



Neutral Citation Number: [2020] EWHC 2989 (QB)

Claim No: HQ17000947

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL
(Remote hearing on Teams)

Date: 6 November 2020

Before:

MR JUSTICE LAVENDER

Between:

MK
(a protected party, by his litigation friend, DP)

Claimant

- and -

Buckinghamshire County Council

Defendant

Jamie Burton (instructed by **GT Stewart Solicitors**) for the **Claimant**
Katie Ayres (instructed by **DWF Law LLP**) for the **Respondent**

Hearing date: 15 October 2020

JUDGMENT

Mr Justice Lavender:

(1) Introduction

1. There are four applications before the court:
 - (1) the claimant’s application issued on 13 January 2020 for an extension of the time limited for serving the claim form;
 - (2) the claimant’s application issued on 21 February 2020 for an extension of the time limited for serving the particulars of claim;
 - (3) the defendant’s application issued on 15 September 2020 for an order striking out the claim as an abuse of process; and
 - (4) the claimant’s application issued on 1 October 2020 for an order for anonymity and for permission to amend his earlier applications.
2. I am also asked to make an order appointing a litigation friend for the claimant. Miss Ayres submitted that the claimant’s claim is certain to fail, but there was no application before me for an order striking out the claim on that ground. She also indicated that the defendant intends to apply for a wasted costs order against the claimant’s solicitors, but that too is not a matter which was before me.

(2) Background

3. The claimant was born in Iran on 21 March 1996. He came to the United Kingdom as an unaccompanied child seeking asylum. The defendant council began looking after the claimant in 2010. The claimant has been diagnosed with post-traumatic stress disorder, panic disorder, tic disorder and depression. These conditions have a significant impact on his need for medical and social care.
4. The claimant contends that the defendant has failed in its duties to him in various respects over the course of several years. This has led to proceedings in the Court of Protection (case no 126424190), which resulted in a determination on 15 January 2019 that the claimant lacked capacity to make decisions regarding his care and maintenance, and several applications for judicial review:
 - (1) One concerned a dispute about the claimant’s age. That was resolved by consent in August 2013.
 - (2) Another (CO/422/2015) concerned the welfare duties owed to the claimant under the Children Act 1989 as a “looked after child” and “former relevant child”. I am told that this claim is likely to conclude imminently.
 - (3) A third (CO/2881/2016) concerned the duties owed to the claimant under the Care Act 2014 as an adult requiring care and support. That claim concluded in 2017.
5. The claimant has been represented by the same litigation friend in all of those proceedings. The claimant’s solicitors also sent a number of pre-action letters concerning alleged failures by the defendant in meeting the claimant’s needs between

June 2019 and November 2019. This led to attempts at ADR in the spring and early summer of 2020.

6. The claimant contends that the defendant's alleged failures have resulted in him sleeping rough on a number of occasions because the temporary accommodation provided by the defendant was unsuitable. He contends that the defendant's alleged failures have caused a significant deterioration in his mental health. He has, for example, committed acts of self-harm on several occasions and, most recently, he was detained under section 2 of the Mental Health Act 1983 for part of April 2020. He is currently in temporary accommodation paid for by the defendant, pending the hoped-for implementation of settled arrangements for his accommodation and care.

(3) The Present Action

7. The claim form was issued on 20 March 2017, which was a day less than 3 years after the claimant's 18th birthday. Curiously, no litigation friend was named in the claim form, although it is the position of those representing the claimant that he has lacked capacity to conduct litigation throughout.

8. The brief details of claim were as follows:

“A claim for person injury damages against the Defendant in respect of psychiatric injury, pain, suffering and emotional distress to the Claimant.

A claim for damages under ss 6(1) and 7(1) of Human Rights Act 1998 in respect of a violation by the Defendant of the Claimant's right under Articles 3 and 8 of the European Convention on Human Rights.”

