Neutral Citation Number: [2024] EWHC 1579 (KB)

Case No: QB-2022-001762

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 June 2024

Before :

MASTER DAGNALL

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Between :

THE OCCUPIERS OF SAMUEL GARSIDE HOUSE	**Claimants**
- and -	
(1) BELLWAY HOMES LIMITED	**Defendants**
(2) SHEPPARD ROBSON ARCHITECTS LLP	

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David Sawtell (instructed by Edwards Duthie Shamash) for the **Claimant**
Tim Calland (instructed by Gateley Legal LLP) for the **First Defendant**
James Frampton (instructed by Mayer Brown International LLP) for the **Second Defendant (and Sheppard Robson Architects LLP and Sheppard Robson Limited)**

Hearing date: 8 November 2023; further submissions received in and up to 27 March/22April 2024

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Approved Judgment

This judgment was handed down at 10.00am on 25 June 2024 at a non-attendance hearing and subsequent circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MASTER DAGNALL:

Introduction

1. There are before me two applications made by the Claimants:

   (1) An Application Notice dated 28 April 2023 ("the April Application") seeking a Declaration that the Claim Form has been validly served, alternatively relief from sanctions in relation to its not having been validly served, and extensions of time for service of (a) the Claim Form and (b) the Particulars of Claim

   (2) An Application Notice dated 23 August 2023 ("the August Application") seeking (i) to add various Claimants who are minors ("the Additional Claimants"), and (ii) "that the Second Defendant's name be amended to "Sheppard Robson Limited".

2. The Claim arises from the event of a serious fire ("the Fire") at a block of flats ("the Building"), originally constructed in 2013, known as Samuel Garside House, 2 De Pass Gardens, Barking, Essex IG11 0FQ on 9 June 2019. The Claimants are occupiers or former occupiers of various of the flats in the Building. The First Defendant is the developer and constructor of the Building. The corporate architect of the Building was a company with the name Sheppard Robson Limited ("SRL") and which is an associated entity of another company Sheppard Robson Architects Limited ("SRAL"). The Claimants seek damages against the Defendants at common-law and under the Defective Premises Act 1972 ("the 1972 Act") for alleged negligence and breach of statutory duties. Those damages are both for physical damage and economic loss, and for personal injuries. All but one of the original Claimants is an adult, but three of the five Additional Claimants are, or are said to be, minors.

3. The Claim Form was issued on 6 June 2022 and against the First Defendant and "Sheppard Robson Architects LLP". Various extensions of time for service of the Claim Form were agreed but steps for service were only taken in April 2023. The Defendants assert that those steps were insufficient to comply with the relevant Civil Procedure Rules ("CPR"). The Claimants contend that they were but also that there was a further agreed extension of time for service to June 2023; and so that they should be granted a Declaration that there has been good service; and, if they fail on both contentions in relation to a relevant Defendant, that they should be granted some relief from resultant sanctions.

4. The Claimants further contend that the naming of "Sheppard Robson Architects LLP" as the Second Defendant was a misnomer, or a mistake, for "Sheppard Robson Limited, and which should be corrected by an amendment of the name to "Sheppard Robson Limited". SRAL and SRL contend that it is SRAL which has been sued and to substitute SRL at this point would be impermissible for limitation reasons.

5. There is a further difficulty, if the Claimants fail at least in relation to the April Application, as to what should be the consequence, and, in particular, in the light of the very recent Court of Appeal decision in *R (on the application of Rezq Allah Koro) v The County Court at Central London [2024] EWCA Civ 94* ("*Koro*"). This raises the question of whether the Defendants can actually complain about improper service on the facts before me.

6. The addition of the Additional Claimants is not opposed as such but is dependent upon what else occurs.

Applicable Limitation Provisions

7. The Applications exist within a particular context of the law relating to limitation.

8. Section 11 of the Limitation Act 1980 ("the 1980 Act") provides for a time-limit for the bringing of any claim for negligence or breach of duty where the claim includes damages in respect of personal injury to have a time-limit of 3 years from the acquiring of relevant knowledge. This provision applies even if other non-personal injury damages are claimed. However, it is subject to a power for the Court to disapply the time-limit where such is just and equitable under section 33 of the 1980 Act. That power is often exercised especially where there will be no substantive prejudice to a defendant due to a delay beyond the expiry of the three-year limitation period.

9. Section 135 of the Building Safety Act 2022 has inserted a new section 4B into the 1980 Act, and provides as follows:

"135 (1) After section 4A of the Limitation Act 1980 insert—

"4B Special time limit for certain actions in respect of damage or defects in relation to buildings

(1) Where by virtue of a relevant provision a person becomes entitled to bring an action against any other person, no action may be brought after the expiration of 15 years from the date on which the right of action accrued.

(2) An action referred to in subsection (1) is one to which—

(a) sections 1, 28, 32, 35, 37 and 38 apply;

(b) the other provisions of this Act do not apply.

(3) In this section "relevant provision" means—

(a)section 1 or 2A of the Defective Premises Act 1972;

(b)section 38 of the Building Act 1984.

(4) Where by virtue of section 1 of the Defective Premises Act 1972 a person became entitled, before the commencement date, to bring an action against any other person, this section applies in relation to the action as if the reference in subsection (1) to 15 years were a reference to 30 years.

(5) In subsection (4) "the commencement date" means the day on which section 135 of the Building Safety Act 2022 came into force."

(2) In section 1(5) of the Defective Premises Act 1972, for "the Limitation Act 1939, the Law Reform (Limitation of Actions, &c.) Act 1954 and the Limitation Act 1963" substitute "the Limitation Act 1980".

(3) The amendment made by subsection (1) in relation to an action by virtue of section 1 of the Defective Premises Act 1972 is to be treated as always having been in force.

(4) In a case where—

(a) by virtue of section 1 of the Defective Premises Act 1972 a person became entitled, before the day on which this section came into force, to bring an action against any other person, and

(b) the period of 30 years from the date on which the right of action accrued expires in the initial period, section 4B of the Limitation Act 1980 (inserted by subsection (1)) has effect as if it provided that the action may not be brought after the end of the initial period.

(5) Where an action is brought that, but for subsection (3), would have been barred by the Limitation Act 1980, a court hearing the action must dismiss it in relation to any defendant if satisfied that it is necessary to do so to avoid a breach of that defendant's Convention rights.

(6) Nothing in this section applies in relation to a claim which, before this section came into force, was settled by agreement between the parties or finally determined by a court or arbitration (whether on the basis of limitation or otherwise).

(7) In this section—

"Convention rights" has the same meaning as in the Human Rights Act 1998;

"the initial period" means the period of one year beginning with the day on which this section comes into force."

10. In principle, it was common-ground before me that the effect of this new section 4B of the 1980 Act was that the limitation period for bringing claims under section 1 of the 1972 Act has not yet expired; and that this would apply to resultant claims for physical damage and economic loss.

11. However, the position may be different in relation to claims brought in common-law negligence as section 4B only applies to section 1 of the 1972 Act claims. I was not specifically addressed on when those claims might expire or have expired except that it was common-ground (at least to some extent) that a claim at common-law which included a claim for personal injuries would initially attract section 11 of the 1980 Act so that its limitation period would be three years (from knowledge of injury), in this case expiring shortly after the issue of the Claim Form, albeit subject to potential extension under section 33 of the 1980 Act.

12. There also seemed to be some mutual agreement that claims for personal injuries were simply governed by section 11 (and section 33) of the 1980 Act and therefore did not fall within and were not assisted by the new section 4B of the 1980 Act. That may be correct either generally or at least if such claims cannot be made the subject of claims under section 1 of the 1972 Act (although even then there would be a tension between the two sections, as section 11 of the 1980 Act applies to any claim which includes a claim for damages for personal injuries). I am not at all sure that either proposition is

correct not having been addressed in any detail on them or the construction of new section 4B.

13. It was common-ground that the claims of the existing minor claimant and of the Additional Claimants (insofar as they are children as they assert), being all claims brought by minors, have the benefit of section 28 of the 1980 Act which effectively postpones the starting date from which limitation is to run for their claims (assuming that they were alive when the relevant right of action accrued and they are not claiming under some other person to whom the right of action had previously accrued when that other person was an adult) to the dates when they respectively attain 18.

14. As I have said, I was only addressed on those statutory provisions in outline as it was common-ground that their consequences include that:

    i) in relation to at least some of the personal injury claims, the Claim Form was issued within the initial limitation period (under section 11) but that initial limitation period has now expired so that if any of the relevant Claimants were to issue a new Claim Form claiming in respect of personal injuries they would, or at least might, have to rely on section 33 and seek for the court to disapply the limitation period; and, further,

    ii) in relation to the common-law claims for loss other than in respect of personal injuries, it is at least arguable that the Claim Form was issued within the initial limitation period but that it has now expired so that if any of the relevant (non-adult) were to issue a new Claim Form advancing those claims they would be met by a limitation defence.

15. I am not entirely sure that the above analysis is necessarily correct, at least in relation to the 1972 Act claims and claims for personal injuries, and I should not be taken as having affirmed it to be correct by this judgment; but it is at least arguable, and that, it seems to me, is sufficient to trigger various of the relevant rules (in particular section 35 of the 1980 Act as carried into effect by CPR17.4 and CPR19.6) to which I will come in this judgment.

16. I add that there would seem, at first sight, to be a substantial argument that, even if section 11 applies, a section 33 disapplication would be granted in relation to any new Claim Form. However, no submission was made to me that I could take that as being self-evident and so I have proceeded on the basis that such a section 33 case would only be arguable rather than certain.

17. I further must, and do, proceed on the basis that even if the Defendants' assertions of these various limitation points were to turn out eventually to be bad in law (or overridden by a section 33 disapplication), the Defendants are entitled to require the relevant rules, those within the 1980 Act and the CPR, to be complied with. If the procedural law is that the result on the facts which I come to find is that this Claim Form must be struck-out as against one or more of the Defendants, then that is what I must do even if it may well turn out that the only real consequence is that the Defendants obtain costs orders against the Claimants.

The Procedural History

18. The Claimant's solicitors, Edwards Duthie Shamash ("EDS") sent a Pre-Action Protocol Letter of Claim to the First Defendant's solicitors Gateley Legal LLP ("GL") at their Leeds office ("Leeds") dated 18 December 2020. GL replied by letter of 22 January 2021 from Leeds giving an email address of Andrew.johnson@gateleylegal.com ("the Johnson Email Address") and containing a Document Exchange address ("the Leeds DX Address") but no fax number.

19. EDS also sent a Pre-Action Protocol initial Letter of Claim addressed to "Sheppard Robson Architects LLP" stating that Sheppard Robson Architects LLP were the architects of the Building and intimating a claim against them dated 18 December 2020. On 14 January 2021 Mayer Brown International LLP solicitors ("MB") replied to say that they were instructed by "Sheppard Robson Limited ("Sheppard Robson")" and referred "to your letter of claim to Sheppard Robson dated 18 December 2020…" and then sent a more (and highly) detailed letter on 20 January 2021 which started "We refer to your letter of claim to Sheppard Robson Limited ("Sheppard Robson") dated 18 December 2020…". That and subsequent letters contained both a fax number ("the MB Fax Number") and a DX address ("the MB DX Address") for MB.

20. On 9 May 2022, EDS sent by email to GL at the Johnson Email Address a letter (which I infer must have been addressed to the Leeds Address, as this was EDS's ordinary practice, and although I do not have a copy of it in evidence, I regard that as proved by the Claimants as being more likely than not on the balance of probabilities having considered all the evidence and the inherent probabilities) which asked for them for confirmation as to whether they would accept service. GL replied by an email of 9 May 2022 which did not bear any fax number, stating that "I can confirm that we are authorised to accept service of proceedings."

21. On 11 May 2022 EDS sent a letter to MB headed "Your Client: Sheppard Robson Architects LLP" and asking "whether you have instructions to accept service of proceedings on behalf of your client." MB responded by letter of 12 May 2022 to complain that the Protocol process was not being followed including by reference to "our Letter of Response on 20 January 2021", but also saying "we can confirm that we are instructed to accept service of proceedings on behalf of our client in relation to the Development", although they did not there identify what entity was "our client".

22. On 19 May 2022 EDS sent a letter to MB again headed "Your Client: Sheppard Robson Architects LLP" and proposing a limitation standstill agreement and attached a draft which referred to a party being "Sheppard Robson Architects Limited". On 26 May 2022 MB responded with a draft which altered that name to "Sheppard Robson Limited". The standstill agreement was never finally agreed.

23. On 6 June 2022 EDS issued the Claim Form with the Second Defendant being "Sheppard Robson Architects LLP". The Claim Form stated:

> "The Claimants' claim is for damages and interest together with any other relief for personal injury and property damage, direct loss and consequential loss and expenses sustained as a result of the fire on 9 June 2019 at [the Building] due to the professional negligence and/or breach of statutory duty of the Defendants."

24. On 7 June 2022 EDS notified MB by a letter headed "Your Client: Sheppard Robson Architects LLP" that the Claim Form had been issued.

25. On 22 September 2022 EDS wrote to MB by a letter headed "Your Client: Sheppard Robson Architects LLP", asking for them to agree a Consent Order for a stay of the Claim until 6 January 2023 and to extend time for service of the Claim Form and Particulars of Claim to 24 February 2023. On the same day they sent a similar letter to GL.

26. GL replied by letter of 30 September 2022 giving an email address of rakshinda.nazir@gateleylegal.com ("the Nazir Email Address") bearing a physical address of Gateley's Belfast office ("the Belfast Address") and with no Document Exchange address and no fax number. The relevant fee earners were then and remained located in Leeds and no explanation has been given for the sending of this or other letters bearing the Belfast Address. EDS responded by letter sent by DX to the Leeds Address and email to the Johnson Email Address with a revised proposed consent order proposing service of the Claim Form and Particulars of Claim by 4pm on 3 March 2023.

27. On 22 September 2022 EDS also wrote to MB by a letter headed "Your Client: Sheppard Robson Architects LLP", asking for them to agree extended deadlines leading to a Protocol meeting of the parties by 3 April 2023. They referred to the existing Consent Order having extended time for service to 4pm on 21 April 2023.

28. MB responded by letter of 30 September 2022 which stated amongst other things "You have issued a claim form against the wrong entity. As we confirmed in our Letter of Response and when we subsequently provided our comments on your proposed standstill agreement Sheppard Robson Limited (not Sheppard Robson Architects LLP) was instructed by Bellway Homes on the Development. Therefore any claim in tort is now time barred under the Limitation Act 1980." They then proposed that there be a timetable leading to a Protocol discussion meeting.

29. On 3 October 2022 GL sent a signed (by both GL and MB) copy of the proposed consent order by email from the Nazir Email Address and asked that all further correspondence to GL should be sent to the Nazir Email Address copying in Andrew Johnson. The email bore a Leeds telephone number.

