants' submission, to the effect that where, as in the present case, a claimant has failed to serve a claim form before it expires, its sole resort is CPR Rule 7.6(3) so that the Court has no power in such circumstances to dispense with service of the claim form as a means of extricating a claimant from the consequences of late service, is correct. As the Claimant has not made an application pursuant to CPR Part 7.6(3) I conclude that it follows inexorably that the court has no power to make an order dispensing with service of a claim form.

51. It follows that even if Mr Roy was able to persuade the court that there had been exceptional circumstances, as envisaged by CPR Part 6.16 these would not assist him. In fact, Mr Roy made lengthy submissions as to the circumstances surrounding the present case which he contended were to be considered exceptional for the purpose of CPR 6.16 but in my view, and in any event, Mr Roy failed to make out a case for exceptional circumstances. With respect to these aspects I make the following comments:
    a. The fact that it was the understanding of the Claimants' solicitors that, pursuant to CPR Part 7.4, it was necessary for the Claimant to serve its Particulars of Claim with its Claim Form, arose from their own erroneous understanding of the rules and cannot be considered an exceptional circumstance.
    b. It is not an exceptional circumstance that the Claimants' solicitors, having misunderstood the intention of the wording in the July 18th direction, refused to agree with Defendant's

email suggestions which would have removed the effect of any possible ambiguity, if there was one, and then failed to act upon that exchange by asking the court for clarification.

c. Mr Roy made a number of submissions with respect to the plight of the Claimant which the Defendants argued, in a submission by Mr Craig which was adopted by Mr Buckingham, were to attract the sympathy of the court and should be ignored as irrelevant. I agree with Mr. Craig. They do not amount to exceptional circumstances for the purposes of CPR Part 6.16.

d. Additionally, Mr Roy has asserted that the tragedy caused the Claimant to "fall to pieces". Again, it is not clear what relevance this has to the present issues. However, if the Claimant is to be entitled to bring proceedings substantially out of time it must obtain the permission of the court pursuant to s.33 of the Limitation Act. The burden rests upon the Claimant to satisfy the court that its discretion should be exercised. Although the circumstances of the Claimant may be relevant to an application pursuant to s.33 of the Limitation Act, in my view, this aspect has little or no relevance to the issue arising under CPR Part 6.16 and does not amount to an exceptional circumstance

e. Further Mr Roy referred to the background of the incident in which Mr Lacey died at length and drew attention to the MAIB investigation and report. It is common ground that the report may not be admitted in evidence unless the court exercises its discretion to allow it. That has yet to be decided and may be relevant to the strength of the Claimant's case if it comes to a trial but I do not see that the merits of the claim are relevant to the present issues. In any event with respect to the strength of the claim against the Second Defendant it has drawn attention to the provisions of s.16 of the Pilotage Act 1987, the effect of which is to negate liability by the Second Defendant in respect of navigational fault whether or not the MAIB reports are admitted into evidence at the trial. These aspects do not amount to exceptional circumstances for the purposes of CPR Part 6.16.

f. Mr Roy has also made extensive and somewhat bullish criticisms of the Defendants' conduct. These were made on the basis that the underlying principle is that the Defendants are expected to act in "*a fair and responsible manner*", as referred to by Jackson LJ in *Nicholls v Ladbrokes Betting & Gaming Ltd* [2013] EWCA Civ 1963; [2014] P.I.Q.R. p.4 at paragraph 69. Mr Roy has submitted that the Defendants' approach has been anything but fair and reasonable.

g. Whilst that judicial observation accords with the overriding objective of the rules I do not consider that the adversarial basis of English litigation can be disregarded to the extent that it is the duty of a Defendant to make up for or make good the deficiencies of a Claimant's

case or its conduct of proceedings. If that were the case it would be hardly worth any Defendant ever raising any objection to a Claimant's case or conduct however bizarre and rules of court providing for time limits would become otiose and redundant.