9. Miss Ayres submitted that there was only one claim being advanced in the claim form, namely a claim under the Human Rights Act 1998. I do not agree. The two paragraphs describe two different claims, i.e. a claim for damages for personal injury and a claim for damages under the Human Rights Act.
10. Between 14 July 2017 and 12 September 2019 six applications were made for extensions of the time limited for serving the claim form, which would otherwise have expired on 20 July 2017, pursuant to CPR 7.5(1). The requested extensions of time were granted, most recently until 13 January 2020. In each case, the extension of time was requested on the basis that it was considered appropriate to await the conclusion of the other proceedings before pursuing the present action. This was in part because it was considered to be contrary to the claimant's best interests to pursue this claim before the issues raised in the other proceedings had been resolved, as pursuing this claim might damage the relationship between the claimant and the defendant, and in part because it was considered that the claimant would not be able to give the instructions needed to plead his claims until settled arrangements for his accommodation and care had been put in place.
11. A seventh application for an extension of the time limited for serving the claim form was made on 13 January 2020, i.e. just in time under CPR 7.6(2). The application notice stated that the claimant was seeking:

“An order extending time for service of the claim form (see attached order)”

12. The attached draft order was for an extension of time to 12 May 2020. Master Thornett considered the application and said as follows in an email dated 22 January 2020:

“Despite the reasons stated in support of the Application, I note it is now approaching three years since the Claim Form was issued. I consider it unreasonable to extend time yet further, as distinct from now serving the Claim Form but seeking an extension of time for service of Particulars of Claim and thus pleadings to follow. This course of action allows both the Defendant and the court a degree of control rather than leaving matters entirely in the hands of the Claimant. Rather than dismiss this application, however, I invite the Claimant to reconsider amending the same and it then being on notice.”

13. It will be noted that the Master did not dismiss the application. On the contrary, he envisaged that the action would proceed, but with the claim form being served, which would necessitate an extension of time beyond 13 January 2020.

14. On 29 January 2020 the solicitor who had been handling this case for the claimant, Warwick Norris, handed over conduct of the case to another solicitor, Sepideh Ghaffari. She needed time to read in to the case. On 18 February 2020 she sent a copy of the claim form by email to Lee Bartlett of the defendant’s legal services division. It appears that she mistakenly believed that this constituted valid service of the claim form in accordance with CPR 6.3. However, it is not suggested that the defendant had previously indicated in writing to the claimant that it was willing to accept service by email or indicated the email address to which the claim form must be sent, as required by CPR 6.3(1)(d) and paragraph 4.1(1) of Practice Direction 6A.

15. The defendant did not take any exception to the fact that the claim form had been sent by email until shortly before the hearing on 24 September 2020. Indeed, after an exchange of emails between them, Mr Bartlett said as follows in an email to Ms Ghaffari on 20 February 2020:

“I write in relation to the claim for damages now served upon BCC and your request that the proceedings be stayed or time extended to serve the particulars of claim.

Please accept this email as Bucks CC consent to the proceedings being for stayed for 6 months where after the stay may be reviewed.”

16. On the same day, Ms Ghaffari sent Mr Bartlett a draft consent order and a notice of issue of legal aid. It appeared from the draft consent order that the time for serving the claim form had expired. This prompted Mr Bartlett to write as follows:

“Thank you for your email. I had not appreciated that MK is out of time for serving his claim upon BCC. I will require to take further instructions and in the circumstances suggest that you make your application on notice. In the interim I will seek instructions to agree the renewal of the claim.

The protective claim is now out of time to be progressed and please provide the basis why it should be renewed.”

17. On 21 February 2020 Ms Ghaffari issued the second application notice which is before me. It stated that the Claimant was seeking:

“To stay the current proceedings for 6 months and extend the time for service of the particulars of claim until 2 September 2020. The Defendant has been served with a copy of the Claim form and given an opportunity to agree to the draft order.”