30. On 1 November 2022 the Court made, and on 2 November 2022 sealed, the proposed consent order ("the November Order"), which was headed with the name of the Second Defendant as "Sheppard Robson Architects LLP" and which provided "The deadline for the Claimants to file and serve the Claim Form and Particulars of Claim shall be extended to 4pm on 21 April 2023." and was signed by MB for "Sheppard Robson".

31. On 2 December 2022 EDS wrote to both GL (by DX to the Leeds DX Address and email to the Johnson Email Address) and MB (by email) asking for certain extensions and stating that given the November Order extended time for service of the Claim Form and the Particulars of Claim to 21 April 2023, those extensions would not prejudice the timetable.

32. On 8 December 2022, MB sent a letter to EDS, which letter bore the London Fax Number. It stated that the current timetable provided for the Claim Form and Particulars of Claim to be served by 21 April 2023.

33. It said in its paragraph 2(d) that given that the Claimants were unlikely to send their Letter of Claim until 16 February 2023 "the dates of the subsequent steps in the

timetable will most likely need to be adjusted as follows… Claim Form and Particulars of Claim to be filed and served by 8 June 2023…".

34. It said in its paragraph 4 that "Notwithstanding the above, we propose that the dates set out at paragraph 2(d) are considered further in due course i.e. after your clients have procured the necessary evidence from their fire-engineering expert and if appropriate sent a revised Protocol Letter of Claim. We think that is a sensible approach because:

    (a) unless and until your clients have received the expert evidence, they will not be able to reach a decision on whether or not to continue with the claim; and

    (b) it is possible that you will be delayed further in finalising and sending the Letter of Claim, in which case this would, as explained above, impact upon the subsequent deadlines."

35. GL then sent an emailed letter of 16 December 2022 from the Johnson Email Address again bearing the Belfast Address and no DX address and no fax number. They said "4. If you are not in a position to serve the Letter of Claim by 16/12/2022, it seems logical to delay the subsequent steps in the timetable to the following dates… Claimant's Claim Form and Particulars of Claim to be filed/served by 8/6/2023. 5. Mindful that you are yet to receive the expert's evidence (and to allow for any further delays) it is suggested that the dates in paragraph 4 are further reviewed on receipt of the same."

36. EDS responded to GL by letter of 19 December 2022 sent by DX to the Leeds DX Address and email to the Johnson Email Address saying "We agree with your paragraph 5 and with that in mind, we propose to update you once the expert evidence is received so that we can confirm a timetable. We would hope that that timetable coincides with the same set for [MB]. We attach a copy of correspondence with [MB] dated 2 and 19 December 2022 and we will endeavour to update you as soon as we have further insight from the expert in order to discuss the timetable further."

37. EDS responded to MB by letter also of 19 December 2022 saying "We consider your approach in paragraph 4 to be most sensible. We are content to notify you once we have received the expert evidence and have a clearer date for the necessary next steps i.e. for the revised Letter of Claim in the first instance. The parties can then liaise further on the timetable."

38. By letter of 18 January 2023 sent by EDS to GL by DX to the Leeds DX Address and email to the Johnson Email Address, and also sent by email to MB, EDS referred to further delay with the fire expert and asked "Can you please confirm that you are content for us to provide you with an update closer to the 4 week mark to ensure the report is due on time, and then we can agree revised dates, hopefully within the stay, and if not review the stay. We will endeavour to keep you updated."

39. MB responded by email of 19 January 2023 (copied to GL) to say "… we confirm that our client is content with the approach which you have proposed therein. For the reasons which were set out in [MB's letter of 8 December 2022], if and to the extent

that your clients elect to proceed with this claim… the current timetable (and stay in the proceedings) will certainly need to be adjusted."

40. Nazir of GL responded by email (which bore a Leeds telephone number), copied to MB, of 20 January 2023 to say "We confirm… that if on receipt of the expert evidence your client chooses to proceed with the claim, our client agrees your approach."

41. On 7 February 2023 GL wrote to MB to request a copy of "the architect's retainer" but by letter of 9 February 2023 MB refused the request, seeking various explanations first.

42. By letter of 15 February 2023 sent by EDS to GL by DX to the Leeds Address and email to the Johnson Email Address, and also sent by email to MB, EDS referred to further delay with the fire expert and said "… we would prefer to provide a timetable that can be made and once we have a firm date for the report. We therefore propose to update you once the expert's report has been received, and then set a timetable to be agreed by all parties in respect of the revised letter of claim… We invite you to kindly agree to this, with the view that you should be hearing from us by the end of the month with an update and thereafter we can review the timetable and, if necessary, execute a further Consent Order."

43. MB responded by email of 15 February 2023 to say that "we have no objection to your proposal."

44. On 21 April 2023 at 2.17pm EDS emailed GL to the Nazir Email Address stating "The deadline for service of the claim is today. Can you confirm whether you will agree to execute a consent order to postpone the deadline by three months… We are due the final expert's report by the beginning of May…Forgive us for the time constraints but may we have your reply by 2.45pm after which time we will serve the claim and would be content to continue the discussions on the stay thereafter." At 15.22pm EDS emailed a proposed consent order. At 3.53pm a Roger McCourt of GL, with an email which bore the Leeds Telephone Number, responded to refuse in circumstances "where you are proceeding to serve a claim form…" At 4.18pm EDS responded to say that their Salma Hussain had confirmed with a "Barbara" at GL their fax number but that "That fax number has not been recognised." and said "given the issues with the fax at your end, can you confirm that our email timed at 15.44… can be accepted as service of the claim."

45. On 21 April 2023, EDS sent or purported to send, by way of service, the Claim Form to GL by DX to the Leeds DX Address and by fax under cover of a letter of 21 April 2023 which also referred to Service by Fax (giving a Leeds Fax Number) and which stated that it was sent "(by way of copy only)" to the Johnson Email Address; and invited a stay. EDS contend that they sought to send the Claim Form to GL by fax at 4pm, but which failed, and by DX (and I deal with what actually happened further below).

46. Also on 21 April 2023, EDS sought to send the Claim Form by fax (and also by email) to MB. EDS contend that they then sought to send the Claim Form to MB by fax at 15.49pm, but which failed, and by DX (and I deal with what actually happened further below).

47. On 27 April 2023, GL replied by emailed letter which bore the Leeds Address and did not have any fax number to say that: (i) the Claim Form had not been served in accordance with the November Order and where there had been no previous indication of a preparedness to accept service by fax or electronic means (ii) there was also a serious failure to serve Particulars of Claim in time and (iii) they would be applying to strike-out the claim under CPR3.4(2)(c).

48. On 27 April 2023, MB sent EDS a letter referring to emails on 21 April 2023, and stating that they had not received any fax, and saying that the Claim Form (and Particulars of Claim) had not been served in time and any application for leave to serve them would be resisted and they would apply to strike out the Claim. They repeated that the Claimants had issued and attempted to serve the wrong entity.

49. On 28 April 2023, the Claimants applied for a declaration that the Claim Form had been served, alternatively for relief from sanctions for any failure to serve the Claim Form and Particulars of Claim in time and/or for an extension of time. The application was supported by a witness statement of Kavita Rana ("Rana") of EDS of 28 April 2023 and which referred to the past events and which I have considered in its entirety but which in particular (i) stated there had been an agreement to extend time for service to 8 June 2023 (ii) referred to the history (iii) said that Salma Hussain of EDS had spoken to a "Barbara" at GL at 15.22 on 21 April 2023 and asked for confirmation of the Leeds Fax Number, which Barbara gave (iv) stated that EDS sought to fax the Claim Form to GL at around 3.45pm but received an error message and then tried and failed again (v) stated that Ms Hussain confirmed the fax number with Barbara at about 3.45pm (vi) stated that the fax did not deliver to GL (vii) said that attempts had been made to fax the Claim Form to MB on 21 April 2023 but had failed (vii) stated that relief from sanctions was sought in relation to all matters, should such be required, and including because EDS were seeking to comply with a Protocol process but the Defendants had refused to accept the agreed extension to 8 June 2023.

50. On 4 May 2023 EDS responded to GL to state (i) the effect of *Jones v Chichester 2017 EWHC 2270 "Jones")* was that the Claimant merely needed to have carried out a relevant service step in time and (ii) this had been done in any event by the Claim Form having been placed in the DX on 21 April 2023 and (iii) in any event there had been an agreed extension to 8 June 2023 and (iv) they sought a further extension for the Particulars of Claim to 10 May 2023. GL asserted by letter of 4 May 2023 from Leeds that the Claim Form had not been effectively served.

51. On 10 May 2023, EDS sent the Particulars of Claim and the Claim Form to both GL and MB by DX. The Particulars of Claim referred to an intention to amend the name of the Second Defendant to "Sheppard Robson Limited.".

52. I note that no-one has filed any Acknowledgment of Service or made any application under CPR Part 11 for the Court to declare that it lacks jurisdiction or should not exercise any jurisdiction that it does have.

53. By letter of 17 May 2023 sent from Leeds, GL asserted that the Claim Form had not been served and that there was no obligation to file an Acknowledgment of Service "unless the Court grants the Claimants permission to serve the Claim Form and Particulars of Claim." and referred to *North Midland v Geo Networks [2015] EWHC 2384 ("North Midland")*.

54. The April Application was listed for hearing before me on 8 November 2023.

55. The August Application was issued on 23 August 2023 to change the name of the Second Defendant to Sheppard Robson Limited and to add the various proposed minor Claimants. It was listed for hearing before me on 8 November 2023.

56. On 27 September 2023, MB wrote to EDS to refuse permission to amend unless all claims in negligence for personal injury were deleted, on the basis that SRL had not yet been sued and such claims against SRL were time-barred (albeit that this would be absent a section 33 of the 1980 Act extension). On 3 October 2023 EDS wrote to MB (albeit with a title stating "Your Client" as being SRAL) to say that there had been a genuine mistake as to the name of the Second Defendant and it was clear as to which entity was meant.

57. On 24 October 2023 Nazir for GL provided a witness statement which I have considered in its entirety and which in particular stated that as at 28 April 2023 EDS had not attempted to serve on the First Defendant and that GL was not authorised to accept service on behalf of the First Defendant and had not suggested that it was. In the light of the GL email of 9 May 2022, those contentions have not been pursued.

58. Also on 24 October 2023, the Claimants adduced a second witness statement from Rana. This (i) referred to the 9 May 2022 GL email and its stating that GL was authorised to accept service (ii) stated that the Claim Form letters were sent (but without stating when) by DX to GL and had not been returned (iii) stated that the Claim Form and Particulars of Claim were also served on GL by DX and post on 12 May 2023.

59. On 30 October 2023, MB adduced a witness statement of Robert Hobson of MB, stating that he was acting on behalf of both "the Second Defendant and Sheppard Robson Limited". The witness statement was drafted on the basis that it was SRAL which was "the Second Defendant". I have considered it in its entirety but note in particular that it stated that: (i) the Claim Form had been received on 24 April 2023 and it was not known when it had been left at the DX (ii) MB had no records of receiving any fax from EDS on 21 April 2023 or on any other date, and had no record of any conversations with EDS about fax (iii) there was no agreement made to extend time for service to 8 June 2023 (iv) the Particulars of Claim were served late on any basis (v) the Court lacked jurisdiction as a result of failures to serve the Claim Form and Particulars of Claim in time (vi) EDS had deliberately named SRAL as the Second Defendant when they had been told it should have been SRL, and in the circumstances it was not clear that they had intended to sue SRL, and they had unreasonably delayed and it was too late for them to correct their errors.

60. I heard oral submissions (supplementing written skeleton arguments) in relation to the two applications on 8 November 2023 but time proved insufficient and I adjourned the matter to 8 February 2024. The parties then, shortly before that hearing, asked me to vacate the hearing and to deal with the matter purely on the basis of their written submissions. I agreed to that course.

61. In the meantime, the Claimant served the third and fourth witness statements of Rana of 27 November 2023 and 17 January 2024; and the Second Defendant a second witness statement of Hobson of 21 December 2023. I have considered them and the other witness statements in their entirety, but note in particular that:

i) The third witness statement from Rana referred to: the documents being sent to both GL and MB by DX on 21 April 2023; the documents having been prepared for DX following 3.40pm then being placed in a designated area of the EDS office reception for collection by the DX courier and such usually occurring "after office hours" with the DX courier having a key to the office; a series of Fax transmissions having been sought to be made to the Fax numbers obtained for GL and MB before (MB) at (GL) and shortly after (MB) 4pm on 21 April 2023 and such having all failed; a print-out for the first (15.49pm to MB fax) with an error code ##280 which the relevant machine supplier indicated suggested an error at either the sending fax machine or the receiving fax machine or inbetween them; print-outs for the second and third faxes suggesting that the faxing failed because of feeding problems into the EDS system; the fax machine having sent faxes that day to other fax numbers successfully; and there having been on other subsequent days problems in sending faxes to GL and MB

ii) The second witness statement from Hobson referred to the ##280 error code being said to have a number of potential causes, and to MB's employees not being aware of any problems with their fax machine on 21 April 2023

iii) The fourth witness statement from Rana stated that the ##280 error code had not been identified on 21 April 2023.

62. However, the Court of Appeal then decided the case of *Koro*. It seemed to me that that raised further questions as to what was the effect of there being no Acknowledgments of Service or CPR Part 11 applications on the part of any of the Defendants, and I invited further written submissions. These were eventually provided with the last being submitted to the Court's electronic CE-File on 27 March 2024 but only being processed on 22 April 2024.

63. I have considered all the parties' submissions and evidence in coming to this judgment.

The Relevant Civil Procedure Rules and Provisions of the Limitation Act 1980

64. I have considered in particular the following elements of the CPR. The overriding objective is contained in CPR1.1 (although it tends to take a secondary place to specific rules):

"1.1
(1) These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders."

65. CPR2.11 provides that parties can usually vary CPR time-limits by written agreement:

"2.11 Unless these Rules or a practice direction provide otherwise or the court orders otherwise, the time specified by a rule or by the court for a person to do any act may be varied by the written agreement of the parties.

(Rules 3.8 (sanctions have effect unless defaulting party obtains relief), 28.3 (variation of case management timetable – fast track and intermediate track) and 29.5 (variation of case management timetable – multi-track), provide for time limits that cannot be varied by agreement between the parties)"

66. CPR3.9 deals with relief from sanctions and provides:

"3.9

(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.

(2) An application for relief must be supported by evidence."

67. CPR Part 6 deals with service generally. CPR6.7 is the rule which renders service on a party's solicitor mandatory when a solicitor acting for that party has notified the claimant in writing of a business address in England & Wales or Scotland or Northern Ireland:

"6.7

(1) Solicitor within the jurisdiction: Subject to rule 6.5(1), where –

(a) the defendant has given in writing the business address within the jurisdiction of a solicitor as an address at which the defendant may be served with the claim form; or

(b) a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within the jurisdiction,

the claim form must be served at the business address of that solicitor.

