Neutral Citation Number: [2018] EWHC 3345 (Comm)

Claim No: LM-2018-000036

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11/12/2018

Before:

HIS HONOUR JUDGE KLEIN SITTING AS A JUDGE OF THE HIGH COURT

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Between:

(1) CAPITAL ALTERNATIVES SALES AND MARKETING LIMITED (IN LIQUIDATION)
(2) GREEN PLANET INVESTMENT LIMITED (IN LIQUIDATION)
(3) DAVID ANTHONY INGRAM (AS LIQUIDATOR OF CAPITAL ALTERNATIVES SALES AND MARKETING LIMITED AND GREEN PLANET INVESTMENT LIMITED) **Claimants**

- and -

(1) VITORIA NABAS
(2) NABAS INTERNATIONAL LAWYERS LLP
(3) CUBISM LIMITED
(4) CORINTHIAN TRUST COMPANY LIMITED **Defendants**

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Francis Collaco Moraes (instructed by **Gowling WLG (UK) LLP**) for the **Claimants**
David Turner QC (instructed by **DWF LLP**) for the **First Defendant**

Hearing date: 27 November 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

HIS HONOUR JUDGE KLEIN

His Honour Judge Klein:

1. This is the judgment following the hearing of two applications; namely:

   i) an application, by a notice originally issued on 15 August 2018 and amended, most recently, on 26 August 2018, by the Claimants for the following remedies:

      a) a declaration that the First Defendant was validly served with the claim form and the Particulars of Claim at Unit 44, City Business Centre, St Olav's Court, Lower Road, Canada Water, London, SE16 2XB ("Unit 44") (which is the registered office of the Second Defendant and which, the First Defendant accepts, is a "registered address" of the First Defendant for the purpose of s.1140 of the Companies Act 2006 ("section 1140"));

      b) pursuant to CPR r.6.15(2), an order giving retrospective permission for the Claimants to serve the claim form and Particulars of Claim on the First Defendant by leaving them at an alternative place or address for service, being the offices of Cubism Ltd. (the Third Defendant) at 1 Plough Place, London, EC4A 1DE ("Plough Place") (which the First Defendant accepts is her postal address for business purposes but which is not a registered address of the First Defendant for the purpose of section 1140) and/or at the offices of the Second Defendant at Unit 44;

      c) pursuant to CPR r.6.16, an order that service of the claim form and Particulars of Claim on the First Defendant be dispensed with;

      d) pursuant to CPR r.7.6(2) and/or CPR r.3.1(2)(a), an order extending the time for service of the claim form and Particulars of Claim on the First Defendant to 14 days after the date of the order on the application, together with an order that such service may be effected by service on the First Defendant's solicitors;

      e) pursuant to CPR r.3.9 and/or CPR r.3.10, an order for relief from any sanction imposed by CPR rr.6.9, 7.5(1) and 7.6(2) and/or to remedy any error caused by the failure to follow those provisions;

   ii) an application, by a notice issued on 18 July 2018, by the First Defendant, for the following remedies:

      a) a declaration that the court has no jurisdiction, alternatively that it will not exercise any jurisdiction, to try the claim against the First Defendant;

      b) an order that the claim form and/or its purported service be set aside.

2. There are three preliminary points I must make about the Claimants' application. First, by the time of the hearing before me, it had been amended twice. David Turner QC, who represented the First Defendant at the hearing, indicated that the First

Defendant consented to the Claimants' application being determined on its re-amended basis and, to the extent I needed to do so, I permitted the amendments to the Claimants' application. Secondly, Francis Moraes, who represented the Claimants at the hearing, did not pursue that part of their application by which an order was sought under CPR r.7.6(2) or under CPR r.3.1(2). Thirdly, as Mr Moraes made the application under CPR rr.3.9, 3.10 at the hearing, the procedural defect which he contended had occurred (on the Claimants' alternative case) and which ought to be rectified, he contended, was a failure, by the Claimants, to comply with CPR r.6.8.

3. It was agreed by the parties, that, unless the Claimants' application succeeds, the proceedings against the First Defendant cannot continue (but that, if it does succeed, the proceedings will continue against her, and her application will fail). Indeed, the Claimants went somewhat further and accepted that, if their application fails, the First Defendant's application should succeed, in the light of the decision of the Court of Appeal in *Hoddinott v. Persimmon Homes (Wessex) Ltd.* [2008] 1 WLR 806, at [21]-[29].

4. Because of the parties' positions on the effect, on the First Defendant's application, of the outcome of the Claimants' application, I only received submissions on the Claimants' application, so that, in this judgment, I only address further that application.

The background to the dispute

5. Both counsels' skeleton arguments helpfully summarise the substantive dispute between the parties, in a similar way. The summary of the substantive dispute I set out below is derived from those skeleton arguments.

6. The Third Claimant is the liquidator of the First Claimant and the Second Claimant. Terras de Extremoz Investimentos Imobillarios Ltda. ("GP Brazil") is a Brazilian subsidiary of the Second Claimant. In 2011, GP Brazil acquired a property, in Extremoz, in the Capim District of Brazil, called White Sands Country Club ("the Property"). Development plots at the Property were disposed to retail investors and the First Claimant and the Second Claimant received £14.7 million in return. The Claimants allege that (i) title to those development plots has not been transferred to those retail investors, (ii) the development plots remain registered in the name of GP Brazil, (iii) the development plots have no value, (iv) the retail investors are entitled to prove in the liquidations of the First Claimant and the Second Claimant and (v) the First Claimant and the Second Claimant have lost the £14.7 million to which I have referred.