18. The supporting statement said, inter alia, as follows:

“The Court of Protection proceedings concerning MK have concluded with final declarations that he lacked capacity in relation to his residence, care, managing his finances and in relation to making decisions about his travel document. The judicial review proceedings concerning duties owed to MK under the Children Act 1989 remain outstanding with a consent order for settlement put forward on behalf of MK. A number of applications have been made ex-parte for MK by the proposed Defendant. Matters in relation to reaching a final conclusion regarding an accommodation placement and care plan for MK have not been resolved and remain in flux, with the parties negotiating to confirm a permanent accommodation placement and care package for MK. The parties are currently in the process of arranging a roundtable meeting on or around April 2020. It continues to be submitted that these proceedings remain stayed so that matters concerning MK’s care and residence may be resolved. MK is a vulnerable adult who is currently residing in temporary accommodation in the London Borough of Camden.

A further application is made with notice pursuant to the order of Master Thornett dated 22 January 2020 (copy enclosed). The Defendant was served with a copy of the sealed Claim Form on 18 February 2020. An email was forwarded to the Defendant to seek their agreement to the stay/execution of the deadline to serve the Particulars of Claim however the Defendant required more time to consider this matter. As this application is made on notice, the Defendant will have an opportunity to respond.

As per previous applications, it is hoped that once care planning matters are resolved, the issues raised in this claim may then be negotiated with the Defendant through formal correspondence to settle the claim without recourse to the court proceedings. It is considered that this would be in line with the overriding objective and therefore further reason why it is appropriate to stay the proceedings and provide further extension for the service of the Particulars of Claim.”

19. On 12 March 2020 Master Thornett enquired of the claimant’s solicitors whether the application was opposed or not and Ms Ghaffari forwarded this enquiry to Mr Bartlett. On 20 March 2020 DWF Law LLP (“DWF”) wrote to Ms Ghaffari enclosing a Notice of Acting and said as follows:

“Our client requires you to make an on notice application for an extension of time for service of the Particulars of Claim. It is remarkable that it took you almost three years after issuing the Claim form to notify our client of this matter. Your application should be supported by a witness statement explaining the background to the claim, the reasons why you maintain that our client is legally

liable and an explanation as to why there have been delays in progressing the claim. We will then consider whether to agree to the application.

Your correspondence refers to “ongoing negotiations”. With whom have there been negotiations? About what? And what is the current position?”

20. This is a curious letter, in that it was requiring the claimant’s solicitors to do that which they had already done a month before, i.e. to issue an application for an extension of the time limited for serving the particulars of claim. DWF chased for a reply on 26 March 2020 and Ms Ghaffari sent a holding reply on 6 April 2020, saying that she was seeking instructions from her client. No substantive reply was ever sent. Indeed, the claimant’s solicitors did not communicate at all with DWF in the period from 7 April to 6 August 2020, despite chasing emails from DWF on 17 April, 5 May, 15 June and 13 July 2020.
21. A further chasing email on 6 August 2020 prompted a response from Ms Ghaffari that the matter had now been transferred to her colleague, Matthew Court. (That had happened on 1 June 2020.) Another chasing email sent to Mr Court on 26 August 2020 prompted a reply from him that he hoped to be in a position to update DWF shortly. Despairing of ever receiving a reply to their letter of 20 March 2020, on 15 September 2020 DWF issued the third application which is before me, seeking an order striking out the claim as an abuse of process pursuant to CPR 3.4(2)(b).
22. Meanwhile, no reply was ever sent to Master Thornett’s query. The court did not list either of the claimant’s applications for hearing. This was presumably a consequence of the pandemic.
23. Rebecca Hill of the claimant’s solicitors has explained that Mr Norris, Ms Ghaffari and Mr Court have now all left the firm. She took over the matter on 17 September 2020. She has also explained that work was being done in the period from March to September 2020 to progress the claimant’s claim, including obtaining relevant documents by way of subject access requests to the defendant and other bodies. Moreover, the claimant and defendant have had continuing dealings with one another during that period in connection with the underlying dispute about the claimant’s accommodation and care. However, the failure to respond to DWF’s letter was inappropriate and unjustifiable.
24. The defendant’s application was listed before me on 24 September 2020. By Miss Ayres’ skeleton argument for that hearing, the defendant raised an objection for the first time to the service, or purported service, of the claim form by email. At that stage, it was arguable that the claim form had still not been served, eight months after the expiry of the time for doing so on 13 January 2020 and 4 months after the period to 12 May 2020 for which an extension of time had been sought in January. On the other hand, I saw force in Mr Burton’s submission that, regrettable though the conduct of the claimant’s solicitors in 2020 had been, this was not a case of abuse of process.
25. I adjourned the defendant's application to 15 October 2020, to be heard with the claimant's applications dated 13 January and 21 February 2020 and any new application made by the claimant by 4 pm on 1 October 2020. I ordered the claimant to pay the defendant’s costs of the hearing on 24 September 2020 in any event. I observed that the defendant had been quite right to bring this case to the attention of the court and that the claimant was now in the last chance saloon.