('Solicitor' has the extended meaning set out in rule 6.2(d).)

(2) Solicitor in Scotland or Northern Ireland: Subject to rule 6.5(1) and the provisions of Section IV of this Part, and except where any other rule or practice direction makes different provision, where—

(a) the defendant has given in writing the business address in Scotland or Northern Ireland of a solicitor as an address at which the defendant may be served with the claim form;

(aa) a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within Scotland or Northern Ireland;

(b) [Omitted]

(c) [Omitted]

the claim form must be served at the business address of that solicitor."

68. CPR Practice Direction 6A supplements CPR6 in relation to methods of service regarding document exchange, post, fax and e-mail as follows (the provisions have changed slightly since the purported service in this case but not so as to be material to what I have to decide):

"When service may be by document exchange

2.1 Service by document exchange (DX) may take place only where –

(1) the address at which the party is to be served includes a numbered box at a DX, or

(2) the writing paper of the party who is to be served or of the solicitor acting for that party sets out a DX box number, and

(3) the party or the solicitor acting for that party has not indicated in writing that they are unwilling to accept service by DX.

How service is effected by post, an alternative service provider or DX

3.1 Service by post, DX or other service which provides for delivery on the next business day is effected by –

(1) placing the document in a post box;

(2) leaving the document with or delivering the document to the relevant service provider; or

(3) having the document collected by the relevant service provider.

Service by fax or other electronic means

4.1 Subject to the provisions of rule 6.23(5) and (6), where a document is to be served by fax or other electronic means –

(1) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving –

(a) that the party to be served or the solicitor is willing to accept service by fax or other electronic means; and

(b) the fax number, e-mail address or e-mail addresses or other electronic identification to which it must be sent; and

(2) the following are to be taken as sufficient written indications for the purposes of paragraph 4.1(1) –

(a) a fax number set out on the writing paper of the solicitor acting for the party to be served;

(b) an e-mail address or e-mail addresses set out on the writing paper of the solicitor acting for the party to be served but only where it is stated that the e-mail address or e-mail addresses may be used for service; or

(c) a fax number, e-mail address or e-mail addresses or electronic identification set out on a statement of case or a response to a claim filed with the court.

(3) Where a party has indicated that service by email must be effected by sending a document to multiple e-mail addresses, the document may be served by sending it to any 2 of the e-mail addresses identified.

4.2 Where a party intends to serve a document by electronic means (other than by fax) that party must first ask the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means (for example, the format in which documents are to be sent and the maximum size of attachments that may be received).

4.3 Where a document is served by electronic means, the party serving the document need not in addition send or deliver a hard copy."

69. It is noticeable (and which was affirmed in *Barton v Wright Hassall [2018] UKSC 12*) that: where a fax number is given by a solicitor, it is deemed that service can take place by fax without more; while, where an email address is given by a solicitor, the solicitor has to state that it can be used for service (and there should be made an advance enquiry regarding document sizes) and that in the absence of such a statement email cannot be used. I believe that this differentiation is presently being considered and may be

consulted on by the Civil Procedure Rules Committee but I am concerned with the law in its present form.

70. CPR7.5 deals with time for taking a service step:

"7.5

(1) Where the claim form is served within the jurisdiction, the claimant must complete the step required by the following table in relation to the particular method of service chosen, before 12.00 midnight on the calendar day four months after the date of issue of the claim form.

Method of Service	Step Required
First class post, document exchange or other service which provides for delivery on the next business day.	Posting, leaving with delivering to or collection by the relevant service provider.
Delivery of the document to or leaving it at the relevant place.	Delivering to or leaving it at the relevant place.
….	
Electronic method.	Sending the email or other electronic transmission.

(2) Where the claim form is to be served out of the jurisdiction, the claim form must be served in accordance with Section IV of Part 6 within 6 months of the date of issue."

71. I note that CPR7.5 does not require the taking of a relevant service step to have been successful. CPR6.14 deems service within the UK to have occurred upon the second day after the taking of the relevant service step; but for the purposes of CPR7.5 only the service step needs to have been taken.

72. CPR7.6 deals with the seeking of extensions for service of the claim form:

"Extension of time for serving a claim form

7.6

(1) The claimant may apply for an order extending the period for compliance with rule 7.5.

(2) The general rule is that an application to extend the time for compliance with rule 7.5 must be made –

(a) within the period specified by rule 7.5; or

(b) where an order has been made under this rule, within the period for service specified by that order.

(3) If the claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if –

(a) the court has failed to serve the claim form; or

(b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and

(c) in either case, the claimant has acted promptly in making the application.

(4) An application for an order extending the time for compliance with rule 7.5

(a) must be supported by evidence; and

(b) may be made without notice."

73. CPR7.4 deals with time for service of Particulars of Claim:

" 7.4

(1) Particulars of claim must –

(a) be contained in or served with the claim form; or

(b) subject to paragraph (2) be served on the defendant by the claimant within 14 days after service of the claim form.

(2) Particulars of claim must be served on the defendant no later than the latest time for serving a claim form.

(Rule 7.5 sets out the latest time for serving a claim form)…"

74. CPR10 contains provisions for filing by a defendant with an acknowledgment of services following service of a claim form and particulars of claim, and refers to the ability of a claimant to obtain default judgment if that does not occur:

" 10.1

(1) This Part deals with the filing of an acknowledgment of service.

(2) Where the claimant uses the procedure set out in Part 8 (alternative procedure for claims) this Part applies subject to the modifications set out in rule 8.3.

(3) A defendant must file an acknowledgment of service if—

(a) they are unable to file a defence within the period specified in rule 15.4; or

(b) they wish to dispute the court's jurisdiction.

(Part 11 sets out the procedure for disputing the court's jurisdiction.)

Consequence of not filing an acknowledgment of service

10.2 If—

(a) a defendant fails to file an acknowledgment of service within the period specified in rule 10.3; and

(b) does not within that period file a defence in accordance with Part 15 or serve or file an admission in accordance with Part 14, the claimant may obtain default judgment if Part 12 allows it.

The period for filing an acknowledgment of service

10.3

(1) The general rule is that the period for filing an acknowledgment of service is—

(a) 14 days after service of the particulars of claim where the defendant is served with a claim form which states that particulars of claim are to follow; and

(b) 14 days after service of the claim form in any other case.

(2) …"

75. CPR11 deals with disputing the court's jurisdiction and provides as follows:

"11

(1) A defendant who wishes to –

(a) dispute the court's jurisdiction to try the claim; or

(b) argue that the court should not exercise its jurisdiction

may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.

(2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.

(3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.

(4) An application under this rule must –

(a) be made within 14 days after filing an acknowledgment of service; and

(b) be supported by evidence.

(5) If the defendant –

(a) files an acknowledgment of service; and

(b) does not make such an application within the period specified in paragraph (4),

he is to be treated as having accepted that the court has jurisdiction to try the claim.

(6) An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including –

(a) setting aside the claim form;

(b) setting aside service of the claim form;

(c) discharging any order made before the claim was commenced or before the claim form was served; and

(d) staying(GL) the proceedings.

(7) If on an application under this rule the court does not make a declaration –

(a) the acknowledgment of service shall cease to have effect;

(b) the defendant may file a further acknowledgment of service within 14 days or such other period as the court may direct; and

(c) the court shall give directions as to the filing and service of the defence in a claim under Part 7 or the filing of evidence in a claim under Part 8 in the event that a further acknowledgment of service is filed.

(8) If the defendant files a further acknowledgment of service in accordance with paragraph (7)(b) he shall be treated as having accepted that the court has jurisdiction to try the claim.

(9) If a defendant makes an application under this rule, he must file and serve his written evidence in support with the application notice, but he need not before the hearing of the application file –

(a) in a Part 7 claim, a defence; or

(b) in a Part 8 claim, any other written evidence."

76. CPR Part 17 deals with amendments. CPR17.1 provides:

"17.1

(1) A party may amend their statement of case, including by removing, adding or substituting a party, at any time before it has been served on any other party.

(2) If his statement of case has been served, a party may amend it only –

(a) with the written consent of all the other parties; or

(b) with the permission of the court.

(3) If a statement of case has been served, an application to amend it by removing, adding or substituting a party must be made in accordance with rule 19.4.

(4) A party who files a notice under Part 38 discontinuing all or part of a claim may amend their statement of case without the court's permission to give effect to the discontinuance.

(Part 22 requires amendments to a statement of case to be verified by a statement of truth unless the court orders otherwise).

77. There is no issue as to the Claimants having complied with CPR19.4 in relation to their amendment application, but the Defendants rely on CPR17.4 which reads:

"17.4

(1) This rule applies where –

(a) a party applies to amend their statement of case in one of the ways mentioned in this rule; and

(b) a period of limitation has expired under –

(i) the Limitation Act 19801;

(ii) the Foreign Limitation Periods Act 19842; or

(iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.

(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.

(3) The court may allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question.

(4) The court may allow an amendment to alter the capacity in which a party claims if the new capacity is one which that party had when the proceedings started or has since acquired.

(Rule 19.6 specifies the circumstances in which the court may allow a new party to be added or substituted after the end of a relevant limitation period(GL))"

78. The Defendants further rely upon CPR19.6 which reads:

"19.6

(1) This rule applies to a change of parties after the end of a period of limitation under –

(a) the Limitation Act 1980;

(b) the Foreign Limitation Periods Act 19842; or

(c) any other enactment which allows such a change, or under which such a change is allowed.

(2) The court may add or substitute a party only if –

(a) the relevant limitation period(GL) was current when the proceedings were started; and

(b) the addition or substitution is necessary.

(3) The addition or substitution of a party is necessary only if the court is satisfied that –

(a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;

(b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant; or

(c) the original party has died or had a bankruptcy order made against them and their interest or liability has passed to the new party.

(4) In addition, in a claim for personal injuries the court may add or substitute a party where it directs that –

(a)

(i) section 11 (special time limit for claims for personal injuries); or

(ii) section 12 (special time limit for claims under fatal accidents legislation), of the Limitation Act 1980 shall not apply to the claim by or against the new party; or

(b) the issue of whether those sections apply shall be determined at trial."

79. Those last rules reflect various provisions of the Limitation Act 1980, section 33(1) of which provides that the court has a discretion to disapply sections 11 and 12:

"33

(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—

(a) the provisions of section 11 [F1, 11A, 11B] or 12 of this Act prejudice the plaintiff or any person whom he represents; and

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates."

80. Section 35 of the Limitation Act 1980 provides that:

"35 New claims in pending actions: rules of court.

(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—

(a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and

(b) in the case of any other new claim, on the same date as the original action.

(2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either—

(a) the addition or substitution of a new cause of action; or

(b) the addition or substitution of a new party;

and "third party proceedings" means any proceedings brought in the course of any action by any party to the action against a person not previously a party to the action, other than proceedings brought by joining any such person as defendant to any claim already made in the original action by the party bringing the proceedings.

(3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim.

For the purposes of this subsection, a claim is an original set-off or an original counterclaim if it is a claim made by way of set-off or (as the case may be) by way of counterclaim by a party who has not previously made any claim in the action.

(4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.

(5) The conditions referred to in subsection (4) above are the following—

(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and

(b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action.

(6) The addition or substitution of a new party shall not be regarded for the purposes of subsection (5)(b) above as necessary for the determination of the original action unless either—

(a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name; or

(b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action.

(7) Subject to subsection (4) above, rules of court may provide for allowing a party to any action to claim relief in a new capacity in respect of a new cause of action notwithstanding that he had no title to make that claim at the date of the commencement of the action.

This subsection shall not be taken as prejudicing the power of rules of court to provide for allowing a party to claim relief in a new capacity without adding or substituting a new cause of action.

(8) Subsections (3) to (7) above shall apply in relation to a new claim made in the course of third party proceedings as if those proceedings were the original action, and subject to such other modifications as may be prescribed by rules of court in any case or class of case."

Whether the Claim Form was served in compliance with CPR7.5

81. The Claimants seek a determination that the Claim Form was validly served i.e. in accordance with the Civil Procedure Rules. The Defendants say that such has not occurred; and, further, SRAL and SRL contend that SRL is not and should not be treated as being a party and that there has been no service ever on SRL.

Whether Service was to be on Solicitors

82. It is now common-ground, I think although in any event I consider that it is the case, that both GL (by their email of 9 May 2022) and MB (by their letter of 12 May 2022) provided solicitor confirmations for the purposes of CPR6.7 that they were authorised to accept service. Those confirmations rendered it mandatory for service to take place on the solicitor and not the client (see e.g. *Nanglegan v Royal Free [2001] EWCA Civ 127*).

83. I note that CPR6.7 requires the solicitor to confirm that they will accept service "at a business address within [the jurisdiction/Scotland/Northern Ireland]". The GL email did not give any business address.

84. The general law as to construction of documents is not in dispute (and is applicable to these circumstances – see the final paragraph of the White Book notes at 6.7.1 and such cases as *Actavis v Ely Lilly [2013] EWCA 517* and *Higgins v ERC [2017] EWHC 2190*). As stated in such cases as *Arnold v Britton 2015 UKSC 36* and *Lukoil Asia Pacific Pte Ltd v. Ocean Tankers (Pte) Ltd (The "Ocean Neptune") [2018] EWHC 163 (Comm)* the Court asks itself how a reasonable reader would interpret the document and the words used in the light of the factual matrix known to the parties and the apparent commercial purpose, giving proper weight to the words themselves and ignoring the parties' subjective understandings, and weighing up the various possible interpretations together (as opposed to in some sort of order so as to leave a default meaning if others are not accepted) in order to come to the answer.

85. Here the wording of the 9 May 2022 email on its own is unclear. However, the construction process has to take place in the context of the factual matrix. Here, the previous letter from GL of 22 January 2021 gave the Leeds Address, and also gave the Leeds Email Address which was being used by both EDS and GL for the purposes of these communications, and I infer (see above) that the letter of 9 May 2022 from EDS to GL seeking confirmation that GL would accept service was addressed to the Leeds Address (although sent by email). That factual matrix seems to me to favour the correct interpretation of the 9 May 2022 email as being that the Leeds Address, being a business address of GL, was being said to be where service should take place. Further, the commercial purpose of the 9 May 2022 email was to provide for service in accordance with CPR6.7, and that also favours it as being interpreted to be stating that the Leeds Address (being the only one so far identified for GL) was the relevant business address for service, as otherwise the 9 May 2022 email would not have the obviously intended effect. Having considered the words, the factual matrix and the commercial purpose, and all the possible constructions, I conclude that the reasonable reader would construe the 9 May 2022 email as stating that the Leeds Address was the business address for service.