7. The First Defendant is a Brazilian national, resident in the UK, who is a Registered Foreign Lawyer. She was the founder of the Second Defendant and was a member of it from 30 December 2010 until 20 September 2012 and from 31 July 2014. The Second Defendant, was a legal practice, but ceased to be one on 30 September 2016. The Third Defendant is, according to the Claimants at least, the successor practice to the Second Defendant.

8. The Claimants allege that the First Claimant and/or the Second Claimant retained the Second Defendant to provide legal services and advice in relation to the disposals, to investors, of the development plots at the Property. They also allege that the First

Defendant owed the First Claimant and/or the Second Claimant a duty of care in tort in relation to the legal services and advice for which the Second Defendant was retained.

9. Although Mr Turner did not say so in terms at the hearing, the parties proceeded, realistically, on the basis that the First Defendant disputes the allegations against her.

Background – chronology

10. Having summarised the substantive dispute, I need to set out, chronologically, some events.

11. The Claimants contend that they retained the Second Defendant in February or March 2012.

12. In September 2012, a legal opinion, signed by the First Defendant, was given.

13. The Claimants contend that GP Brazil lost the ability to dispose of the development plots at the Property on 7 November 2012.

14. The Third Claimant was appointed the First Claimant's and the Second Claimant's liquidator on 13 August 2014.

15. By August 2015, the Third Claimant had instructed the Claimants' present solicitors ("the Solicitors"). (It might be more accurate to say that that the Third Claimant in fact appointed a predecessor practice of the Solicitors, but nothing turns on the actual legal practice acting for the Claimants, in relation to the dispute, from time to time).

16. The Third Claimant was conducting interviews with the staff or former staff of the First Claimant by October 2015, from which interviews it appeared that the First Defendant had played a role in the First Claimant's legal affairs.

17. On 18 December 2015, the Third Claimant sought documents and information from the Second Defendant and, thereafter, between March 2016 and August 2016, the Third Claimant sought information and documents from the First Defendant and the Second Defendant. Whether those requests have been fully complied with may be a matter of dispute.

18. The Solicitors entered into a conditional fee agreement with the Claimants on 5 April 2016.

19. On 10 January 2017, the Solicitors wrote to the Solicitors Regulation Authority asking for details of the Second Defendant's professional indemnity insurers because the Solicitors believed that "limitation in respect of some causes of action may expire on 1 February 2017".

20. The claim form was issued on 20 February 2018 (and so it was required, by CPR r.7.5, (in the circumstances of this case) to be left at a permitted place for service by 20 June 2018).

21. By the Professional Negligence Pre-action Protocol:

i) as soon as the Claimants decided that there was a reasonable chance that they would bring a claim against the First Defendant, they were encouraged to notify her in writing;

ii) as soon as the Claimants decided that there were grounds for a claim against the First Defendant, they should have written a detailed letter of claim to her.

In fact, the first intimation of a claim against the First Defendant was a letter, dated 7 June 2018, from the Solicitors to her, under cover of which they enclosed "by way of notice only and not service" the claim form and by which they invited her to enter into a 6 month standstill agreement during the period of which standstill they intended "to send…a formal letter before legal action setting out the Claimants' claim in detail so that [the parties could] engage in pre-action correspondence" ("the 7 June letter"). By the 7 June letter, the Solicitors asked for a response, by 13 June 2018, to the proposal for a standstill agreement and explained that, if the First Defendant did not respond by then, the Claimants intended to serve the claim form.

22. The First Defendant accepts, for the purpose of the Claimants' application, that the claim form first came to her attention on or around 7 June 2018.

23. The First Defendant did not respond to the proposal for a standstill agreement and the Solicitors chased for a response on 13 June 2018 and 14 June 2018.

24. On 19 June 2018 ("19 June"):

i) one envelope, which had a clear window through which the name and address of the recipient of a letter could be seen, was left by a courier on the Claimants' behalf at Unit 44;

ii) two envelopes, which had clear windows through which the name and address of the recipient of a letter in each of those envelopes could be seen, were left by a courier on the Claimants' behalf at Plough Place;

iii) a copy of the claim form was also contained in each envelope (together with the Particulars of Claim, a notice of funding and documents for responding to the claim).[1] The copy of the claim form contained in each envelope was identical. The copy of the claim form:

a) identified the First Defendant as one of the defendants to the claim;

b) gave the First Defendant's address as Plough Place;

c) contained brief details of a claim against each of the Defendants;

d) in the box on the final page in which there was required to be inserted the "Defendant's name and address for service including postcode" ("the Address Box"), the Third Defendant's name appeared as did the Plough Place address (which is its registered office);

[1] In this judgment, I refer to each envelope and its contents as a "Service Pack".

iv) the two envelopes which were left by the Claimants' courier at Plough Place were then delivered to Unit 44 (the First Defendant accepts), by a courier as a result of an internal arrangement between the First Defendant, Second Defendant and/or Third Defendant.

The letters in the envelopes left by the Claimants' courier at Plough Place were identical and were addressed to the Third Defendant. None of the letters left by the Claimants' courier on 19 June were addressed to the First Defendant. (Mr Jay of the Solicitors explains, in a witness statement dated 14 August 2018, that "there was a separate but identical letter prepared and addressed to the First Defendant but this letter was not sent").[2]

25. Until the First Defendant's solicitor made a witness statement on 23 November 2018, the Claimants did not know that the Service Packs which had been left at Plough Place were then sent to Unit 44.

26. On 2 July 2018, the Solicitors completed a certificate of service indicating that a Service Pack for the First Defendant had been left at Plough Place.

27. On 4 July 2018, the First Defendant filed an acknowledgement of service indicating that she intended to contest jurisdiction.

28. As I have indicated, on 18 July 2018, the First Defendant made her application and, on 15 August 2018, the Claimants made their application.