26. The claimant served the claim form by post, with the deemed date of service being 29 September 2020. On 1 October 2020 the claimant issued the fourth application before me, seeking:
- (1) an order for his anonymity;
 - (2) the amendment of his application notice issued on 13 January 2020 to request an extension of the time limited for service of the claim form until 18 February 2020 or 29 September 2020;
 - (3) the amendment of his application notice issued on 21 February 2020 to request an extension of the time limited for service of the particulars of claim to 31 March 2021; and
 - (4) the extensions of time sought.
27. Unfortunately, the application notice was not issued until 4.18 pm. I was told that this was because Mr Burton had been off work with an injured hand, which had made typing difficult for him. On 1 October 2020 he had only just fully returned back at to work and he did not leave enough time to complete the application notice in time to be filed at 4 pm.

(4) The Applications

(4)(a) The Litigation Friend

28. I will make an order appointing the proposed litigation friend, who has filed a certificate of suitability and made a witness statement explaining her involvement with the claimant. Without making a final determination on the point (which might be disputed in due course), it does appear on the information presently available to me that the claimant lacks capacity to conduct litigation. A litigation friend is therefore needed. The litigation friend proposed has acted as such in all of the claimant's other litigation and knows and is trusted by the claimant. She appears to be a suitable person to act as litigation friend.

(4)(b) The Defendant's Application

29. Miss Ayres did not invite me to make any decision on the defendant's application, on the basis that my decision either to grant or to refuse the extensions of time sought by the claimant would render the defendant's application otiose. Mr Burton contended that the defendant's application was misconceived, although he changed his position during the hearing as to what application he submitted that the defendant should have made instead of that which it did make. I do not propose to make a decision on the defendant's application.
30. It seems to me that the defendant's application, whether it was correct in point of form or not, has served a useful purpose in getting this case before the court, but that its purpose has now been served. The evidence relied on in support of the defendant's application is relevant to the central questions which I have to decide, namely whether or not to extend the time limited for service of the claim form and the particulars of claim.

(4)(c) The Application made on 1 October 2020

31. There was a dispute as to whether I should hear the application made on 1 October 2020, given that it was issued 18 minutes late. Miss Ayres contended that my order of 24 September 2020 should be applied strictly, given the background and given what I said on that occasion. She had a point. Mr Burton sought, in effect, relief from sanction. The 18 minutes' delay had no practical effect and an explanation has been offered for it which is consistent with efforts being made in good faith to comply with my order. Looking at all the circumstances, I bear in mind that, in substance, apart from seeking an order for anonymity (which was not contested), the application seeks no more than it was obvious on 24 September 2020 that the claimant would be seeking at this hearing, namely extensions of time for serving the claim form and the particulars of claim.
32. Further, I consider that the applications for orders amending the earlier application notices were strictly unnecessary. By the earlier applications, the claimant sought extensions of the time limited for serving the claim form and the particulars of claim. He specified in each case the date to which he was seeking an extension, but the applications have not come before the court until after those dates. It seems to me that in such circumstances it is open to the court to grant longer extensions than were originally sought. The amendment applications were merely making plain that which was already obvious at the hearing on 24 September 2020. Accordingly, I decided that the course which was most consistent with the overriding objective was for me to hear the application made on 1 October 2020.
33. As to the application made on 1 October 2020:
- (1) I will make an order for anonymity pursuant to CPR39.2(4), on the basis that it is necessary to secure the proper administration of justice and to protect the interests of the claimant in circumstances where it will be necessary in this action to make extensive reference to the claimant's medical records and his mental health and other matters in respect of which he has a right to privacy.
 - (2) As I have said, I regard the applications for amendments to the claimant's earlier application notices as unnecessary. Had I regarded them as necessary, I would have allowed them, since to do otherwise would have defeated the purpose of my decision on 24 September 2020 to adjourn the matter to 15 October 2020.
 - (3) Insofar as the application made on 1 October 2020 constituted a free-standing application for an extension of the time limited for serving the claim form, it is accepted that the criteria in CPR 7.6(3) are not met. I dismiss the application if and insofar as it makes such an application.