86. I further consider that, even if the correct interpretation on construction principles of the 9 May 2022 email was not that the Leeds Address was being stated as the business address for service, such a statement would be implied to be within it. Such a statement is clear, reasonable, and also both obvious (as I consider that the reasonable bystander would consider that it was obvious that both EDS and GL would have answered the question of whether GL was saying that service should at the Leeds Address within a resounding "Yes") and necessary to give business efficacy to the 9 May 2022 email (which would otherwise not have its intended effect of satisfying CPR6.7), and there was no other realistic possible address at that point in time. I consider that the principles for such an implication (and see e.g. *BNY v Cine-UK [2022] EWCA 1021 @ 55, 135-139*) are clearly satisfied.

87. A further question arises as who was meant to be "our client" by MB's statement in the letter of 11 May 2022 that "we can confirm that we are instructed to accept service of proceedings on behalf of our client in relation to the Development".

88. Here the wording "our client" is potentially ambiguous as the MB letter of 12 May 2022 does not refer to any entity by name. I have borne in mind that the MB letter was sent in reply to that of GL of 11 May 2022 which was headed "YOUR CLIENT: SHEPPARD ROBSON ARCHITECTS LLP" and asked whether MB had "instructions to accept service of proceedings on behalf of your client." However, I regard the factual matrix as extending to the entire chain of correspondence (and to which the MB letter of 12 May 2022 expressly referred) and where the original 18 December 2020 letter from GL was sent to SRAL but where MB had replied on 14 January 2021 to state that they were "instructed by Sheppard Robson Limited ("Sheppard Robson")" and to "refer to your letter of claim to Sheppard Robson"; and where MB had then sent the highly detailed letter of 20 January 2021 saying again "We refer to your letter of claim to Sheppard Robson Limited ("Sheppard Robson)" and responding throughout with regard to "Sheppard Robson".

89. In my judgment, a reasonable reader would interpret the MB letter of 12 May 2022 as referring to SRL as being "our client" and not SRAL. That is in particular, although I have considered all the circumstances, because: (1) MB had only ever identified SRL (and not SRAL) as their client (2) the letter of 12 May 2022 by referring to the previous correspondence made clear that it was dealing with refutation of a claim (and service of any claim form) against SRL being the entity specifically identified by MB in the previous correspondence. While the GL letter of 11 May 2022 identified SRAL as being MB's client, I am here concerned with MB's letter and that has to be seen in the overall context where MB clearly regarded themselves as acting on behalf of SRL and had not ever suggested that they acted on behalf of SRAL.

Time for taking of a service step

90. It is common-ground that the November Order extended the time for the taking of a service step under CPR7.5 to 4pm on 21 April 2023. That is essentially what was decided by Master McCloud in *Jones*. In any event, I regard that decision as being correct and applicable here, notwithstanding that the wording of the November Order was "time for service is extended until…" Applying the general principles of construction set out above, I regard that interpretation a being correct, in particular as:

    i) The words "time for service" are ambiguous as they could mean either the deemed date of service under the CPR (CPR6.14 provides it is the second business day after the taking of the relevant service step where service takes place within the jurisdiction as was clearly contemplated here) or the taking of one of the prescribed service steps;

    ii) The more natural focus of the extension of time order is an extension of time for doing what is actually required by the CPR i.e. the taking of a prescribed service step; rather than its eventual deemed consequence (i.e. deemed service on a particular date which then triggers the running of time for further steps such as the filing of an Acknowledgment of Service);

    iii) The decision in *Jones* is itself part of the factual matrix. The Order, and which was itself a Consent Order embodying an agreement between the parties, should be interpreted in the light of that relatively recent and published decision;

iv) I agree with Master McCloud that the previous decision in *Brightside v RSM 2017 EWHC 6* is fully distinguishable as relating to the interpretation of CPR7.7 rather than of an Order.

I would add that it is much to be preferred if these extension orders referred expressly to the taking of a CPR7.5 step (as is my usual practice, but where here I was making a consent order which contained the parties' agreement) but I regard the true construction of this Order as being to the same effect.

91. However, I do add that the time for the taking of the prescribed step for service was expressly limited by the November Order to 4pm, and not midnight, on 21 April 2023. While CPR7.5 provides for a midnight deadline, I see no reason to ignore the particular time expressly stated in the November Order.

92. The questions then arise as to whether what happened on 21 April 2023 was sufficient to amount to the taking of a prescribed service step in accordance with the November Order in time in relation to each Defendant (and assuming at this point that the Second Defendant is in fact to be treated as being SRL).

Taking of Service Steps regarding the First Defendant within the time set out in the November Order

93. As far as the First Defendant is concerned, service was purportedly effected by Fax and by DX.

Service by Email

94. I note that references have been made to service by email but that has not been pursued as a contention by the Claimants, and rightly in my view as:

i) The relevant emails did not state that they were purporting to amount to service but rather simply "(by way of copy only)"

ii) CPR PD6A paragraph 4.1(2)(b) is clear that email can only be used as a service method where the solicitor has positively stated that they will accept service by way of email, and an email address, whether or not it has been used to correspond in relation to the dispute is not enough – see above and *Barton v Wright Hassall [2018] UKSC 12*.

Service by Fax on the First Defendant

95. As far as service by Fax is concerned, questions arise as to (i) whether and if so what Fax number could be used (ii) whether a relevant Fax was actually sent and (iii) if so whether a relevant Fax was actually received and, if not, why that was. I note that in relation to both the Defendants, the Claimants' application of 28 October 2023 and the supporting evidence did not rely upon service by Fax. However, no objection has been taken to the Claimants seeking to rely on service by Fax and I would consider it to be contrary to the overriding objective for them to be prevented from seeking to do so as (i) no prejudice has been suggested (ii) such would not be fair if service had occurred

within time by Fax and (iii) it could lead to the Court potentially reaching a conclusion which was not justified on the true facts by the CPR.

96. The first question is one of interpretation and evaluation of the correspondence. The email which contained the confirmation of authorisation to accept service from GL of 9 May 2022 did not contain any Fax number although it was sent bearing a Leeds telephone number from the Johnson Email Address (and to which EDS' letter seeking to know whether GL were authorised to accept service had been sent). The previous letter from GL (and which bore the Johnson Email Address) was that of 22 January 2021 which bore the Leeds Address but no Fax number; and subsequent letters from GL bore the Belfast Address but no Fax number.

97. In those circumstances, I cannot see any written indication as to service by Fax on the part of GL sufficient to satisfy CPR PD 6A paragraph 4. That provision requires the indication to be "in writing" and permits it to be by a Fax number "set out on the writing paper of the solicitor". However, there is simply nothing in writing at all which bears or refers to any Fax number.

98. Mr Sawtell for the Claimants sought to rely on the conversations with "Barbara" on 21 April 2023 in which GL's Leeds Fax number was ascertained. Those conversations were not in writing and so cannot satisfy CPR PD 6A paragraph 4.

99. It might be arguable that, if a sufficiently clear express or implied statement was made that GL would accept service by fax, some estoppel might arise, although that is dubious where the CPR rule requires there to be a written indication. However, I do not see there as being sufficient in the witness evidence or the emails of 21 April 2023 or the evidence before me as a whole, and having considered inherent probabilities, to render it more likely than not (that is to say applying the balance of probabilities test where the burden of proof (but only to greater than 50.00…% likelihood) here is on the Claimants who would be seeking to assert the existence of the relevant facts) that "Barbara" or some other person at GL who might be said to have authority accepted, expressly or impliedly, that the Claim Form could be served by Fax (as opposed to merely supplying a Fax number by which communications could be made to GL). It seems to me that there would need to be something clear to that effect for an estoppel to be possible, as an oral statement that a particular number was GL's fax number would go no further than that and would not in my view amount to a representation or give rise to a convention that service of a Claim Form could take place by a sending to such number, but I do not regard the evidence as being sufficient.

100. If I was wrong and that service by sending to the Leeds fax number was sufficient; it would seem sufficiently clear to me that attempts were made to send the Claim Form by fax before 4pm on 21 April 2023 were made, and that they did not succeed (the Claimant's own evidence being that the sendings failed).

101. That gives rise to a factual question of whether (a) EDS's fax machine failed to send, (b) EDS's fax machine did send but the message was lost in transit between the EDS fax machine and the GL fax machine/system or (c) the message reached the GL fax machine/system but which could not process it. Again I have had to consider all the evidence on the balance of probabilities and ask myself simply whether it is more likely than not that what the Claimant requires to have taken place did do so (the burden of proof being on the Claimant but only to a standard of greater than 50.00…% likelihood).

102. Here I have the Claimants' evidence of numerous failed attempts to send, so that there were actually received and processed, by Fax to both GL and MB during the afternoon of 21 April 2023 around 4pm. The only attempt to GL was at 4pm (that being what was said with specificity in Rana's third witness statement although an earlier time may have been suggested in Rana's first witness statement) and the error report stated that it was due to problems with the feed into the EDS fax machine and overloading of it. In all the circumstances and having considered all the evidence, and having considered inherent probabilities, I conclude that the Claimants have not discharged the burden of proof to show that it is more likely than not that the EDS fax machine sent out into the transmission network the Claim Form to GL. Rather, the evidence suggests that the feed problem resulted in there being nothing which can be described as a sufficient "sending" of the fax material. That renders it unnecessary for me to decide in relation to the First Defendant: (a) whether any "sending" took place "by 4pm" being the terms of the extension granted by the November Order or (b) whether mere "sending" is sufficient irrespective of the extent to which the electronic material passes through the transmission network (and which I consider below in relation to MB).

103. I therefore conclude that the Claim Form was not validly served on the First Defendant by Fax to GL.

Service by DX on the First Defendant

104. The Claimants also contend that EDS took a relevant CPR7.5 service step in time by sending the Claim Form by DX. I note that CPR7.5 provides that the relevant service step is "Posting, leaving with, delivering to or collection by the relevant service provider." Here there are two questions being (i) whether service by DX was permissible and (ii) whether the relevant service step took place in time.

105. With regard to the first question, the Claimants contend that they can rely on paragraph 2.1 of CPR PD 6A and that GL's writing paper (by the 20 January 2021 letter) set out the Leeds DX Number and GL had not indicated that they were unwilling to accept service by DX. Mr Calland for the First Defendant responds to say that: the GL email of 9 May 2022 did not contain any DX number; and the subsequent GL letters (from 30 September 2022 onwards) were on the Belfast Address notepaper with no DX number and were inconsistent with any preparedness on the part of GL to accept service by DX.

106. It seems to me that if the matter had remained as it was at 9 May 2022, the answer would be simple. The GL 9 May 2022 email is simply a continuation of the previous correspondence sent by the same person (Andrew Johnson) with the same email address (the Leeds Email Address), that correspondence contains the Leeds DX Number on the GL solicitors writing paper, there is no requirement in the PD that the DX number be set out in the letter which contains the confirmation, and I have already held (see above) that the 9 May 2022 email is to be construed (by way of construction or implication) as providing for the Leeds Address to be the address for service and to which address belongs the Leeds DX Number. Thus the Leeds DX Number would satisfy Paragraph 2.1 of CPR PD 6A.

107. However, it does seem to me that the relevant solicitor can change what has been stated previously with regard to service. Were that not to be the case, a solicitor could not safely give an address for service under CPR6.7 for fear that they might change address or other communication details. Such a change should be capable, in my judgment, of

being communicated simply by a clear communicated statement and where, ordinarily, a change in writing paper would be sufficient to imply such a communication (although, obviously, it would be best to have an express statement).

108. However, the difficulty here is that the use of the Belfast Address notepaper was an error as the relevant fee earners were not operating from the GL Belfast office which had no connection with the dispute, or its handling, apart from the use of its notepaper (that being for reasons and in circumstances which Mr Calland, for the First Defendant, was unable to explain). Further, while EDS communicated by email, it did so by sending letters addressed to (and which were also sent by post to) the Leeds Address without any demur or complaint from GL.

109. In all those circumstances, I conclude that the use by GL of the Belfast Address notepaper was such a clear and obvious error that it should be ignored for all (including CPR) purposes; in accordance with the general principle that obvious errors are to be disregarded – see e.g. *Mannai v Eagle Star [1997] AC 749* (and while that decision is in the context of interpretation of notices, I do not see why its principles should not be applied to interpretation of correspondence in this context).

110. I therefore conclude that sending to the Leeds DX Address was an appropriate means of service on the First Defendant.

111. However, the second question is whether such a sending occurred within time; being by 4pm on 21 April 2023. Here the evidence from Rana is that the Claim Form was left in the EDS reception for collection by the DX courier which took place on the usual basis after office hours i.e. after 4pm. That evidence has not been challenged and I accept it and regard those matters as having been proved on the balance of probabilities. However, I note that Rana does not identify precisely when the documents were printed out and left for collection (although it would have been after 3.40pm).

112. Nevertheless, even if the printing out etc. took place before 4pm, I do not regard that as sufficient for the relevant service step to have been taken in time under CPR7.5. The leaving of the material in the EDS reception cannot, in my judgment, amount to a "delivering to… the relevant service provider" and the "collection by the relevant service provider" only took place after the 4pm time limit contained within the November Order. While the position might be different (although I have reached no conclusion on the point) if the material had been placed in a box owned by the DX provider (and possibly to which only the DX provider had a key), Rana only states that the material was left in reception and that the DX courier had a key to the office enabling access after office hours.

113. I therefore do not regard there as having been valid service on the First Defendant by DX (or fax or otherwise) in compliance with CPR7.5 within the extended time allowed for by the November Order.

<u>Service on the Second Defendant within the time set out in the November Order</u>

114. The Claimants again contend that service on the Second Defendant (assuming that it is SRL) was effected by Fax and DX to MB. They do not assert that it was effected by email, rightly in my view for the same reasons as to why service was not effected by email to GL in relation to the First Defendant.

Service on Second Defendant by Fax

115. Here the evidence of Rana, which I accept as to this and other matters (and which has not been challenged as such with no application having been made for cross-examination), is that EDS sought to serve MB by sending a Fax to the MB Fax Number at 15.49pm on 21 April 2023 which generated a ##280 error message and a Fax to the MB Fax Number after 4pm on 21 April 2023 which failed with an error message relating to document feeding problems. The evidence of Hobson, which is consistent with that of Rana, and which I also accept as to this and other matters (and which has not been challenged as such with no application having been made for cross-examination), is that MB did not receive any fax from EDS on 21 April 2023. I regard those matters as proved on the balance of probabilities.

116. I therefore have to consider in relation to each of those two attempts at what point in the transmission sequence the failure occurred; and have considered all the evidence and the inherent probabilities.

117. In relation to the second attempt (i.e. that after 4pm), I consider that the Claimants have not proved on the balance of probabilities that the Fax was sent from the EDS Fax machine at all into the transmission network. That conclusion is consistent with the error message received which appears at first sight to relate to a problem which the EDS Fax machine had with the documents which were being sought to be sent. It is also consistent (although there are other explanations for the following) with the fact that MB did not receive any fax from EDS. I do not consider that the Claimant has proved there occurred what would be sufficient to amount to the taking of a CPR7.5 service step at all. However, in any event, whatever did happen only occurred after the 4pm deadline in the November Order and therefore did not take place in time.