29. The claim against the Third Defendant was discontinued on 21 November 2018.

<u>The application for a declaration that the First Defendant was validly served with the claim form and the Particulars of Claim at Unit 44</u>

30. The Claimants accept that, in the circumstances of this case:

i) under CPR r.6.8, to serve the claim form on the First Defendant, they were required to leave it:

> "at an address at which the defendant resides or carries on business within the UK…and which the defendant has given for the purpose of being served with the proceedings";

ii) under CPR r.6.9, to serve the claim form on the First Defendant, if CPR r.6.8 does not apply, they were required to leave it at the First Defendant's "usual or last known residence", which they have not done, because they do not know where that is.

31. Nevertheless, the Claimants argue that there has been good service of the claim form on the First Defendant because:

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[2] So, on 19 June, (i) no envelope was addressed to the First Defendant, (ii) no letter was addressed to the First Defendant, (iii) no claim form showed, in the Address Box, the First Defendant's name, (iv) no claim form showed, in the Address Box, (it is accepted) the First Defendant's residential address (that is, the address of her usual or last known residence) nor a registered address for the purpose of section 1140 and (v) the only Service Pack left, by the Claimants' courier, at a permitted place for service on the First Defendant (Unit 44) was the one containing a letter addressed to the Second Defendant.

i) a claim form was left for the First Defendant on 19 June;

ii) at a permitted place; namely, Unit 44.

Hence, the Claimants seek a declaration to that effect by their application.

32. The CPR provisions relating to service of Particulars of Claim which are expressed, by the claim form, "to follow", as in this case, may be different to those CPR provisions relating to service of a claim form. I did not receive any submissions on those different provisions because, it seems, the parties accept that, if there has not been good service of the claim form on the First Defendant, it is not appropriate to make any declaration in the Claimants' favour. I will restrict my consideration of this part of the Claimants' application to whether the claim form was left for the First Defendant, on 19 June, at a permitted place, so that there was good service of the claim form on her.

33. The Claimants contend that Unit 44 is a permitted place for service of the claim form on the First Defendant because it is a registered address for the First Defendant for the purpose of section 1140.

34. The First Defendant accepts that, for the purpose of section 1140 (but not CPR r.6.8), Unit 44 is a permitted place for service on her. Section 1140 provides:

> (1) A document may be served on a person to whom this section applies by leaving it at, or sending it by post to, the person's registered address.
>
> (2) This section applies to –
>
> (a) a director or secretary of a company;…
>
> (3) This section applies whatever the purpose of the document in question. It is not restricted to service for purposes arising out of or in connection with the appointment or position mentioned in subsection (2) or in connection with the company concerned.
>
> (4) For the purposes of this section a person's "registered address" means any address for the time being shown as a current address in relation to that person in the part of the register available for public inspection…"

35. In *Key Homes Bradford Ltd. v. Patel* [2015] 1 BCLC 402, Chief Master Marsh held, at [25], that "section 1140…provides a basis for serving a director which is entirely outside the provisions for service in the CPR. It is a parallel code". At [26], the Chief Master added that section 1140 "does indeed provide a new set of provisions which are of broad effect". In the light of *Key Homes*, as I have indicated, the First Defendant accepts (and, for reasons that will become clear, perhaps even encourages me to proceed on the basis) that, under section 1140, good service of the claim form on the First Defendant could be effected by leaving it at Unit 44.

36. Mr Moraes argued that Unit 44 was also a permitted place for service for the purpose of CPR r.6.8, because Unit 44 is shown, in the register at Companies House, as a registered address for the First Defendant and, because that is so, the First Defendant has given Unit 44 as an address for the purpose of being served with the claim form.

37. As it happens, in order for CPR r.6.8 to apply in this case, Unit 44 must also be a place from which the First Defendant carries on business, which is a fact which seemed to me to have been assumed at the hearing.

38. I agree with Mr Turner that it does not follow that, just because Unit 44 is shown as a registered address, for the First Defendant, on the register at Companies House, she is to be taken to have given (or, to use Mr Moraes' word, "elected") it as an address for the purpose of being served with the claim form.

39. I was not taken to any part of the Companies Act 2006 (or any other material) from which I can conclude, on the available evidence, that the registration, in the register at Companies House, of Unit 44 as a registered address for the First Defendant was as a result of an act done by the First Defendant. I was not taken to s.1113 of the Companies Act 2006, which tends to suggest that the relevant registration obligation is on the company rather than on a director.[3] I was taken to ss.162-167 of the Companies Act 2006 which relate, principally, to the register maintained by a company. S.167 of the Companies Act 2006 does deal with information to be given to the Registrar of Companies, but it imposes the relevant obligation on the company in question, it seems to me, so does not assist the Claimants in my view.

40. I am not satisfied, therefore, that CPR r.6.8 applies in this case.

41. In order for the Claimants to be entitled to rely on section 1140 as a parallel code (unconnected to CPR r.6.8), they have to satisfy me that a claim form was left for the First Defendant, on 19 June, at Unit 44. The First Defendant contends that:

    i) no claim form was left for her on 19 June;

    ii) if a claim form was left for her on 19 June, it was not left at Unit 44.

42. In fact, whether or not a claim form was left for the First Defendant on 19 June, so that the claim form was served (or purportedly served) by a method permitted by CPR r.6.3(1)(c) (whether or not the claim form was left at a permitted place), is a matter which I need to decide in relation to other parts of the Claimants' application.

43. The parties accepted, at the hearing, that the determination of (i) whether or not a claim form was left for the First Defendant on 19 June, at any location, for the purpose of section 1140, and (ii) whether or not the claim form was served (or purportedly) served, on that day, by a method permitted by CPR r.6.3(1)(c) (by leaving it for the First Defendant), require the court to answer the same question; namely, whether, assessed objectively, a claim form was left for the First Defendant on that day. Because the assessment is objective, what (i) the Claimants thought they were doing or what they intended to do and (ii) the First Defendant thought the

[3] Contrary to what Mr Moraes may have submitted, I do not believe that Chief Master Marsh suggested, in *Key Homes*, at [14], that the relevant registration obligation is on directors individually rather than on the company in question.