(4)(d) The Claim Form

34. Mr Burton invited me to take one of three courses, i.e.:
- (1) to extend the time limited for serving the claim form to 18 February 2020, on the basis that, in his submission, the defendant had waived its right to assert that service by email was invalid:

- (a) by describing the claim from as “now served” in Mr Bartlett’s email of 20 February 2020; and/or
 - (b) by issuing its application for an order striking out the claim; or
 - (2) to extend the time limited for service of the claim form to 29 September 2020, when it is accepted that the claim form was deemed to be served by post, albeit out of time; or
 - (3) to extend the time limited for service of the claim form to 18 February 2020 and to make an order pursuant to CPR 6.15(2) that sending a copy of the claim form by email on that date was good service.
35. I was not referred to any authority for the proposition that invalid service of a claim form is to be treated as valid service if the defendant:
- (1) fails to take the point about invalid service promptly;
 - (2) refers to the claim form as having been served; or
 - (3) applies for the claim to be struck out.
36. Instead, I was referred to *Global Multimedia International Ltd v ARA Media* [2007] 1 All E.R. (Comm) 1160. However, that was a case concerning submission to the jurisdiction by a defendant overseas who had been validly served with the claim form, but who contended that the court should not have exercised jurisdiction over him. I do not consider that that judgment has any bearing on the present case. It concerned the application of CPR 11(5), which provides that a defendant is to be treated as having accepted that the court has jurisdiction to try his claim if he files an acknowledgment of service and does not (within the period specified in CPR 11(4)) make an application either disputing the court’s jurisdiction or arguing that the court should not exercise its jurisdiction. The defendant in this case has not filed an acknowledgment of service, so CPR 11(5) is inapplicable.
37. I was not referred to any case in which, whether by virtue of waiver or estoppel or otherwise, invalid service of a claim form was treated a valid service thereof. Moreover, I note that, in his email of 20 February 2020, Mr Bartlett does not expressly refer to, and does not appear to have addressed his mind to, the fact that the claim form had been sent by email. The defendant’s position since 20 February 2020 has been that the claim form was not validly served because it was out of time. That was the context in which the defendant made its application, and so the making of that application was not inconsistent with a contention that the claim form had not been validly served because it was sent by email. I do not see any good reason for deeming that bad service was good service.
38. I will proceed on the basis that the claim form was not validly served until it was posted to the defendant (since CPR 7.5(1) provides that the date which matters is the date of posting). However, I bear in mind that the contents of the claim form were brought to the defendant’s attention on 18 February 2020, that the defendant was thereafter able to participate in the proceedings (and did so by issuing its application), that the defendant did not take the point about service by email until just before the hearing on