118. The first attempt (i.e. that at 15.49pm) was within the time limited by the November Order. Here the evidence as to what occurred; being, in particular (although I have considered all of the evidence). the ##280 error message which I am satisfied on the evidence of both Rana and Hobson only meant that a problem had occurred somewhere in the process (which could be at the EDS Fax machine or at the MB fax machine or anywhere in between), the fact that where there were document feeding problems a different error message would be generated, the fact that the EDS Fax machine was successfully sending faxes to other destinations, the fact that the fax was not received by MB, and the fact that no problems were reported with the MB fax machine; is finely balanced. However, the burden of proof is on the Claimants, and I do not consider that the Claimants have discharged it on the balance of probabilities. All I can really tell is that the attempted transmission failed and I do not have sufficient to conclude that it is more likely than not that the transmission failed at some electronic point after the EDS machine had "sent" it. That it does not seem to me can have been sufficient to amount to a "Sending the… other electronic transmission" within the meaning of CPR7.5.

119. If I had concluded that the transmission had failed at some later electronic point, I would then have had to ask myself whether what had occurred was sufficient to comply with CPR7.5 where the wording of "Sending" might be capable of being contrasted with "Receiving" and suggest that all that was necessary was for the Fax to leave the EDS Fax machine electronically and enter into the transmission network even if it did not reach its destination (rather than its being rejected by the MB Fax machine). That would

involve me having to construe CPR7.5 in accordance with the usual construction principles, such to include what appeared to be the underlying statutory purpose.

120. I note that the current wording of the CPR (and which was in place as at 21 April 2023) is that the CPR7.5 service step for "Electronic method" is "Sending the e-mail or other electronic transmission." Before 1 October 2022 (and the coming into force of the Civil Procedure (Amendment No. 2) Rules 2022 SI 2022/783, the rule read "Fax… Completing the transmission of the fax. Other electronic method… Sending the email or other electronic transmission." The rule amendment involved combining all forms of electronic transmission into one, essentially as part of the CPRC's process of simplification of the CPR. The previous (pre-1 October 2022) wording might be said to suggest a need at least for the transmission to reach the receiving (MB) fax machine although it can be read to merely require the electronic data to be transmitted out of the EDS Fax machine. Moreover, there are dangers in using a previous version of the rule to seek to construe the amended version as the actual intention of the CPRC in amending the rule is inadmissible when construing it. I therefore do not find the fact of the rule change or the previous version of the rule as being of particular assistance.

121. In my view the key word is "Sending" and this part of the rule has to be seen in the context of other parts of CPR7.5(1) which are framed in terms of considering what the serving claimant has to have done themselves rather than what others (e.g. the post office or a relevant service provider or the internet) have done (successfully or otherwise) themselves. I therefore would have concluded that it would have been sufficient for the full electronic information (i.e. the Claim Form itself [rather than just a machine enquiry from the EDS Fax machine to the MB Fax machine as to whether the latter would accept a transmission – the electronic fax equivalent to dialling a phone number and getting some tone in response] to have left the EDS Fax machine and entered into the transmission network whether or not it had then reached (but not been accepted by) the MB Fax machine; rather than there having to be shown that the MB Fax machine had actually rejected or failed to process the transmitted Claim Form electronic data. However, I am not satisfied on the balance of probabilities, for the reasons given above, that that occurred.

122. Accordingly, I do not consider that the Claim Form was served by Fax on the Second Defendant within the time limited by the November Order.

Service on the Second Defendant by DX

123. In relation to the contention that the Claim Form was served in compliance with CPR7.5 by DX to the MB DX Address; I accept Rana's evidence that at some time shortly after 15.49pm it was left at the EDS reception for collection by the DX courier but that it was only collected after office hours that day, and find those facts as having been proved on the balance of probabilities. However, for the same reasons as I have stated regarding the First Defendant above, that meant that the service step was not completed within the time limited by the November Order.

Conclusion in relation to service within the time limited by the November Order

124. For the reasons given above, I conclude that the Claimants have failed to show that they completed a CPR 7.5 service step before the time limited by the November Order.

Whether time for service was extended by Agreement to 8 June 2023

125. However, the Claimants contend that the time for taking the CPR7.5 service step (or for service) was further extended by agreement to 8 June 2023. CPR2.10 provides that a variation to a rule or court ordered time-limit can occur by "the written agreement of the parties".

126. That provision was considered in relation to the CPR7.5 time-limits in *Thomas v Home Office [2006] EWCA 1355 ("Thomas")*, where at paragraphs 13-21 it was held that CPR2.11 did enable agreed extensions of CPR7.5 time-limits (and I consider that, and which has not been challenged by the Defendants, the same will apply if such time-limits have been extended by order as here in the case of the November Order).

127. The Court of Appeal in *Thomas* then considered what was required for there to be such an extension. At paragraph 24 it was held that every variation (and not just an initial one) had to be in writing.

128. At paragraphs 25-29 it was said:

> "25. That brings me, then, to the question of what constitutes a "written agreement of the parties". Clearly, it would encompass a single document signed by both parties. However, contrary to Mr Serr's submissions, I see no grounds, either in principle or as a matter of language, for limiting it to a single document. I can see no reason why an exchange of letters between the two solicitors concerned, in which the extension of time is agreed, would not constitute a "written agreement".
>
> 26. An oral agreement which is then confirmed in writing by both sides appears to me also to be within the concept of a "written agreement". The oral agreement itself would not, of course, be capable of being a written agreement. However, it seems to me that where, following the oral agreement, the two solicitors exchange letters confirming what they have agreed, the exchange of letters amounts to an agreement in writing that they have agreed (albeit orally) an extension of time: to my mind, it would, at best, be no more than a quibble to contend that an agreement in writing that the parties have agreed something orally does not constitute a "written agreement of the parties". If the oral agreement, because of the very fact that it was oral, could not validly effect a variation, then it seems to me that there is no reason why it cannot be said that the time limit has been "varied by the written agreement of the parties" even though that written agreement was an agreement between the parties that they had orally agreed the variation.
>
> 27. I think things get more difficult where the parties, having orally agreed a variation, each subsequently refer to what has been agreed in correspondence passing between them. An example, albeit of a slightly unusual nature, may be found in the facts of the present case. The claimant's solicitors effectively confirmed the extension to the 1 April in their letter of 24 February 2005 (and if the defendant's had replied in a letter confirming this extension, then there would, for the reasons I have just given, have been a written agreement in my view). However, what happened is that, almost four weeks later, the defendant's solicitor wrote to the claimant's solicitors in connection with a different matter, namely the expert evidence, and enclosed a letter to the expert in which the solicitor stated that an extension to 1 April 2005 had been agreed.

28. With some hesitation, I have reached the conclusion that this was simply insufficient to amount to a "written agreement" as contemplated by r. 2.11. First, it seems to me to involve an impermissible stretching of the expression to cover the contents of a letter, whose purpose had nothing whatsoever to do with agreeing, but was merely communicating to a third party what had been orally agreed. Secondly, it appears to me undesirable that the question of whether or not there has been a valid agreement should turn on what a solicitor happens to write in subsequent correspondence which was not intended to bear on the question of agreement at all. To my mind, the concept of a "written agreement between the parties", particularly in the context of the CPR, involves a document or exchange of documents which is intended to constitute the agreement or to confirm or record the agreement. Because one cannot envisage every possibility which might eventuate, I would not want this to be seen as being entirely prescriptive."

129. The Court of Appeal then went on to consider the question of a possible estoppel in paragraphs 30-33:

"30. In the claimant's notice of appeal and in Mr Grover's skeleton argument in support, it was contended that, if the facts of the present case mean that there was no sufficient "written agreement" for an extension of time for service of the claim form into June 2005, then the defendant was nonetheless estopped from denying that there was such an agreement, or, to put it another way, the defendant was estopped from relying on the time limit contained in r. 7.5, on the basis that there had been an oral representation that the claimant need not serve the claim form, upon which the claimant had relied by not serving the claim form until June 2005.

31. Such an argument would face obvious difficulty on the basis that it would effectively render nugatory the express requirement of r. 2.11 that any agreement to extend time be "written". Furthermore, there would be obvious force in the argument that, by entering into an oral agreement to extend time, it could not clearly be said that, without more, the defendant was unequivocally indicating that it would not insist on the strict legal requirement that any such agreement, in order to be effective, be in writing.

32. In the event, when faced with the reasoning of the House of Lords in Actionstrength Ltd –v- International Glass Engineering IN. GL. EN SpA [2003] UKHL 17 (especially at paragraphs 9, 28, 35 and 52-3), on a not dissimilar estoppel argument in relation to section 4 of the Statute of Frauds 1677, Mr Grover abandoned the point.

33. In these circumstances, while it is only right to say that, as at present advised, it seems to me that Mr Grover was entirely realistic in abandoning the argument, it is inappropriate formally to rule on it."

130. The Claimants contend that the parties had clearly reached a consensus in their communications in December 2022 and early 2023 that time for service of the Claim Form and Particulars of Claim would be extended to 8 June 2023. They contend that there was sufficient to amount to a "written agreement" for the purposes of CPR2.11, and where *Thomas* permits that to be by multiple documents. The Defendants contend that there was no agreement, and in any event not enough to constitute a "written agreement".

131. With some reluctance, I have concluded that there was not sufficient in this case for there to have been a "written agreement" with regard to either Defendant although the correspondence was clearly proceeding on the basis that any agreement would be tri-partite. This is for the following reasons:

i) Although it was also stated that this was not to be prescriptive in all circumstances, in paragraph 28 of *Thomas* it was said "… , the concept of a "written agreement between the parties", particularly in the context of the CPR, involves a document or exchange of documents which is intended to constitute the agreement or to confirm or record the agreement…"

ii) The initial letter from MB of 8 December 2022 merely said that "… the dates will most likely need to be adjusted as follows…" and then indicated that "… they will need to be considered further in due course…" The initial letter from GL of 16 December 2022 said that "… it seems logical to delay the subsequent steps in the timetable to the following dates… it is suggested that the dates… are further reviewed on receipt of [expert evidence]…"

iii) EDS replied to GL in their 19 December 2022 letter to say that they agreed with the expert evidence point and "… we propose to update you once the expert evidence is received so we can confirm a timetable..."; and to MB in their 19 December 2022 letter to say that "We consider your approach… to be most sensible. We are content to notify you once we have the expert evidence and have a clearer date for the necessary next steps… The parties can then liaise further on the timetable."

iv) The EDS letter of 18 January 2023, referred to an intention for there to be clarification of the date of the expert report "and then we can agree revised dates, hopefully within the stay, and if not review the stay"; and the MB response of 19 January 2023 stated that if the Claimants were to pursue their claims "… the current timetable (and stay in the proceedings) will certainly need to be adjusted"

v) I do not consider that the objective bystander would, or that the evaluative judge should, consider the correspondence to amount to any agreement between any of the parties other than that the question of dates should be the subject of review and discussion leading to some restructured timetable. While the need for a new timetable (including for service of the Claim Form and the Particulars of Claim) was identified, I do not consider that any dates were actually agreed. The parties proceeded on the basis that the Claimants would be providing further information as to when their expert evidence was available, and it was once that information had been received that a new timetable could be discussed and set. I do not see that the usual objective tests for an agreement are met, and all the more so where *Thomas* seems to require there to be an apparent intention that there should be such an exstant agreement on the part of all (relevant) parties appearing within the documents

vi) Further, the correspondence generally made reference to the need for there to be liaison as to and agreed revisions of the timetable, and clearly contemplated that such was yet to happen. It seems to me to be wholly inconsistent with there

already being an agreed revision of the date for service of the Claim Form and Particulars of Claim

vii) Further, various of the correspondence (e.g. EDS's letter of 18 January 2023) expressly considered the fact that the "stay" (which is clearly a reference to the extension of the CPR7.5 service period) was limited and there might become a need to review it. That is inconsistent with there being an agreement to have extended the stay

viii) I have asked myself as to whether the correspondence can be interpreted as containing a written agreement to extend the service period to 8 June 2023 with other matters and a potential further extension being yet to be decided upon. However, I do not read the correspondence in that way. There is never anything which goes further than EDS saying that MB's "most likely" date of 8 June 2023 was an approach which was "most sensible". However, this was all in letters which treat "the timetable" as being a single matter (rather than being divided up into a number of interim timetables) which was to be discussed and agreed in due (and thus future) course once EDS was more clear as to when they would have their expert evidence (and could produce a more full revised Letter of Claim). I do not see that the usual objective tests for an agreement are met, and all the more so where *Thomas* seems to require there to be an apparent intention that there should be such an extant agreement on the part of all (relevant) parties appearing within the documents.

132. I therefore conclude that there was no sufficient agreement for an extension of the time period set out in the November Order.

133. The Claimants have not contended, as such, for an estoppel. However, and for similar reasons to those ventilated in *Thomas*, I cannot see scope for an estoppel here. There was nothing unequivocal from the GL or MB, but rather mere proposals for further discussion, and nothing which could be said to waive the need for a written agreement.

Conclusion on whether the Claimants validly served the Claim Form

134. In the light of my conclusions above, I hold that the Claimant did not comply with CPR7.5. That has the consequence that I will not grant the declaration sought by the Claimants.

Whether I should grant the Claimants relief from sanctions in relation to their not having served the Claim Form

135. The Claimants contend that I have a discretion to grant them relief from sanctions and/or an extension of time for the consequences of their not having served the Claim Form on either Defendant in time. The Defendants contend that I have no jurisdiction to do so and, further, that I should not exercise any discretion which I might have.

136. The question as to whether the Court has jurisdiction to grant an extension of time and associated relief from sanctions in relation to a failure to comply with CPR7.5 where the application is made after the CPR7.5 time-limit has expired (as here) has been considered in numerous cases. While I have some considerable sympathy for the Claimants' submission that it would be just in all the circumstances of this case for me

to exercise any applicable discretion, I have first to consider whether I have any jurisdiction which might properly enable me to do so.

137. There are numerous leading decisions in this area including the judgments in (and the judgments cited in) *Good Law Project Limited -v- Secretary of State for Health and Social Care [2022] EWCA Civ 355* (although that was a specialist Part 8 Claim and so only considered the relevant principles by analogy), *Ideal Shopping Direct Limited -v- Mastercard Inc [2022] 1WLR 1541* and *Pitalia v NHS [2023] EWCA 657 ("Pitalia") at paragraph 32*. I have also decided such cases as *Joe Macari Servicing Limited -v- Chequered Flat International Inc. [2021] EWHC 3175* and *Fit Kitchens v Relx [2023] EWHC 1954* (although that was only published recently) which set out the previous cases and the law in detail.