Claimants were doing, is not relevant. In this context, the parties relied on *Asia Pacific (HK) Ltd. v. Hanjin Shipping Co. Ltd.* [2005] EWHC 2443 (Comm), where Christopher Clarke J said, at [19]:

> "The first question, therefore, is whether what happened on 21 March amounts to service. That question must – as is common ground – be judged objectively, that is to say by looking at what was done and said by and as between the parties in order to determine whether it amounts to service. If it does so, an unexpressed intention that it should not do so cannot alter the position. If it does not do so, the fact that the person who did the acts in question intended or thought that what he did constituted service does not make it so. Whether service has been effected cannot depend upon the views, possibly idiosyncratic or even bizarre, of individual litigants or their advisors."

(The judgment in that case also supports (or is consistent, at least, with) the proposition that sending a claim form to a defendant expressly on terms that it is "for information only" and "not for service" (and the like) cannot amount to service of the claim form on that defendant).

44. The Claimants contend that:

    i) A claim form was left for the First Defendant, on 19 June, at Unit 44 because the Service Pack their courier left at Unit 44 was left there;

    ii) A claim form was left for the First Defendant, on 19 June, at Unit 44 because the Service Packs their courier left at Plough Place were sent, on that day, fortuitously or by a standing internal arrangement which the Defendants had amongst themselves, to Unit 44;

    iii) A claim form was left for the First Defendant, on 19 June, at Plough Place because the Service Packs their courier left there were left there.

45. In order for the Claimants to be entitled to rely on section 1140, they have to establish that a claim form was left for the First Defendant in at least one of the first two ways I have set out. It would not be enough, for the purpose of section 1140, if a claim form was left at Plough Place.

46. The (one) Service Pack which was left, by the Claimants' courier, at Unit 44, which is the Second Defendant's registered office, contained a letter addressed to the Second Defendant and a claim form the Address Box of which referred only to the Third Defendant, giving an address which is the Third Defendant's registered office. Considering these facts (and not having been taken to any of the other documents in the Service Packs), I have concluded that, assessed objectively, the claim form left at Unit 44 by the Claimants' courier was for the Second Defendant.

47. I also reject the Claimants' contention that the two Service Packs left, by the Claimants' courier at Plough Place, and later sent to Unit 44, were left (for the purposes of section 1140 or CPR Part 6) at Unit 44. I do not believe that good service

is effected, under section 1140 or CPR rr.6.3, 6.7-6.10, on their proper construction, by a claim form being left at a permitted place for service not by a claimant or someone on its behalf but by a third party including another defendant who is itself being served, perhaps entirely fortuitously (as might be the case in the present proceedings). Mr Moraes reminded me that, in *Hoddinott*, Dyson LJ explained, at [54]:

> "…service of the claim form serves three purposes. The first is to notify the defendant that the claimant has embarked on the formal process of litigation and to inform him of the nature of the claim. The second is to enable the defendant to participate in the process and have some say in the way in which the claim is prosecuted: until he has been served, the defendant may know that proceedings are likely to be issued, but he does not know for certain and he can do nothing to move things along. The third is to enable the court to control the litigation process. …[U]ntil the claim form is served, the court has no part to play in the proceedings."

If, unknown to the claimant, a defendant can be served with the claim form by it being left at a permitted place by a third party (not by or on behalf of the claimant), how can the court control the litigation process? One way the court controls the litigation process is by entering judgment in default of acknowledgment of service but, where the court is not to serve the claim form, if the claimant cannot tell the court the last date when service ought to have been acknowledged, because it does not know (the claim form having been left at a permitted place by a third party at some time unknown to the claimant), how can the court know whether it is appropriate to enter judgment in default? Further, the logical conclusion of the Claimants' contention in this respect is that, if a claim form is left by a claimant or on its behalf at a permitted place, but then sent to its final destination, which is not a permitted place, by a third party, unknown to the claimant, there will not have been good service of the claim form, which would be inconsistent with the clear language of section 1140 and CPR r.6.3, at the very least. Although these points apply with particular force to the proper construction of CPR Part 6, I know of no reason why they ought not to apply with equal force to section 1140.

48. Mr Moraes suggested that the judgment of Sir Robert Megarry VC, in *Townsends Carriers Ltd. v. Pfizer Ltd.* (1977) 33 P & CR 361, supports the contrary conclusion. I do not agree. That case was a quite different case from the present one. The question before the Vice-Chancellor was not where a document is to be taken to be left or delivered but, rather, who could properly be the recipient of the document in issue in that case. The Vice-Chancellor said, obiter, that the eventual recipient of the document in that case could be taken to have received it if it received it indirectly, but it is not clear to me (although it does not matter) whether the Vice-Chancellor's observation pre-supposed that the intermediate, direct, recipient was the agent of the eventual, indirect, recipient.

49. The (two) Service Packs which were left, by the Claimants' courier, at Plough Place, which is the Third Defendant's registered office, were identical. The letters they contained were addressed to the Third Defendant and the claim forms they contained referred, in the Address Boxes, to the Third Defendant, giving the Third Defendant's

registered address. Considering these facts, the Claimants have not satisfied me (as they accept they are required to do), on an objective assessment, that the claim forms left at Plough Place by the Claimants' courier were for the First Defendant.