h. In my view CPR 1, which requires the court to reach a just decision, involves the exercise of a balance of approach which includes providing justice for a defendant as well as a claimant. The exercise of that balance necessarily requires an approach of the type referred to in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926, see paragraphs 40-43 in which it is to be noted that paragraph 40 specifically refers to the necessity for fostering a culture of compliance with the rules. This must refer to both parties in equal measure.

i. In the circumstances of the present case I consider that Mr Roy's submission, that the Claimant has been met with obfuscation, obstruction, opportunism and tactical game playing, is greatly overstating what has taken place between the parties and ignores the obvious fact that the Defendants are equally entitled to expect the Claimant and her lawyers to act expeditiously and within the rules.

j. In support of his submission as to the Defendants' conduct Mr Roy relies upon the fact that letters of claim were sent to both Defendants in December 2016 and criticises the Defendants for their lack of response. In fact, as appears from Mr Severn's second witness statement, the letter of claim was answered by a request from the First Defendant for further information to which the Claimant's solicitors never responded. It is to be noted, from Mr Purssell's witness statements, that the Second Defendant wrote denying liability on the 17th January 2017 and that the Claimant did not press for a response, Furthermore, after the *in rem* proceedings were commenced, to which the Second Defendant was obviously not a party, it appeared to the Second Defendant that the Claimant was exclusively pursuing the First Defendant as owners of the tug. In my view the Second Defendant's position was understandable and, in the light of this information, Mr Roy's assertion that the Defendants were at fault loses any critical potency.

k. Moreover, even if Mr Roy's points had any validity, it remains the duty of the claimant to progress its cause and, where it fails to do so there is rarely any sensible reason to allow a claimant to seek to transfer the consequential culpability, if any, to the defendant. Whatever the duties of a defendant with respect to co-operation relating to proceedings against them it cannot, in my judgment, include performing those matters which are essential to bringing a claim and are wholly in the compass of the claimant's lawyers. That must include

commencing the claim against the correct party and commencing the proceedings within the correct time limits.

l. In this respect it is to be noted that the claim was commenced by what Mr Roy has described as an abortive attempt to start *in rem* proceedings. In fact, these were commenced outside the primary limitation period which indicates a significant failure to prosecute the claim timeously. Although Mr Roy accepted that the commencement of the initial *in rem* proceedings was a 'false start' he failed to draw attention to the fact that the 'false start' was caused by the Claimant issuing *in rem* proceedings in circumstances where the vessel against which they were issued had already been scrapped.

m. Surprisingly Mr Roy offered no explanation as to how this somewhat fundamental error had come about but more surprisingly, in oral submissions, Mr Roy argued that the First Defendants should be criticised for failing to inform the Claimant that the vessel in question had, in fact, been scrapped! This appeared to be the main limb for his argument in support of his criticism of the First Defendant and, in my view, it demonstrates a wholly one sided and incorrect approach not the least because, as appears from Mr Severn's second witness statement, the Claimant's legal advisers ought to have been aware that the vessel had probably been scrapped from the MAIB report upon which they seek to rely. In any event it is to be expected that solicitors seeking to commence *in rem* proceedings would establish that there was a *res* against which they could proceed or that there were solicitors who were instructed to accept *in rem* proceedings.

n. In fact, the collision and death of Mr Lacey took place on 12th August 2011 which was over 6 years before the *in rem* proceedings were commenced and over 6½ years before an effective Claim Form was issued on 20th March 2018. Although Mr Roy has argued that the Claimant was devastated by her loss and that, by s.33 of the Limitation Act 1980, there is a discretion in the court as to whether to extend time that aspect is yet to be decided by the court. However, there is no evidence of a medically recognised impediment which caused the Claimant to fail to instruct solicitors or take any other effective steps to advance her own claim and the claims of her children. Furthermore, there is no sensible or effective explanation for the apparently leisurely approach to the litigation once she did give them instructions.

o. In my view the Claimant's criticisms appear to be a selfserving attempt to blame the Defendants for, and to divert attention from, the failure to prosecute the claim timeously and the error in failing to serve the Claim Form in good time. However, there is no evidence that the conduct of the Defendants was responsible for the Claimant issuing the

abortive *in rem* proceedings, or for the Claimant waiting until March 2018 before issuing the subsequent claim form or, significantly, for the failure to serve the claim form.