138. In paragraph 46 of *Good Law* it was said that:

> "41 As for the importance of valid service, service of a claim form can be distinguished from other procedural steps. It performs a special function: it is the act by which the defendant is subjected to the court's jurisdiction. This quality is reflected in the terms of CPR r 7.6, with its very strict requirements for any retrospective extension of time. Equally, reliance on non-compliant service is not one of the instances of opportunism deprecated by the courts (see for example Woodward v Phoenix Healthcare Distribution Ltd [2019] EWCA Civ 985 ("Woodward") at [48]). The need for particular care in effecting valid service, particularly when there are tight time limits and/or a claimant is operating towards the end of any relevant limitation period, is self-evident."

139. I consider that all the case-law (including *Barton v Wright Hassall*) makes clear that:

i) Jurisdiction to grant an extension of time under CPR7.6 in relation to an application made after time has expired only exists (here) where the claimant has taken all reasonable steps to comply with CPR7.5 but has been unable to do so (and has, as here, applied promptly)

ii) CPR3.9 and CPR3.10 cannot be used to evade the jurisdictional limits of CPR7.6 whether by way of waiver or granting of relief from sanctions

iii) CPR6.15 (alternative service) is generally only available where there is a good reason for not having used CPR7.5 methods of service (in time)

iv) CPR6.16 is only available where there is exceptional reason to waive service altogether.

140. Here it has not been, and could not be, suggested that the Claimants had taken all reasonable steps to comply with CPR7.5 in time or would have had any difficulty in doing so. They could simply have served the Claim Form by numerous different methods prior to 21 April 2023. I do not see that I have any jurisdiction to grant relief and, even if I had jurisdiction to do so, that I could exercise it in favour of the Claimants on any principled basis.

141. Insofar as I am asked to grant "relief from sanctions" I have to apply a *Denton v White [2014] EWCA 906* analysis. The failure to comply with CPR7.5 attracts a very serious sanction and even though the gaps in time here may be very small the result is that the

breach is serious and substantial. There is no good reason for the failures where service could easily have been effected if the matter had been considered before the last day, and even then by simply taking the Claim Form and an accompanying letter and envelope to the DX office before 4pm. However, whatever the answer to the first two questions, the Claimants cannot show and have not shown that it is just in all the circumstances of the case to grant relief taking into account the CPR3.9 factors which include (as does the overriding objective in CPR1.1(2)(f)) "… the need… to enforce compliance with rules, practice directions and orders..". It would be simply contrary to the jurisdictional framework of CPR7.6 to effectively grant an extension of time contrary to its mandatory provisions (i.e. where the Claimants have not made all reasonable steps to comply with CPR7.5 in time).

142. I therefore refuse relief from sanctions and any other order which (of itself) would validate the service of the Claim Form as being within the time provided for by CPR7.5 (and the November Order).

143. The Claimants have not sought to achieve a similar result of validating service by any of the other means (CPR3.10, CPR6.15 and CPR6.16) identified above, although I consider that they would have failed had they done so as, for the reasons set out above, either the jurisdictional requirements would not have been satisfied or any discretion could not be exercised on a principled basis in their favour.

Claimants' applications for a declaration as to there having been valid service and related relief

144. In the light of the above, I refuse to grant the Claimant (1) a declaration that there has been valid service of the Claim Form (at least in the time limited by CPR7.5(1)); (2) relief from sanctions in relation to failure to serve the Claim Form in term; or (3) an extension of time for serving the Claim Form.

Consequences of there not having been compliance with CPR7.5(1)

145. The Defendants submit that if CPR7.5(1) has not been complied with then the Claim Form can no longer be served and the Claim is at an end and should be struck-out automatically. I had doubts about the correctness of that proposition and drew the parties' attention to various case-law; and with the result that the Claimants contend that this is incorrect, that the Defendants have been served and that the Defendant cannot now (or at least should not now be able to) contest the progression of the Claim.

146. It is common-ground, and clear from the material before me, that:

i) The Claim Form was served out of time but otherwise in accordance with CPR7.5 on each of the Defendants (by post to GL and to MB), assuming that the Second Defendant is actually SRL, in later April 2023 and with Particulars of Claim being served by10/12 May 2023

ii) No Acknowledgments of Service have been filed by either of the Defendants

iii) No Applications have been made by either of the Defendants (their being no Application Notices issued).

147. The provision of the CPR which deals with a party seeking for the Court to decline or not to exercise jurisdiction in relation to a Claim and to have the Claim in consequence struck-out is CPR Part 11 (cited above).

148. It was held in *Hoddinott v Persimmon [2007] EWCA 1203* that it was by use of CPR Part 11 that a defendant was (if at all) to seek to have a Claim struck-out for failure to comply with CPR7.5 in time; and that, if a defendant filed an acknowledgement of service but did not make a CPR11 application with the next 14 days, CPR11 operated to effect a statutory waiver so that the defendant could not seek to contest the Claim on the basis of out-of-time or other defective service.

149. In paragraphs 21-25 of *Hoddinott* it was held that CPR11 was engaged in this context:

> "21. Mr Exall submits that CPR 11 has no relevance in the present context. He says that no issue of "jurisdiction" arises here. He argues that the claimants are in difficulty not because the court does not have jurisdiction to determine the claim, but because they have failed to comply with the rules of court as to service. A defendant who seeks to set aside an order made without notice or to argue that the claim form was served out of time is not challenging the court's jurisdiction, but is merely applying the procedural rules. The court does have jurisdiction to deal with a claim even where the claim form is served out of time. For example, it has jurisdiction retrospectively to extend the time for service under CPR 7.6(3) and to make an order dispensing with service under CPR 6.9. Finally, Mr Exall draws attention to the definition of "jurisdiction" in CPR 2.3: it means "unless the context requires otherwise, England and Wales and any part of the territorial waters of the United Kingdom adjoining England and Wales".
>
> 22. In our judgment, CPR 11 is engaged in the present context. The definition of "jurisdiction" is not exhaustive. The word "jurisdiction" is used in two different senses in the CPR. One meaning is territorial jurisdiction. This is the sense in which the word is used in the definition in CPR 2.3 and in the provisions which govern service of the claim form out of the jurisdiction: see CPR 6.20 et seq.
>
> 23. But in CPR 11(1) the word does not denote territorial jurisdiction. Here it is a reference to the court's power or authority to try a claim. There may be a number of reasons why it is said that a court has no jurisdiction to try a claim (CPR 11(1)(a)) or that the court should not exercise its jurisdiction to try a claim (CPR 11(1)(b)). Even if Mr Exall is right in submitting that the court has jurisdiction to try a claim where the claim form has not been served in time, it is undoubtedly open to a defendant to argue that the court should not exercise its jurisdiction to do so in such circumstances. In our judgment, CPR 11(1)(b) is engaged in such a case. It is no answer to say that service of a claim form out of time does not of itself deprive the court of its jurisdiction, and that it is no more than a breach of a rule of procedure, namely CPR 7.5(2). It is the breach of this rule which provides the basis for the argument by the defendant that the court should not exercise its jurisdiction to try the claim.
>
> 24. We would, therefore, hold that CPR 11 is engaged in the present context. This accords with what was said by Tugendhat J in Mason v First Leisure Corporation Plc [2003] EWHC 1814 (QB) para 11, HH Judge Havelock-Allan QC in The Burns-Anderson Independent Network Plc v Wheeler, (Bristol District Registry Mercantile List, unreported 28 January 2005) para 45 and Uphill v BRB (Residuary) Ltd [2005]

EWCA Civ 60, [2005] 1 WLR 2070 para 34 (although in this last case, it was common ground that CPR 11 was engaged)."

150. In paragraphs 26-29 of *Hoddinott* it was held that statutory waiver consequence followed if an acknowledgement of service was filed and no application made in time under CPR11 even if the defendant had applied to set aside an order extending time for service as the wording of CPR11 was clear:

"26. We doubt whether the Rule Committee addressed the problem that has arisen in this case. But in our view, the interpretation adopted by the district judge was not open to him. Subject to the point discussed at para 28 below, the language of CPR 11 is clear. Paragraph (1) permits a defendant to apply to the court for an order declaring that the court has no jurisdiction to try the claim or that the jurisdiction should not be exercised. Paragraph (2) provides that a defendant who wishes to make such an application "must first file an acknowledgment of service in accordance with Part 10" (emphasis added). Paragraph (4) provides that an application under CPR 11 must be made "within 14 days after filing an acknowledgement of service" (again, emphasis added). Paragraph (5) provides that if the defendant files an acknowledgement of service and does not make an application within the period specified in paragraph (4), "he is to be treated as having accepted that the court has jurisdiction".

27. In our judgment, the meaning of paragraph (5) is clear and unqualified. If the conditions stated in subparagraphs (a) and (b) are satisfied, then the defendant is treated as having accepted that "the court has jurisdiction to try the claim". The conditions include that the defendant does not make an application for an order pursuant to CPR 11(1) within 14 days after filing an acknowledgment of service. An application to set aside an order extending the time for service made before the filing of an acknowledgement of service is not an application under CPR 11(1) nor is it an application made within 14 days after the filing of the acknowledgment of service. The district judge (rightly) did not hold that the application to set aside the order extending time for service was an application under CPR 11(1). Rather, he said that the earlier application to set aside the order rendered it unnecessary to make an application under CPR 11(1). But in our judgment, there is no warrant for holding that, if an application is made before the filing of an acknowledgment of service to set aside an order extending the time for service, this has the effect of disapplying the requirement for an application under CPR 11(1). There is no such express disapplication, nor does one arise by necessary implication.

28. In our view, a defendant is fixed with the consequences stated in paragraph (5) if the two stated conditions are satisfied. At first sight, there is an apparent difficulty with the application of this approach to a case (such as the present) where the defendant wishes to argue that the court should not exercise its jurisdiction to try the claim, rather than to dispute the court's jurisdiction to try the claim. The distinction between the two categories of case seems to have been well understood by the draftsman. It is clearly drawn in paragraphs (1) and (6). But paragraph (3) provides that a defendant who files an acknowledgement of service does not, by doing so, lose any right he may have "to dispute the court's jurisdiction"; and paragraph (5) provides that if the two conditions in (a) and (b) are satisfied, the defendant is treated as having accepted that the court "has jurisdiction to try the claim". It may, therefore, be argued (although it was not argued before us) that paragraphs (3) and (5) refer to paragraph (1)(a) but not paragraph (1)(b). We would reject such an argument. CPR 11 must be read as a whole. It is clear

that both paragraphs (2) and (4) are referring to applications made under paragraph (1)(a) and (1)(b). Further, paragraph (5) provides that if the defendant does not make "such an application" (ie an application under paragraph (1)(a) or (b)), then the consequences will be as stated. Paragraph (5) cannot mean that, if a defendant does not make an application under paragraph (1)(b), he will be treated as having accepted that the court has jurisdiction to try the claim. It must mean that, if a defendant does not make an application under paragraph (1)(b), he will be treated as having accepted that the court should exercise its jurisdiction to try the claim. In our judgment, the reference to disputing the court's jurisdiction in paragraph (3) and accepting that the court has jurisdiction in paragraph (5) encompasses both limbs of paragraph (1). The reference to the court's jurisdiction is shorthand for both the court's jurisdiction to try the claim and the court's exercise of its jurisdiction to try the claim.

29. It follows that, since both of the conditions stated in paragraph (5) were satisfied in this case, the defendant is treated as having accepted that the court should exercise its jurisdiction to try the claim, notwithstanding the late service of the claim form. The effect of paragraph (5) was that he was to be treated as having abandoned its application to set aside the order extending the time for service. This conclusion is reinforced by the fact that in this case the defendant indicated on the acknowledgement of service that it did not intend to contest jurisdiction and did intend to defend the claim."

151. This analysis was affirmed by the Court of Appeal in *Pitalia* where it was also recognised that a defendant could seek to avoid the error of having failed to make a CPR11 application by making an application and seeking an extension of time (CPR3.1) or a CPR waiver (CPR3.10) of the error even though this would tend to involve a need to obtain relief from sanctions (CPR3.9 and *Denton*). In *Pitalia* an application had been made in time but was defective in form. At paragraphs 32 to 38 it was said:

"32. The following principles emerge from the authorities in this area:

(i) Barton v Wright Hassall LLP makes clear the particular importance attached by the Supreme Court to the timely and lawful service of originating process. Failure to comply with the Rules about such service is to be treated with greater strictness than other procedural errors. In the present case, if the Respondent's solicitors had made their application of 24 January 2020 expressly seeking a declaration under CPR 11(1) that the court has no jurisdiction to try the claim, there would have been very little that the Appellants could have said in response.

(ii) On the other hand, the principle established in Vinos and followed in cases such as Ideal Shopping is that CPR 3.10 cannot be used to override an express prohibition in another Rule. An example of such an express prohibition is in CPR 7.6(3). If a claimant applies retrospectively for an order to extend the time for service of a claim form the court may make such an order only if the remaining conditions laid down by the rule have been fulfilled. If they have not been fulfilled then Rule 3.10 is simply not available. But the Vinos principle must not be expanded into saying that CPR 3.10 cannot be used to rectify any breach of the CPR. Otherwise the Rule would be deprived of its utility. When CPR 3.10 is invoked it presupposes that some error of procedure has been made. Without it civil litigation would be even more beset by technicalities than it is already.

(iii) There is a valid distinction between making an application which contains an error, and failing to make a necessary application at all. Steele v Mooney [2005] 1 WLR 2819 is a useful illustration. In that case the claimants sought the defendants' consent to a draft order extending time for service of the Particulars of Claim. That consent was forthcoming, but the extension of time was useless since the claimants had omitted to refer to the claim form. This court, distinguishing Vinos, held that the application for an extension of time was clearly intended to be for service of the claim form as well as the particulars. The subsequent application for relief was not in substance an application to extend time for service of the claim form, but an application to correct the application for an extension of time which had been made within the time specified for service and which by mistake did not refer to the claim form.

33. Hoddinott lays down that if a Defendant acknowledges service without making an application under CPR 11(1) for an order declaring that the court has no jurisdiction (or should not exercise its jurisdiction) to try the case, this is taken to be an acceptance of jurisdiction. Whatever one might think of Hoddinott, the decision is binding on us, and like the judge I do not consider that it has been impliedly overruled by Barton. The judge was also right to reject the argument, based on the use of the word "expired" in Barton, that there is an analogy between the expiry of a claim form and the death of a living creature. Plainly in some circumstances an expired claim form can be revived: see CPR 7.6(3).

34. I agree with the judge that the failure of the Defendant's solicitors, when completing the acknowledgment of service form, to tick the box indicating an intention to contest jurisdiction is not fatal to their application for relief. Even if the box had been ticked an application would still have been required to be made within 14 days. CPR 11(1) does not say that a box on a form must be ticked: it says that an application must be made. As the judge put it, a tick in the box is neither necessary nor sufficient as a basis for challenging jurisdiction.

35. The critical question, therefore, is whether the Defendant's application of 24 January 2020 can, by the use of CPR 3.10, be treated as having been made under CPR 11(1). I do not accept Mr Trotman's argument that such rectification would offend against the Vinos principle. CPR 11(1) does not contain clear mandatory wording equivalent to that laid down by CPR 7.6 (3) that a retrospective extension of time may be granted "only if" certain conditions are fulfilled.