50. Mr Moraes contended that the First Defendant must have appreciated that one of the Service Packs was left for her, because:

    i) from 7 June 2018, it would have been clear to her that she was going to be a party to the claim and the chaser e-mails of 13 June 2018 and 14 June 2018, to which I have referred, reinforced this point;

    ii) there were three Service Packs and they all arrived at Unit 44 on 19 June;

    iii) she filed an acknowledgment of service.

51. It may well be that, in fact, the First Defendant did appreciate that one of the Service Packs was left for her, or thought that one of the Service Packs might have been intended for her (although there is no evidence from her) but, as I have explained, her own subjective thoughts are not relevant to whether, objectively, a claim form was left for her.

52. In any event, I do not think that the correspondence of 7 June 2018, 13 June 2018 and 14 June 2018 ("the June correspondence"), and the existence of the three Service Packs and their ultimate location on 19 June, does lead to the conclusion that the First Defendant appreciated that one of the Service Packs was left for her. A not unreal alternative is that the Claimants had chosen belatedly not to serve her and, in error, had arranged for their courier to leave two Service Packs for the Third Defendant at Plough Place.

53. Further, I cannot conclude, from the filing of the acknowledgement of service in this case, that the First Defendant appreciated that one of the Service Packs was left for her, because:

    i) The acknowledgment of service did not indicate any intention other than that she intended to contest jurisdiction which, in this case, is a tolerably clear indication that she took the view that there had not been good service on her;

    ii) I accept, as Mr Turner contended, that it is equally probable that the filing of the acknowledgment of service in this case was a protective measure taken to prevent judgment in default of acknowledgment of service being entered by the Claimants believing that there had been good service on the First Defendant.

54. I have considered whether the fact and contents of the June correspondence and/or the existence of three Service Packs and their ultimate location affects the objective assessment which I have already made, as admissible background evidence. For the same reason as I have been unable to conclude, from these additional facts, that the First Defendant appreciated that one of the Service Packs was left for her, I have concluded that these additional facts do not alter the objective assessment which I have already made.

55. I have concluded, therefore, that:

    i) for the purpose of section 1140, the Claimants did not leave a claim form for the First Defendant on 19 June;

    ii) so that the Claimants are not entitled to the declaration they seek;

    iii) for the purpose of CPR Part 6, the Claimants did not serve (or purportedly serve) a claim form on the First Defendant by a permitted method on 19 June.

56. There is a suggestion in some of the Claimants' evidence that they contend that the claim form was served on the First Defendant under cover of the 7 June letter but, for the reasons given by Christopher Clarke J in *Asia Pacific*, that is not so, because the letter made clear that the claim form was then being provided for information only and not by way of service.

CPR r.6.15

57. The Claimants seek relief, alternatively, under CPR r.6.15 in relation to both the claim form and the Particulars of Claim. In fact, CPR r.6.27, not CPR r.6.15, applies to the Particulars of Claim, but nothing turns on this, because CPR r.6.27 applies CPR r.6.15 to Particulars of Claim.

58. It is important to have in mind what CPR r.6.15 actually provides; namely:

> "(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…"

59. It is also important to have in mind what relief the Claimants seek under CPR r.6.15. They merely seek an order that service at an alternative place (in this context, Unit 44 or Plough Place) is good service.

60. I have already decided that the Claimants did not leave a claim form at Unit 44 or Plough Place, on 19 June, for the First Defendant, so that waiving only any defect as to place of service, under CPR r.6.15, which is the relief the Claimants seek by their application, would not assist the Claimants and there would be no point in making an order under that provision even if the grounds for doing so are otherwise made out.

61. Nevertheless, the court can do more, under CPR r.6.15(2), than merely retrospectively validate (purported) service at a non-permitted place, and so I need to consider this part of the Claimants' application in more detail. In doing so, I will assume that there was good service on the Second Defendant, on 19 June, at Unit 44 and that there was good service on the Third Defendant, on that day, at Plough Place.

62. Having concluded that no claim form was left for the First Defendant on 19 June, I need to ask myself whether there is good reason for treating, as good service on the First Defendant, the good service on the Second Defendant and the Third Defendant.

63. That I need to consider whether there is "good reason" (so requiring me to look at the relevant facts holistically) rather than "a good reason", as Mr Moraes suggested (if he intended to contend for a different approach to the facts), is clear from what Lord Sumption said in *Barton v. Wright Hassall LLP* [2018] 1 WLR 1119, at [9]-[10], which I quote below, referring, in particular, to what Lord Clarke said in *Abela v. Baadarani* [2012] 1 WLR 2043 (see also Lord Sumption's explanation, in *Barton*, at [18], that CPR r.6.15 provides a "framework within which to balance the interest of both sides").

64. Mr Moraes contended, effectively, that there is good reason for treating the events of 19 June as good service on the First Defendant because:

    i) from 7 June 2018, the First Defendant knew that she was a defendant to an already issued claim of substantial value. As I have explained, the First Defendant does not dispute this;

    ii) on 19 June, the Service Packs were left at Unit 44 and Plough Place, so that (taking into account earlier events too) the First Defendant appreciated that the Claimants intended to serve her. For the reasons I have already given, I am not satisfied that this is so;

    iii) the Claimants did not know the First Defendant's residential address.

65. In *Barton*, Lord Sumption said, at [9]-[10]:

> "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 view of the editors of Civil Procedure 2013, vol.1, para.6.15.5, Lord Clarke JSC 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] 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.

> This is not a complete statement of the principles on which the power under CPR r.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" (emphasis added).