p. In addition, under s.33 of the Limitation Act 1980, the circumstances of the case to which a court is required to have regard include: the length of and reasons for delay on the part of the claimant, the duration of any disability arising after the date of the accrual of the cause of action and the extent to which the claimant has acted promptly and reasonably. Therefore, contrary to Mr Roy's submission, I consider that late service of a claim form may have an effect on limitation.

q. The rules provide that the Claim Form must be issued and served and this must be done within a specific time frame. The importance of this is well established in a number of decisions and, in my view notification of a potential claim by way of a pre-action letter or the draft particulars of claim cannot, lacking exceptional circumstances which are not present in this case, be accepted as a substitute for service of a claim form.

r. The stringency with respect to which the court may enforce the rules or exercise its discretion to apply them must depend upon the relevant rule and the relevant circumstances. However, amongst the most important of the procedural rules which are administered strictly are those related to the time limits for issuing proceedings and those relating to the service of the Claim Form once issued. This is true, for example, of CPR Part 7.6(3) where the court's discretion is specifically limited to where certain requirements are satisfied, namely that the claimant has sought to serve the claim form during the time permitting this to be done, see *Hoddinott v Persimmon Homes (Wessex) Ltd* [2008] 1 WLR 806 at paragraph 55 *per* Dyson LJ.

s. Although Mr Roy submitted that this was not a case of highly culpable conduct by the Claimant nonetheless it was a case where issuing the claim form was left until late and it was not served in time. This was caused by the conduct of the Claimant although it was well aware of the relevant time limit for service as can be seen from the wording of the Claimant's draft order which was subsequently included in the June 2018 Order. In the light of CPR Part 7.6(3) the fact that the service was, as Mr Roy submits, only minimally late has no potency.

t. Mr Roy submitted that there is no prejudice to the Defendants but, as is noted in the judgment of Neuberger LJ in *Kuenyehia,* above, the absence of prejudice to a Defendant is not a relevant factor in considering applications arising under CPR Part 6.16.

u. Mr Roy has submitted that the claims of the children will survive in any event. That is so but it is common to all cases where a claim has been struck out for failure of service and

the time limit for service has expired. In that sense there is no exceptional circumstance which should give rise to an order under CPR Part 6.16. However, a strike out, and the consequent passage of time, may have an effect upon a subsequent application under s.33 of the Limitation Act made by the Claimant and the other child on whose behalf she brings the proceedings. Whether it does or does not is not however an exceptional circumstance within CPR Part 6.16.

v. Whether the Claimant recommences proceedings, as Mr Roy says she will do, she will still need to obtain the permission of the court pursuant to s.33 of the Limitation Act. That will have to be decided by the court considering that aspect, as it would have been if the present proceedings continued. It follows that ordering a strike out at this stage is neither draconian nor will it have an adverse effect on the administration of justice. In fact, the present proceedings have been so little advanced that it is unlikely to make any real difference to the administration of justice in this case. In any event I do not consider that the point made by Mr Roy in this context could be regarded as an exceptional circumstance of the purpose of CRP Part 6.16.

w. It is to be noted that the acknowledgements of service filed in these proceedings indicated an intention to challenge jurisdiction. In reality no additional court resources will be required if another claim form is issued and the only additional costs of substance that will be incurred are the costs of issuing a new claim form.

x. For the reasons set out I do not consider that the combination of circumstances in the present case can be considered exceptional or provide grounds for dispensing with service under CPR 6.16.

Conclusion

52. For the reasons set out above I hold:

a. the First and Second Defendants' applications, by their Notices dated the 11th and 20th September 2018 respectively, succeed and that the Claimant's Claim Form, dated the 20th March 2018, is struck out;

b. The Claimant's application by its Notice, dated 11th October 2018 seeking an Order that the Defendants' applications are dismissed or, pursuant to CPR Part 6.16 that the service of the Claim Form is dispensed is dismissed.

Dated this 25th day of January 2019