36. The failure to make express reference to CPR 11(1) in the letter of 21 January 2020 or the application of 24 January 2020 was in my view an error capable of rectification under CPR 3.10. The three documents - the acknowledgment of service, the covering letter and the application to strike out supported by witness statements – together made the Defendant's intentions clear. This was in substance an application to stop the case on the grounds that the Claimants had failed to serve the claim form in time. The case is much closer to Steele v Mooney than to Vinos or Hoddinott.

37. I am not impressed by the argument on behalf of the Appellants that if their failure to comply with the rules is to be treated so strictly despite the serious consequences, the same procedural rigour should be applied to the Respondent. That argument is contrary to the decision of the Supreme Court in Barton. Errors in issuing and serving originating process are in a class of their own.

38. I would also reject the Appellants' alternative argument based on Denton v TH White Ltd. I do not regard the failure of the documents served on 21 and 24 January 2020 to make express reference to CPR 11(1) as a serious and significant transgression. It was, rather, just the sort of technical error for which CPR 3.10 was designed."

152. I note that the Court of Appeal's approach in *Pitalia* is to the same effect as my analysis in *Macari* and *Fit Kitchen* although it is, of course, the Court of Appeal's judgment which is the binding statement of the law.

153. This area has, however, been further considered by the Court of Appeal in *R (Koro) v County Court at Central London 2024 EWCA 94 ("Koro")* where a Part 7 Claim Form had been purportedly served but the service was said not to be in accordance with the rules and no acknowledgment of service had been filed. The court then struck out the claim on its own initiative in response to the informal submissions from the defendant that the Claim Form had not been properly served within time and so was a nullity. The Court of Appeal was mainly concerned with the procedural approach taken by the court which it held was wrong in various respects.

154. In paragraphs 64-70, the Court of Appeal said:

"Relevant principles

Defective service and its consequences

64. It was wrong of Ms Longson to submit and wrong of HHJ Baucher to accept that defective service means that proceedings do not exist. Proceedings that have been properly issued and are properly constituted exist whether or not they have been properly served. They do not cease to exist either because they are not served in time or have been served defectively. We consider this to be axiomatic.

65. The procedure for disputing the Court's jurisdiction is laid down by CPR Part 11. For present purposes, the most relevant provisions of CPR Part 11 are CPR 11 (1)-(4) which should be well known:

[CPR11 was then set out]

66. In Hoddinott v Persimmon Homes (Wessex) Ltd [2007] EWCA Civ 1203 at [23], the Court of Appeal held that the word "jurisdiction" in CPR Part 11 does not denote territorial jurisdiction but is a reference to the court's power or authority to try a claim:

"But in CPR r 11(1) the word does not denote territorial jurisdiction. Here it is a reference to the court's power or authority to try a claim. There may be a number of reasons why it is said that a court has no jurisdiction to try a claim (CPR r 11(1)(a)) or that the court should not exercise its jurisdiction to try a claim: CPR r 11(1)(b). Even if Mr Exall is right in submitting that the court has jurisdiction to try a claim where the claim form has not been served in time, it is undoubtedly open to a defendant to argue that the court should not exercise its jurisdiction to do so in such circumstances. In our judgment, CPR r 11(1)(b) is engaged in such a case. It is no answer to say that service of a claim form out of time does not of itself deprive the court of its jurisdiction, and that it is no more than a breach of a rule of procedure, namely CPR r 7.5(2). It is the

breach of this rule which provides the basis for the argument by the defendant that the court should not exercise its jurisdiction to try the claim. ”

67. In Caine v Advertiser and Times Ltd and Ors [2019] EWHC 39 (QB) Dingemans J held that Hoddinott was binding authority for the proposition that an application that the court should not exercise its jurisdiction to try a claim must be made by CPR Part 11. Subsequently, Nugee LJ sitting in the Intellectual Property List of the Patents Court expressed a degree of uncertainty about the breadth of the Hoddinott principle in a case where a defendant had not served an acknowledgement of service and, as Nugee LJ found, there was a separate route provided by CPR r.7.7(3).

68. Given the breadth of the terms of CPR Part 11 and the absence of any alternative route elsewhere in the CPR which the CPS could have adopted or did adopt, we would hold that CPR Part 11 provides the procedure for disputing the Court’s jurisdiction in a case such as this. Accordingly, if the CPS wanted to assert defective service, it should have followed that procedure, served an Acknowledgment of Service and made an application pursuant to CPR Part 11 within 14 days thereafter.

69. Even if we were to be wrong and there were to be some other route by which the CPS could have or could now raise the assertion of defective service, it would not be safe to speculate about what the outcome of such an application would be. It is not to be assumed (and could not be assumed by HHJ Baucher or the Deputy Judge when considering whether to give permission in these proceedings) that the end result would be that the Court would decline to exercise jurisdiction. Many different considerations might arise of which three of the most obvious are the nature of the defect in service (as to which see [7.iii)] above), the promptness (or otherwise) with which the point was taken by the CPS, and whether the CPS had waived the defective service. As Ms Milligan fairly and correctly pointed out, on any such application (whenever and however made) the Court would have a range of case management options from which to select the most appropriate, including (a) retrospectively dispensing with service, (b) extending time for service of an amended Claim Form to cure the defect or (c) making a retrospective or prospective order under CPR 6.15. This is not intended to be an exhaustive catalogue of the Court’s available powers in an appropriate case.”

155. The Court of Appeal then set a procedural course for enabling the matter to be resolved. At paragraph 88 they made clear that they were not deciding as to what should happen at any full hearing of whatever turned out to be the various applications in the case.

156. The Claimants rely on *Koro* to say that there is and (in the absence of an acknowledgment of service and subsequent application) cannot be any challenge to the progress of the Claim, and that the Defendants need permission to file acknowledgements of service late which they should not have other than on condition that the Claim progresses notwithstanding the previous failure to comply with CPR7.5(1) (in relation to the Claim Form) and CPR7.4 (in relation to the Particulars of Claim) and the November Order.

157. The Defendants have asserted that the reasoning in *Koro* should be confined to the facts of that case and in any event kept without bounds and including in particular as:

i) The facts were unusual and very case-specific relating to the making of a number of inconsistent orders by the county court and what was held to be a refusal to properly hear from the claimant

ii) The underlying claim was one in judicial review regarding the Part 7 proceedings and what had happened to them. In consequence the Court of Appeal was dealing with the matter in a judicial review context

iii) The Court of Appeal were really simply concerned with whether the claimant should have an opportunity to have a full contested hearing, and:

a) their comments on other matters were mere obiter dicta, and

b) there was nothing to stop the defendant in that case at the eventual hearing contending that the county court should decline jurisdiction on ordinary defective service principles

iv) The Court of Appeal expressed some uncertainty as to their conclusion that for a defendant to seek to challenge the Claim on (non)service grounds it would be necessary for the defendant to first file an acknowledgment of service and then to make an application

v) In any event, it is the Claimants who require an extension of time for service of Particulars of Claim, and until they obtain that there is no obligation on the Defendants even to file an acknowledgment of service (only after which can they make a CPR11 application).

158. In my judgment, it is clear from these authorities, which are binding upon me, that:

i) Defective, or even no, service does not render a Claim or the Claim Form a nullity or cause it to be automatically struck-out. The Claim continues in existence unless and until the Court makes an order declining or refusing to exercise jurisdiction (and where CPR11 provides that a consequential striking-out order can then be made)

ii) Such an order (as far as one arising from defective or non-service is concerned) will only be made if there is an acknowledgment of service from a relevant defendant and subsequent application under CPR11. While the need for an acknowledgement of service is dealt with only in *Koro* (there having been acknowledgments of service in the other cases), I consider that it is clear from the wording of CPR11 and from the Court of Appeals decisions in *Hoddinott @ paragraph 26* and in *Koro* (which is very highly persuasive even if that element can be said to be obiter)

iii) If there has been an acknowledgment of service but no application within the 14 days provided for by CPR11 there will be a statutory waiver by the relevant defendant of the service points unless relief from sanctions (and any other appropriate relief) is obtained by that defendant.

159. I note that there can also be a common-law waiver by conduct of the jurisdiction/service points (see e.g. *Fit Kitchen* for the applicable principles) but I cannot see anything in

the material before me to suggest that such could have occurred where the defendants have been very keenly asserting points on service from 21 April 2023 onwards.

160. I have considered an argument advanced by Mr Calland for the First Defendant that these principles and *Koro* have or should have no application where the Claimants have themselves made an application for there to be determined whether or not there has been valid service. I disagree. The CPR and the case-law make clear that it is the CPR11 process which is to be followed and that otherwise a statutory waiver arises. While Claimants may seek a determination (as these Claimants have done) regarding service, the essential question is not as to whether service has occurred in accordance with the rules but whether the claim should proceed, and as is made clear by both the CPR and the case-law.

161. The present position is that there are no acknowledgments of service and no applications on the part of either of the Defendants. In those circumstances, it seems to me that I simply cannot decide the question of whether a jurisdiction challenge would succeed as none has been made. In theory I could waive the various failures to file acknowledgments of service under CPR3.10 and to issue application notices under CPR3.10 and CPR23.3(b) but that has not been argued fully (if at all) before me and would deserve substantial consideration including as to potential prejudice to the Claimants. Taking such a course summarily would also be, at first sight, inconsistent with the Court of Appeal's general statement in *Koro* and also various other decisions such as *Talos v JSC [2014] EWHC 3977*, *Taylor v Giovani [2015] EWHC 328* and *Mansard v Beyat [2021] EWHC 3355 @ paragraphs 17 and 18* to the effect that defendants require permission to file acknowledgments of service out of time and especially where such is to be the first stage of their mounting a jurisdiction challenge.

162. However, I do think that I can decide the question of whether or not the Defendants require permission to file acknowledgments of service out of time. The Defendants submit that they do not because (a) the Claim Form was not served in time (CPR7.5(1)) and the November Order) and (b) the Particulars of Claim were not served in time (CPR7.4 and the November Order). They say that therefore the period in CPR10.3 for filing acknowledgements of service has never started to run.

163. I disagree, for the following reasons:

i) The Claim Form is not rendered a nullity by reason of defective or late service (see above). I do not see why it should follow from the CPR7.5|(1) or the CPR7.4 time for service requirement that eventual service out of time is a nullity. In my judgment it is service (assuming that it complied with the method of service rules, and which was clearly the case here, in relation to both the First Defendant and, if it is to be held to be SRL, the Second Defendant) albeit late service

ii) CPR10.1(3)(b) makes clear that an acknowledgment of service must be filed if a defendant wishes to contest jurisdiction. While I accept that in some circumstances a defendant may wish to make an application (a) where a claim form has not been served properly at all or (b) a claim form has been served in time in accordance with the CPR (e.g. a forum non conveniens or a revocation of permission to serve out of the jurisdiction application – and various cases cited by the Claimants relate to such circumstances which are in my view

potentially conceptually different from that of a claim form which has been served late); it is a common case that a claim form has been served late. There is nothing in CPR10 to indicate that an acknowledgment of service is not required in such circumstances if a jurisdictional point is to be taken in consequence

iii) For a defendant to have to act within the combined CPR10 and CPR11 time-limits is entirely consistent with the policy of the rules. That policy is that a defendant may seek to challenge jurisdiction on service (or other) grounds but must do at an early first stage (see e.g. *Texan Management v Pacific 2009 UKPC 46 @ paragraph 69*). That results in certainty and avoids the possibility of a claim proceeding with a challenge to jurisdiction only being made at a stage later than close to the start. The rules achieve that objective by requiring a speedy acknowledgment of service followed speedily by an application to challenge jurisdiction. While it may be possible in a case of defective service for a defendant to say that there has been no service at all and that they therefore do not have to do anything until something which amounts to service has taken place, I cannot see it as being consistent with the statutory policy or scheme for them to be able to do nothing where actual service has eventually taken place even if out of time. That would also lead to immense uncertainty in the course of litigation

iv) Although *Koro* does not actually pose, or answer, this direct question; my answer is at least consistent with the statements that a defendant who wishes to dispute jurisdiction must get on and do so in accordance with the CPR.

164. In this context I have considered the Defendants' contention that the Claimants require permission to serve the Particulars of Claim out of time (as they should have been served by 4pm on 21 April 2023) and that there has been no service of them at all unless and until that permission is given. That argument has been pressed with greater force with regard to the purported (late) service of the Particulars of Claim but, logically, it can also be applied to the purported (late) service of the Claim Form.

165. I accept that there are various decisions which suggest that late filing or service of procedural material at the early stage of the litigation renders the material itself a nullity. That is said to be the case in relation to late filed acknowledgments of service in *Talos @ paragraph 33*.

166. However, I do not see the (late) service of the Particulars of Claim (or of the Claim Form) as rendering them a nullity or, more importantly, such that they prevented the period for filing an Acknowledgment of Service under CPR10.3 from running. In my judgment, when the statutory scheme is considered as a whole, and essentially for the reasons given above, the effect of proper service (even if out of time) is that the statutory scheme does operate and the time for filing an acknowledgment of service does begin once that service has taken place. This does not result in any unfair prejudice as far as a relevant defendant is concerned, they have been served and the CPR provide that the consequence of service is that the defendant must file an acknowledgment of service (which is not a burdensome matter) and has a period of time to then either defend or to challenge jurisdiction.

167. It therefore seems to me that one way or another the Defendants will have to obtain consent or permission to file acknowledgments of service out of time and where the Claimants are likely to contend that such should only occur on condition that no challenge to jurisdiction (and, perhaps, to the late service of the Particulars of Claim – although I have heard no argument and express no view on that) is made or succeeds (effectively a conditional order under CPR3.1(3)). Those matters are not such that I consider that I can properly, on the limited material and submissions before me, determine in this judgment.

168. In these circumstances, it seems to me that the Defendants will have to decide whether they wish to apply to file acknowledgments of service out of time and to make a jurisdiction challenge (technically, if the defendants simply file them out of time, the Claimants will have to seek to set them aside). This could give rise to some complexity as to order of applications, and I set out below the orders which I am intending to make to seek to ensure that everything can be sensibly advanced before and decided by the court at once.