66. In the light of the conclusions I have already reached, I must inevitably conclude that the Claimants did not take any steps, on 19 June, to bring the claim form to the First Defendant's attention on that day, even if, because of the events which happened, the claim form actually came to her attention. This part of the Claimants' application, to the extent that it depends solely on the events of 19 June, cannot therefore succeed.[4]

67. If I am wrong and the events of 19 June are to be taken as then bringing the claim form to the First Defendant's attention, then a "critical factor" for an order under CPR r.6.15 exists. Similarly, it seems to me that the supply of a copy of the claim form under cover of the 7 June letter meets that requirement in any event (as the First Defendant effectively acknowledged). However, as Lord Sumption made clear, that is

[4] See, also, Lord Briggs' dissenting judgment in *Barton*, at [29].

not enough. To accede to this part of the Claimants' application I would need to be satisfied that there is good reason to treat the good service on the Second Defendant and the Third Defendant as good service on the First Defendant.

68. There is no reason to think that, by a straightforward search, it was not easy for the Claimants (through the Solicitors) to discover that Unit 44 is a registered address for the First Defendant. The necessary information is discoverable from the public part of the register at Companies House. Had that information been discovered in time, in the circumstances of this case, good service on the First Defendant at Unit 44 would have been easy to effect. There is no evidence that the Claimants (or the Solicitors) took any steps, before 20 June 2018, to discover a registered address for the First Defendant. There is no evidence that the Claimants (or the Solicitors) made any enquiries, before 20 June 2018, as to the address of the First Defendant's usual or last known residence.[5] There is no evidence that the Claimants (or the Solicitors) took any steps at all to try to effect service on the First Defendant by any method permitted under CPR rr.6.3(1)(a), (b), or (d). Further, in the light of the conclusions I have already reached, the Claimants did not leave a claim form for the First Defendant at Plough Place (or, indeed, Unit 44). Weighing up these matters, taking into account also the First Defendant's knowledge of the claim form, I am not satisfied that the Claimants did take reasonable steps to effect service in accordance with the rules. Nor am I satisfied that there is good reason to validate, as good service on the First Defendant, the good service on the Second Defendant and the Third Defendant.

69. Mr Moraes also suggested that there is good reason for treating the events of 19 June as good service on the First Defendant because:

i) the Claimants sought to enter into a standstill agreement;

ii) the First Defendant did not respond to that proposal and, so, she was not being co-operative;

iii) the First Defendant had not, on the Claimants' case at least, retained documents which she should have done;

iv) the Claimants have limited resources;

v) if an order is not made under CPR r.6.15, the First Defendant will obtain a windfall at the expense of the First Claimant's and the Second Claimant's retail investors. Although Mr Moraes did not spell out what the First Defendant's windfall might be, I assume that the Claimants' concern is that there is a risk, at least, that any future claim would be statute-barred.

70. I struggle to see how any of the first four matters could constitute a justification for the events of 19 June. It is to be remembered that:

i) the Solicitors had been engaged for a number of years before June 2018, to act for the Third Claimant, in particular;

[5] Mr Jay says, at para.55 of his witness statement, that investigations to discover the First Defendant's residential address have been made "now".

ii) more than two years before 19 June, the Solicitors had entered into a conditional fee agreement, it is reasonable to suppose having made some assessment of the case against the First Defendant;

iii) matters were so advanced that, by 20 February 2018, the Claimants were able to issue a claim against the First Defendant;

iv) nevertheless, at no time, before 7 June 2018, did they apparently make any effort at all to take the steps they were encouraged to take by, and which they ought to have taken to comply with, the Professional Negligence Pre-action Protocol;

v) they did not engage with the First Defendant until towards the end of the period of the claim form's validity;

vi) leaving a Service Pack for the First Defendant at Unit 44 would have been good service. As I have said, it was apparently a simple exercise to establish that Unit 44 was a permitted place for service under section 1140. In any event, there was no particular cost to the Claimants in leaving a Service Pack there (or, indeed, at Plough Place) for the First Defendant.

71. In any event, I do not think it is right to conclude that the First Defendant's non-response, between 7 June 2018 and 19 June (a period of 12 days), to the request to enter into a standstill agreement was unreasonable or should be weighed significantly or at all against her (and, I note, in passing, that Wright Hassall's refusal in *Barton*, to Mr Barton's request for an extension of time to serve the claim form in that case was not the subject of criticism by the Supreme Court). The Solicitors had said, in the 7 June letter, that, if the First Defendant did not respond, the claim form would be served on her. In my view, she was entitled to put the Claimants to an election to serve or not serve the claim form on her within the period of its validity. If she had responded, it is reasonable to suppose that she would have declined to enter into a standstill agreement, so that the Claimants would have been in the same position in which they found themselves on 19 June.

72. Even if I am wrong, and I should attribute particular weight in the Claimants' favour, to these four matters, in my view, they are significantly outweighed by those matters which have otherwise already led me to conclude that there is insufficient reason, in this case, for retrospectively validating, as good service on the First Defendant, the good service on the Second Defendant and the Third Defendant.

73. I cannot decide whether a future claim would be statute-barred, and I am not invited to decide that point. However, in the light of (i) the background to the dispute which I have set out, (ii) the Solicitors' correspondence with the Solicitors Regulation Authority to which I have referred, (iii) what Mr Jay says, in paragraph 49 of his witness statement, about "potential dates" when a limitation period began to run and (iv) the suggestion that the First Defendant may or will obtain a windfall if an order is not made under CPR r.6.15, there is a real risk that a future claim will be statute-barred.

74. If the First Defendant will obtain a windfall, as Mr Moraes suggests, that will not be as a result of anything that the First Defendant has done. Rather, it will be as a result of what the Claimants and the Solicitors have not done; namely:

    i) not to engage with the First Defendant until almost the very last moment;

    ii) not to attempt to serve the claim form well within the period of its validity;

    iii) not to take the apparently simple step of serving the claim form on the First Defendant by leaving a Service Pack addressed to her and/or a claim form with the Address Box containing her details at Unit 44 (or, indeed, at Plough Place) on 19 June or beforehand.