24 September 2020 and that the claimant served the claim form by post as soon as the point was taken.

39. It is relevant to consider the position as to limitation. The claimant's position is that at all material times he has been under a disability, with the result that section 28 of the Limitation Act 1980 operates to postpone the start of the limitation period for his claim for damages for personal injury until such time as he ceases to be under a disability. If that is right (and it may or may not be disputed hereafter), then the claimant could issue a fresh claim form today bringing the same claim. As Ms Ayres submitted, that is a factor which can be said to cut both ways, since, if it is right, there is no prejudice to either party if this claim does, or does not, continue.
40. The limitation period for the Human Rights Act claim is one year. If I do not extend the time limited for service of the claim form, the claimant will lose the opportunity to pursue his Human Rights Act claim in respect of the period from 17 March 2016 to 17 March 2017. On the other hand, if I do extend the time limited for service of the claim form, the defendant will have to meet that claim. The Human Rights Act claim arises out of the same facts as the claim for damages for personal injury, but Mr Burton submitted that it may be easier for the claimant to establish liability under the Human Rights Act, since the test for causation is less stringent and the question whether the defendant assumed responsibility for the claimant's care does not arise under the Human Rights Act.
41. I note also that, whereas the claimant contends that the defendant's alleged failures have continued since the claim form was issued, the defendant's position is that the claimant may only pursue in this action claims which had arisen before the issue of the claim form. It may be, therefore, that a fresh claim form has to be issued in any event.
42. Perhaps the most striking feature of this case is that the court has accepted on six occasions that there was good reason to extend the claim form and has granted extensions for a total of a few days short of two and a half years. The defendant has not applied for those extensions to be set aside and Miss Ayres did not contend before me that the court was wrong to grant them. The starting point, therefore, is that there was in this case good reason for a substantial extension of the time limited for serving the claim form. Moreover, that reason did not cease to exist on 13 January 2020. The related proceedings had not concluded then and have still not concluded. The claimant remains in temporary accommodation. Settled arrangements for his accommodation and care are yet to be put in place. Meanwhile, his condition took a significant turn for the worse in April.
43. In addition, the effect of Master Thornett's indication in January was that there should be a further extension of the time limited for service of the claim form, albeit this time with the application being made on notice to the defendant and including an application for an extension of the time limited for the service of the particulars of claim. In those circumstances, I would have had little hesitation in extending the time limited for serving the claim form to 18 February 2020, if the claim form had been validly served then.
44. The delay since then in serving the claim form has had little practical effect, because the defendant had a copy of the claim form, the question whether to extend time still had to be addressed and the application for an extension of time was not heard until

after the claim form had been served. The reason for the delay is Ms Ghaffari's mistake, compounded by her and Mr Court's refusal to engage with DWF. However, I also bear in mind that the claim form would no doubt have been served by post earlier if the defendant had taken the point about email service earlier. It is also relevant to note that all of the matters raised before me might have been addressed sooner if the court had listed the claimants' applications for hearing sooner.

45. In all the circumstances, I consider that the course which is most consistent with the overriding objective is to extend the time limited for serving the claim form to 29 September 2020.

(4)(e) The Particulars of Claim

46. I accept Mr Burton's submission that drafting the particulars of claim will be a substantial exercise, since it requires collating and considering a substantial quantity of medical and other records which have been gathered from different sources, obtaining instructions thereon from a claimant with mental health problems and obtaining a report from an independent social worker. Miss Hill's evidence is that the claimant's solicitors have not been inactive in this regard since January. I see force in Mr Burton's submission that it is only now that it is appropriate to seek to take instructions from the claimant.
47. It seems to me that it is consistent with the previous decisions of the court and with my decision in relation to the claim form that I should now allow time for the particulars of claim to be drafted. I will extend the time limited for serving the particulars of claim to 31 March 2021, as requested. Miss Ayres invited me to make an unless order. Since this is a first extension, I will not do that, but, since it is a substantial extension, I will order that any application for a further extension of time must be made by 17 March 2021.

(5) Conclusion

48. For the reasons given in this judgment:
- (1) I appoint the proposed litigation friend.
 - (2) I make an order for anonymity.
 - (3) I extend the time limited for service of the claim form to 29 September 2020.
 - (4) I extend the time limited for service of the particulars of claim to 31 March 2021.
 - (5) I order that any application for a further extension of time must be made by 17 March 2021.
49. Finally, I express my gratitude to both counsel for their clear and helpful submissions.