The Claimants' Application for an extension of time for serving the Particulars of Claim

169. This application is opposed by the Defendants on the basis that the Claimants are in breach of the November Order (and thus also of CPR7.4), where the Claim Form was issued at the end of some (but not other) applicable limitation periods, and where it is contended that the Claimants have delayed generally and this is not an "in-time" application but one made after the relevant time-limit expired. There is some authority – see the White Book notes at 7.4.2 and e.g. *Venulum v Space 2013 EWHC 1242* - that the Court should approach the matter on a relief from sanctions CPR3.9/*Denton* basis, and Mr Sawtell seemed to concede that that was appropriate in these circumstances. The Claimants contend that any delay was short; the Defendants knew perfectly well the general case against them; no prejudice whatsoever has been caused to the Defendants; and the Defendants had indicated a preparedness in correspondence for the Claim Form and Particulars of Claim to be served nearly a month later; and, further, that any limitation problems (at least apart from the common-law non-personal injury claims) can be overcome by the application of section 33 (as well as the new section 4B) of the Limitation Act 1980 and that they would have a strong case under section 33 (including, they would say, because much of the substance of their claims is going to be investigated and fought out anyway). The Claimants contend that, even if there was a serious and substantial breach, and no good reason for it, it is just in all the circumstances of the case for relief from sanctions to be granted and the claim to be allowed to proceed. The Defendants contend that the Claimants are guilty of numerous delays and cannot show that it is just that an extension should be granted.

170. I have decided that it is not appropriate for me to decide this question in this judgment. The jurisdictional issues can be well said to logically come first (and I do not have any formal application to set aside the service of the Particulars of Claim, and it may even be that any attempt to set them aside would itself have to involve a jurisdiction challenge under Part 11 and/or that the Claimants might seek to make sanctioning the service of the Particulars of Claim a condition of permitting the late filing of an acknowledgment(s) of service – but none of those matters have yet been argued before me and so I do not express any view on any of them); but, and also importantly, the questions of who should be granted what (if any) extensions of time involve considerations of material, merits and prejudice which are heavily inter-related.

171. It seems to me that this aspect and the questions of extension of time for acknowledgments of service and jurisdictional challenge should all be dealt with together; and I have provided below for directions to enable that to occur.

The Second Defendant

172. Mr Frampton for SRL and SARL contends that the Claim has been brought against SARL when it should have been brought against SRL. He resists the Claimants' application to amend the name of the Second Defendant to that of SRL. He contends that:

(1) The Claim has been brought against SARL, and the Claimants are seeking a true substitution of a new defendant rather than a re-naming of an existing defendant

(2) There has actually been no service of "the Second Defendant" at all. As I have held, the CPR6.7 confirmation of authorisation of MB to accept service was only given in relation to SRL and service thus only took place (out of time) on SRL. He submits that SARL is the present Second Defendant and there has been no service upon it and therefore no service on "the Second Defendant"

(3) An amendment is required; and such is only possible if the Claim is not to be disposed of absolutely on jurisdictional or similar grounds against all the existing defendants, as, if that is the case, there will be nothing to amend

(4) The Claim has been or may have been brought within the primary limitation periods of the common-law non-personal injury claims and of the personal injury claims; but that those primary limitation periods (in relation to adult claimants) have or may have now expired

(5) For there now to be an amendment to substitute SRL for SARL would result in adult claimants obtaining an impermissible limitation advantage prohibited by CPR17.4(2) and 19.6(3) and section 35 of the 1980 Act

(6) Accordingly, if the Claim is not simply to be struck-out (on jurisdictional or failure to serve Particulars of Claim in time grounds), any substitution of SARL for SRL, as well as any addition of adult claimants, should only be on what are known as "Mastercard" (a reference to *Mastercard v Deutsche [201]7 EWCA Civ 272* and see also *Libyan v King [2020] EWCA 1690* and *DR Jones v Drayton [2021] EWHC 1971*) terms being that all the claims against SARL and/or the claims of the new adults should be deemed only to be brought as at the date of the ultimate order (and not relate back to the issue of the Claim Form as would otherwise be the case under section 35 of the 1980 Act).

173. Mr Sawtell for the Claimants essentially accepts this analysis except that he contends that the amendment sought as to the name of the Second Defendant is a permissible amendment within CPR17.4(3) (and section 35) because it is the correction of "a mistake as to the name of a party" where "the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question." He would contend that it is truly SRL which has been sued, and obvious that the claim was

intended to be brought against SRL so that all that is involved is a correction of name rather than substitution of a new entity, but otherwise that SRL can be substituted for SARL if, indeed, it is SARL which is the entity which has been sued. I do not think that he is contending that the matter was in some way resolved by the November Order (which referred to SARL as being the Second Defendant and was signed by MB "for Sheppard Robson").

174. I note that the Court can under CPR19.6(4) authorise an amendment even if the "mistake" provisions do not apply by directing that a section 33 application to disapply the primary limitation periods in relation to a personal injuries claim should be dealt with at trial. However, that provision would not assist in relation to the common-law non-personal injury claims; and the simple solution (if Mr Sawtell is not correct on "mistake" and this Claim is not to be defeated altogether on jurisdictional or similar grounds) is to adopt the Mastercard course.

175. As to the issue regarding the CPR and "mistake", the parties have cited *Cameron v BDW [2022] BLR 183* where at paragraphs 59-63 it was said:

"59. The leading case on this area of the law, *The Sardinia Sulcis [1991] 1 Lloyds LR 201*, also arose under the old Rules of the Supreme Court. In that case it was held that the name of a party could be corrected if the court was satisfied that:

a) there was a genuine mistake;

b) the mistake was not misleading;

c) the mistake was not such as to cause reasonable doubt as to the identity of the person intending to sue (or be sued);

d) it would be just to allow the amendment.

60. The older authorities were reviewed by the Lord Chief Justice in Adleson & Anr v The Associated Newspapers Limited [2007] 4 All ER 330 . He summarised the principles, and confirmed the relevance of the Sardinia Sulcis test:

"43. These authorities have led us to the following conclusions about the principles applicable to RSC Order 20 rule 5.

i) The mistake must be as to the name of the party in question and not as to the identity of that party. Such a mistake can be demonstrated where the pleading gives a description of the party that identifies the party, but gives the party the wrong name. In such circumstances a 'mistake as to name' is given a generous interpretation.

ii) The mistake will be made by the person who issues the process bearing the wrong name. The person intending to sue will be the person who, or whose agent, has authorised the person issuing the process to start proceedings on his behalf.

iii) The true identity of the person intending to sue and the person intended to be sued must be apparent to the latter although the wrong name has been used.

iv) Most if not all the cases seem to have proceeded on the basis that the effect of the amendment was to substitute a new party for the party named."

61. Thereafter, having set out the subsequent authorities under r.19.5, Lord Phillips summarised the position under the CPR :

"55. CPR 19.5(3)(a) makes it a precondition of substituting a party on the ground of mistake that:

"The new party is to be substituted for a party who was named in the claim form in mistake for a new party"

It is clear from this language that the person who has made the mistake must be the person responsible, directly or through an agent, for the issue of the claim form. It is also clear that he must be in a position to demonstrate that, had the mistake not been made, the new party would have been named in the pleading.

56. The nature of the mistake required by the rule is not spelt out. This Court has held that the mistake must be as to the name of the party rather than as to the identity of the party, applying the generous test of this type of mistake laid down in Sardinia Sulcis. The 'working test' suggested in Weston v Gribben, in as much as it extends wider than the Sardinia Sulcis test, should not be relied upon.

57. Almost all the cases involve circumstances in which (i) there was a connection between the party whose name was used in the claim form and the party intending to sue, or intended to be sued and (ii) where the party intended to be sued, or his agent, was aware of the proceedings and of the mistake so that no injustice was caused by the amendment. In SmithKline, however, Keene LJ accepted that the Sardinia Sulcis test could be satisfied where the correct defendant was unaware of the claim until the limitation period had expired. We agree with Keene LJ's comment that, in such a case, the Court will be likely to exercise its discretion against giving permission to make the amendment."

62. In Adelson there was also an issue as to the corporate structure of the claimant group (because they were seeking to substitute one company within the group for another). The LCJ said:

"69. We have explained why Morgan Est should not be followed. If those responsible for the Particulars of Claim had knowledge of the corporate structure of the Las Vegas Sands Group and of the part played by each company in the group activities and deliberately decided to sue in the name of the Second Claimant alone, the fact that this decision may have been mistaken will not bring the case within CPR 19.5. To do this the Claimants must establish that those responsible for the Particulars of Claim were under a mistake as to the group structure or the roles played by the members of the group and, but for that mistake, would have included as claimants the Third and Fourth Claimants. This is the very minimum that they need to achieve if they are to have an arguable case that a mistake of name within the Sardinia Sulcis test occurred.

70. The Particulars of Claim were settled by junior counsel, who no longer represents the Claimants, and a declaration of truth was signed on behalf of the Claimants by a member of Salans. No evidence has been adduced to show that there was a mistake on the part of Salans or counsel as to the roles played by the claimant companies, but for which mistake the Third and Fourth Claimants would have been joined in the action."

63. Reference was also made to Insight Group Limited & Anr v Kingston Smith (A Firm) [2012] EWHC 3644 (QB) ; [2013] 3ALL ER 518. In that case, again taking up the point that X may deliberately have sued Y even though it knew that the relevant services had been provided by Z, Leggatt J (as he then was) said:

"57. In order to decide whether the claimant's mistake can be regarded as one of name rather than description, it is thus necessary to distinguish between the following two possible cases:

(1) The claimant sues the LLP in the mistaken belief that the LLP provided the services which are said to have been performed negligently, failing to recognise that the services were provided by the former partnership and not the LLP.

(2) The claimant knows that that the services were provided by the former partnership but mistakenly believes that the LLP is legally liable for the negligence of the earlier firm.

The court has the power to grant relief in case (1) but not in case (2)."

176. Mr Frampton contends that:

i) The Claimants were told by MB's letter of 14 January 2021 that they acted for SRL, and that MB corrected the draft standstill agreement from SARL to SRL to make it even more clear that the correct defendant was SRL

ii) The Claimants have provided no witness evidence (beyond a reference to the draft standstill agreement correction being made by MB in Section 10 of the 23 August 2023 Application Notice as to how or by whom the asserted "mistake" came to be made.

177. Mr Sawtell contends that:

i) It was obvious throughout that the Claimants' intention was to sue the actual architects, and that they had simply overlooked the various references of MB to SRL, and where MB did not correct the Claimants' continued references to SARL expressly except in the correction to the draft standstill agreement

ii) There is no real prejudice in terms of any real misapprehension on the part of SRL or SARL as to what the Claimants intended

iii) This is actually a CPR19.6(3) case rather than a CPR17.4(2) case where the additional requirements of "genuine mistake" etc. are not prescribed.

178. I can see that there is potential force in Mr Sawtell's argument that a genuine mistake was made by someone within the process of drafting the Claim Form. The clear intention was to sue the architects, notwithstanding that the Claimants had been told that it was SRL which was the relevant architect corporate entity. However, it also seems to me that there is considerable force in Mr Frampton's criticisms of the way in which the Claimants have sought to advance this application and the absence of any evidence as to how it came about that SARL were named, who was the person responsible for SARL being named, and what was actually intended by the relevant decision-maker(s). There is also Mr Frampton's argument to the effect that as the

Claimants were told that SRL were the correct entity, they may be taken to have deliberately rejected that and chosen to sue SARL and insist that it was the entity in question.

179. Again, I am hesitant to decide questions of this nature where the jurisdictional and similar matters technically come first. This is all the more so as if the Claim is not struck out as against the First Defendant, but were to be struck out as against the Second Defendant, there would remain an extant Claim to which there would be jurisdiction to add a further party (e.g. SRL), if appropriate, but only on the basis that the Claim as against them would be deemed to have been commenced only on the date of their addition to it (i.e. an equivalent consequence to a Mastercard order albeit on a different underlying basis). While I could, in theory, decide whether or not the present Second Defendant is actually SRL (and not SARL), to do so could inhibit my ability to reach decisions on the various permutations which arise in this case and cause difficulties were there to be an appeal. I think that these matters can best be argued and taken together.

180. It also seems to me that it is in accordance with the overriding objective in these circumstances, where there is to be a further hearing in any event, for the Claimants to be given an opportunity to correct asserted deficiencies in their evidence, and all the more so where the matter has been allowed on the last occasion to proceed on written submissions alone rather than a second oral hearing. Any prejudice to SARL and SRL can be dealt with by a costs order should that turn out to be appropriate.

181. Having weighed up all the matters together, I conclude that it would be in accordance with the overriding objective to adjourn this aspect to the further hearing which is going to take place in relation to the other matters. The parties should liaise as to directions with regard to the filing of any further evidence.

Conclusions

182. For all these reasons:

i) I determine that:

a) A relevant step for service of the Claim Form was not taken in time by the Claimants in accordance with CPR7.5 and the November Order in relation to either the First Defendant or the Second Defendant; and the Claimants' application for a determination or declaration to the contrary is to be refused

b) The Claimants should not be granted relief from sanctions or any similar relief (whether under CPR3.1, 3.10, 6.15 or 6.16 or otherwise) in relation to their failures to comply referred to in sub-paragraph (i) above; but this is not to prevent them seeking any appropriate conditions with regard to any application by either Defendant to seek permission to file an acknowledgment of service in time

c) The Claimants did serve the Claim Form and Particulars of Claim out of time on the First Defendant and SRL (the Court not yet having decided whether or not the SRL is or is to be or treated as the Second Defendant)

d) The First Defendant and SRL (if it is or is to be or treated as the Second Defendant) each require permission to file an acknowledgment of service out of time and which is a precondition of their being able to make any application under CPR11 (and thus to request the court to declare that it has no jurisdiction or to decline to exercise jurisdiction in relation to the Claim)

ii) I will direct when handing-down this judgment, and adjourning that hearing, that:

a) The Claimants file and serve any further evidence in support of their applications in relation to their contentions that SRL is or is to be or is to be treated as being the Second Defendant by 4.30pm on 23 July 2024

b) The Defendants issue and serve any applications (including for permission to file acknowledgment(s) of service out of time and under CPR11) by 4.30pm on 10 September 2024 and also by then file and serve any witness evidence in support of their applications or in answer to the Claimants' further witness evidence

c) The Claimants file and serve any witness evidence in reply to that of the Defendants by 4pm on 1 October 2024

d) The hearing shall be adjourned to a further hearing listed for one day not before 14 October 2024; and:

i) An agreed Supplemental Bundle be lodged not less than 8 days before the hearing

ii) Further Skeleton Arguments be filed and served not less than 4 days before the hearing

iii) A further agreed bundle of authorities be filed not less than 2 days before the hearing

iv) The parties shall liaise and shall file dates of Mutual Availability for that hearing for the period from 14 October to 20 December 2024 by 4.30pm on 11 July 2024

v) All costs are reserved to that hearing

e) There be extended until further order (and which is to be considered at the further (adjourned) hearing):

i) Time for filing any appeal notice in relation to this Judgment

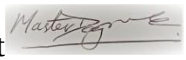
ii) Time for seeking any permission to appeal in relation to this Judgment

f) There be adjourned to and for consideration at the further (adjourned) hearing all questions as to:

i) Time for filing any appeal notice in relation to this Judgment

ii) Permission for appeal in relation to this Judgment.

183. The parties should liaise and submit in a usual way a form of order embodying the above.

ApprovedJudgment  25.6.2024