75. Although not put in this way by Mr Moraes, his point that the First Defendant will obtain a windfall is really an objection to the First Defendant taking advantage of what appears to have been an honest mistake (as Mr Moraes described it) on the part of the Solicitors (who had drafted a letter to the First Defendant to go with the Service Packs but did not send it). In *Societe Generale v. Sanayi* [2018] EWCA Civ 1093 (the first instance decision in which Mr Turner took me to, by reference to the judgment in *Higgins v. ERC Accountants and Business Advisors Ltd.* [2017] EWHC 2190 (Ch)), Longmore LJ said, at [23]:

> "It must, I think, follow that in the context of alternative service, it cannot be right to say that negligence or incompetence of the claimant's lawyers is always "a bad reason". It does not, of course, follow that it is "a good reason". That must depend on the facts of the case…"

I have already described the step of serving the First Defendant by leaving a Service Pack for her at Unit 44 (or at Plough Place) as apparently simple. In such circumstances, I am not satisfied that the suggested windfall in this case is "a good reason" for present purposes.

76. In any event, in considering how to treat Mr Moraes' windfall argument, I do need to bear in mind what Lord Sumption said in *Barton* at [10]; namely that a relevant factor for not making an order under CPR r.6.15 may be:

> "…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…"

If the First Defendant will gain the assumed windfall if an order is not made under CPR r.6.15, she will lose the benefit of an accrued limitation defence if an order is made under that rule.

77. For all these reasons, I have concluded that Mr Moraes' windfall argument is not a weighty factor in favour of making an order under CPR r.6.15 and it does not alter the conclusions I have already reached.

78. In *Barton*, Lord Sumption said, at [23]:

> "…having issued the claim form at the very end of the limitation period and opted not to have it served by the court, [Mr Barton] 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 r.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 [(Wright Hassall's solicitors)] 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."

The same could be said in this case.

79. I have concluded, therefore, that there is insufficient reason for treating, as good service of the claim form on the First Defendant, the service of the claim form on the Second Defendant and the Third Defendant on 19 June.

80. I have also considered whether there is sufficient reason to treat, as good service on the First Defendant, the provision to her of a copy of the claim form under cover of the 7 June letter. If, as I have concluded, the events of 19 June ought not to be treated as good service on the First Defendant, then, in my view, the sending of the claim form to the First Defendant, under cover of the 7 June letter, expressly not for service, ought not to be treated as good service on her.

81. Taking into account all I have said, I have concluded that this part of the Claimants' application fails.

<u>CPR r.6.16</u>

82. CPR r.6.16 provides that "the court may dispense with service of a claim form in exceptional circumstances."

83. The point may be made that the "exceptional" circumstances in which the court can make an order, under CPR r.6.16, dispensing entirely with service, are more limited than the circumstances in which the court can make an order, under CPR r.6.15, retrospectively validating steps taken if there is "good reason" to do so. This point is sufficiently supported by comparing the language of CPR r.6.16 (in particular, the reference to "exceptional circumstances") with the language of CPR r.6.15 (in particular, the reference to "good reason") (as, I believe, Lord Clarke did in *Abela* at [33]). This point is reinforced by what Arnold J said in *Chopra v. Bank of Singapore Ltd.* [2015] EWHC 1549 (Ch), at [116]; namely:

> "Many of the earlier authorities on what is now rule 6.16 were reviewed by Sir Anthony Clarke MR (as he then was) in *Olafsson v. Gissurarson (No 2)* [2008] EWCA Civ 152, [2008] 1 WLR 2016 at [15]-[23]. It is clear from that review that the court's power retrospectively to dispense with service of a

> claim form under this rule should only be exercised in truly exceptional cases…"

In *Higgins*, HH Judge Pelling QC made the point explicitly, at [46], in the following way:

> "For these reasons, I conclude that no good reason has been demonstrated for making the Order sought under CPR r.6.15. In those circumstances and for similar reasons, Cs cannot overcome the more difficult threshold imposed by CPR r.6.16, which requires the applicant to establish the existence of exceptional circumstances before an order can be made."

84. Mr Moraes relied, on this part of the Claimants' application, on the decision of the Court of Appeal in *Anderton v. Clwyd CC* [2002] 1 WLR 3174. In that case, Mummery LJ explained, at [56]-[58]:

> "In our judgment there is a sensible and relevant distinction,…between two different kinds of case.
>
> First, an application by a claimant, who has not even attempted to serve a claim form in time by one of the methods permitted by rule 6.2, for an order retrospectively dispensing with service under rule 6.9 [(now CPR r.6.16)]. The claimant still needs to serve the claim form in order to comply with the rules and to bring it to the attention of the defendant. That case is clearly caught by *Godwin's* case as an attempt to circumvent the limitations in rule 7.6(3) on the grant of extensions of time for service of the claim form.
>
> Second, an application by a claimant, who has in fact already made an ineffective attempt in time to serve a claim form by one of the methods allowed by rule 6.2, for an order dispensing with service of the claim form. The ground of the application is that the defendant does not dispute that he or his legal adviser has in fact received, and had his attention drawn to, the claim form by a permitted method of service within the period of four months, or an extension thereof. In the circumstances of the second case the claimant does not need to serve the claim form on the defendant in order to bring it to his attention, but he has failed to comply with the rules for service of the claim form. His case is not that he needs to obtain permission to serve the defendant out of time in accordance with the rules, but rather that he should be excused altogether from the need to prove service of the claim form in accordance with the rules. The basis of his application to dispense with service is that there is no point in requiring him to go through the motions of a second attempt to complete in law what he has already achieved in fact. The defendant accepts that he has received the claim form before the end of the period for service of the claim form. Apart from losing the opportunity to take advantage of the point that

> service was not in time in accordance with the rules, the defendant will not usually suffer prejudice as a result of the court dispensing with the formality of service of a document, which has already come into his hands before the end of the period for service. The claimant, on the other hand, will be prejudiced by the refusal of an order dispensing with service as, if he is still required to serve the claim form, he will be unable to do so because he cannot obtain an extension of time for service under rule 7.6(3).
>
> In the exercise of the dispensing discretion it may also be legitimate to take into account other relevant circumstances, such as the explanation for late service, whether any criticism could be made of the claimant or his advisers in their conduct of the proceedings and any possible prejudice to the defendant on dispensing with service of the claim form."

85. Mr Turner argued that this case is within the first category of case discussed by Mummery LJ, so that the Claimants cannot have recourse to CPR r.6.16, particularly because they have abandoned the part of their application made under CPR r.7.6(3); Mr Moraes having accepted that the grounds for an order under CPR r.7.6(3) are not made out in this case.

86. There may be force in Mr Turner's argument but I would prefer to rest my decision, on this part of the Claimants' application, on whether or not the Claimants have established the exceptional circumstances required for an order under CPR r.6.16.

87. For the same reasons that I have concluded that there are insufficient grounds for making an order under CPR r.6.15 in this case, and having carried out the same balancing exercise, I have concluded that there are insufficient circumstances for making an order under CPR r.6.16; in particular, because:

    i) there is a real possibility that the Claimants left it until at least late within the limitation period to issue the claim form;

    ii) there is no evidence that they took any steps to attempt to serve the claim form on the First Defendant until towards the end of the period of its validity;

    iii) 19 June was at the very end of the period of the claim form's validity;

    iv) as I have already concluded, there was no attempt, on 19 June, to leave the claim form, for the First Defendant, at a permitted place for service even though, seemingly, this could have been done easily;

    v) the Claimants did not apparently attempt to take steps they were encouraged to take or ought to have taken under the Professional Negligence Pre-action Protocol before 7 June 2018;

    vi) there is no evidence that they took any steps, during the period of the claim form's validity, to consider or investigate the practicality of serving the claim

form on the First Defendant otherwise than by leaving it at a particular location;

vii) there is no evidence that they took any steps, easy as they were in relation to section 1140, during the period of the claim form's validity, to investigate where might be a permitted place for service on the First Defendant;

viii) this conduct has to be set against the likelihood that the Claimants had contemplated a professional negligence claim for some years before the claim form was issued;

ix) if I make an order dispensing with service of the claim form on the First Defendant, she may lose the benefit of an accrued limitation defence.

88. This part of the Claimants' application therefore fails.

CPR rr.3.9, 3.10

89. I do not propose to address this part of the Claimants' application at length because, as Mr Turner suggested, it is doomed to failure, for a number of reasons, some of which I turn to consider briefly now.

90. As I understood Mr Moraes' submissions with respect to this part of the Claimants' application made under CPR rr.3.9, 3.10, it must fail unless I also decide that, by the register at Companies House showing Unit 44 as a registered address for the First Defendant, the First Defendant has, under CPR r.6.8, thereby given Unit 44 as an address for the purpose of being served with the claim form. I have already decided that the First Defendant has not given an address for service for the purpose of CPR r.6.8. It must follow that, on this ground alone, this part of the Claimants' application must fail. In any event, this part of the Claimants' application must fail because CPR r.6.8 only deals with permitted places for service. As in relation to the part of the Claimants' application under CPR r.6.15, so in this context, a waiving of any procedural defect under CPR r.6.8 does not get over the problem that, as I have found, no copy of the claim form was left for the First Defendant (or purportedly served in any other way by the Claimants on her) on 19 June.

91. I also agree with Mr Turner that, in this case, the Claimants cannot avoid the limitations imposed by CPR rr.6.15, 6.16 by making an application under CPR r.3.10. As Dyson LJ explained, in analogous circumstances, in *Steele v. Mooney* [2005] 1 WLR 2819, at [15]:

> "In *Vinos v. Marks & Spencer* this court had to consider the relationship between rule 3.10 and rule 7.6(3). The claimant issued his claim form about one week before the expiry of the limitation period, but due to an oversight, his solicitors did not serve it until nine days after the expiry of the four month period specified by rule 7.5(2). He applied for an extension of time for serving the claim form. He accepted that he could not satisfy the conditions of rule 7.6(3)(a) or (b), but contended that the court could grant the extension under rule 3.10 on the grounds that a failure to serve the claim form within the prescribed

period was an error of procedure which could be corrected under the general power conferred by that rule. This court held that rule 3.10 cannot be invoked to obtain an extension of time for service of a claim form after the end of the period specified by rule 7.5(2) in circumstances where an extension of time is prohibited by rule 7.6(3). May LJ said in terms, at para.20:

> "The general words of rule 3.10 cannot extend to enable the court to do what rule 7.6(3) specifically forbids, nor to extend time when the specific provision of the rules which enables extensions of time specifically does not extend to making this extension of time. What Mr Vinos in substance needs is an extension of time – calling it correcting an error does not change its substance.""

92. Mr Turner also argued that, where the issue before the court relates to the service of a claim form, a claimant cannot have recourse to CPR r.3.9.[6] This is a point I do not need to decide but I do note that, in *Barton*, Lord Sumption said, at [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 r.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), especially 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 r 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

[6] On the facts of this case, and taking into account the conclusions I have already reached, I have to say that it is difficult to see any sufficient basis for the court to give the Claimants relief under CPR r.3.9, even if the court could do so.

> 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."

Disposal

93. For the reasons I have set out, the Claimants' application is dismissed and the claim against the First Defendant cannot continue. I will hear further from counsel about how effect is to be given to this judgment.