Case No: HT-2020-000111

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2021] EWHC 947 (TCC)

Royal Courts of Justice
Rolls Building
London, EC4Y 1NL

Date: 19/04/2021

Before:

MRS JUSTICE O'FARRELL DBE

- -

Between:

BOXWOOD LEISURE LIMITED	**Claimant**
- and -	
(1) GLEESON CONSTRUCTION SERVICES LIMITED **(2) M J GLEESON GROUP LIMITED**	**Defendants**

- -
- -

Martin Bowdery QC (instructed by **Ashfords LLP**) for the **Claimant**
Tom Owen (instructed by **Systech Law**) for the **Defendants**

Hearing date: 27th November 2020
Further notes by email: 18th December 2020

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Approved Judgment

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

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Monday19th April 2021 at 10:30am"**

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. The matter before the court is an application by the claimant ("Boxwood") for relief that would render valid the late service of its claim form. The application is opposed by the defendants ("Gleeson").

2. The issues raised are:

   i) whether the court's power to grant relief is limited to an extension of time for service of the claim form pursuant to CPR 7.6;

   ii) whether the court has power to grant relief from sanctions pursuant to CPR 3.9;

   iii) whether the court has power to rectify the failure to serve the claim form pursuant to CPR 3.10 or its general case management powers in CPR 3.1(2)(m);

   iv) whether the court has power to vary the Order dated 7 April 2020 so as to extend time for service of the claim form; and

   v) whether the court should exercise any such discretion in favour of Boxwood.

Background facts

3. On 8 July 2003 Boxwood and the first defendant ("GCSL") entered into a contract executed as a deed whereby GCSL agreed to carry out the design and construction of three indoor leisure centres on sites at Erith, Crook Log and Sidcup.

4. The second defendant ("MJG") undertook to guarantee GCSL's performance under the contract by a deed dated 8 July 2003.

5. On 23 March 2006 Boxwood, GCSL and MJG entered into a deed of variation to the contract.

6. The works were completed by about March 2008.

7. On 24 March 2020, Boxwood commenced these proceedings, seeking damages against both defendants for breach of contract and/or negligence and/or against MJG in respect of the guarantee.

8. Boxwood's case is that the design and/or construction of the leisure centre at Sidcup was defective, resulting in water ingress, deterioration of the external fabric of the building and inadequate fire protection measures. It claims damages in the sum of £683,212.66 in respect of the estimated cost of remedial works.

9. On 24 March 2020 Boxwood issued an application for directions pursuant to paragraph 12 of the TCC pre-action protocol and/or for an order under CPR 7.6, including an extension of the period for service of the claim form and particulars of claim until 2 April 2021.

10. The application was opposed by Gleeson, who sought an order that the claim form be served by 16 April 2020, the particulars of claim by 4 June 2020 and a stay thereafter to allow the parties to comply with the pre-action protocol.

11. The parties submitted witness statements, setting out the history of the dispute and their respective arguments.

Order dated 7 April 2020

12. On 7 April 2020 the court made the following order:

> "UPON READING the application of the Claimant dated 24 March 2020
>
> AND UPON reading the witness statements of Mathilda Traill dated 24 March 2020 and 6 April 2020 respectively
>
> AND UPON reading the witness statements of Neil Hunter dated 2 April 2020 and 6 April 2020 respectively
>
> IT IS ORDERED THAT:
>
> 1. The period for service of the Claim Form and Particulars of Claim is extended until 10 September 2020.
>
> 2. The proceedings shall be stayed from 13 September 2020 to 10 December 2020 to allow time for the parties to comply with the Pre-Action Protocol for Construction and Engineering Disputes.
>
> 3. The Defence shall be served by 17 December 2020.
>
> 4. Costs of the application are costs in the case.
>
> 5. Liberty to apply.
>
> REASONS
>
> (1) The Court has the benefit of witness statements from both parties and this matter can be dealt with on paper to avoid the time and costs of a remote hearing.
>
> (2) The Claimant is entitled to an extension of time for service of the Claim Form and Particulars of Claim, having regard to the difficulties caused by the COVID-19 crisis. The Defendants' suggestion that the Claimant's expert should flout the Government directions to "stay at home unless necessary" is unrealistic.

> (3) However, the claims are very old and the Defendants are entitled to expect the Claimant to identify, as quickly as reasonably practicable, the allegations made so that the Defendants understand the case against them and can seek to pass on any claims if so advised. The extended date for service will enable the Claimant to carry out any further investigations by its expert and provide a properly pleaded case.
>
> (4) It is noted that the Defendants have issued protective proceedings against sub-contractors and other potential parties. It is a matter for the Defendant to seek any extensions of time if necessary for it to advance those claims."

13. There was no appeal against the order and no application to vary the terms was made under the liberty to apply provision.

14. On 8 September 2020 a trainee solicitor at Ashfords, solicitors acting for Boxwood, sent a letter by email to Systech, solicitors acting for Gleeson, stating:

> "We hereby enclose, by way of service upon you, the Claimant's Particulars of Claim and Response Pack in respect of the above matter.
>
> We also enclose our client's Initial Disclosure List in accordance with paragraph 5 of Practice Direction 51U. An electronic copy of the Initial Disclosure is provided with the emailed version of this letter …"

15. Attached to the email were the particulars of claim, acknowledgement of service forms and initial disclosure. The documents sent to Systech did not include the claim form.

16. On 14 September 2020 Ashfords appreciated that the claim form had not been served and sent a further letter by email to Systech, stating:

> "Without prejudice to our prior service of the Particulars of Claim in respect of this matter on 8 September 2020, we hereby enclose, by way of service upon you, the Claimant's Claim Form along with the Particulars of Claim, Response Pack and our client's Initial Disclosure List …"

17. The attachments to the email included the claim form.

18. On 17 September 2020 Systech sent a reply by email to Ashfords, stating:

> "We refer to your emails of 8 and 14 September 2020. The Claim Form was not served by 10 September 2020, as ordered by O'Farrell J. No application to extend the time for

> compliance under CPR r.7.6(3) has been made. The purported proceedings are therefore a nullity."

The application

19. On 23 September 2020 Boxwood issued this application, seeking an order that:

    i) pursuant to CPR 3.9, 1.2 and 3.1(2)(m), Boxwood be granted relief from its failure to comply with the order dated 7 April 2020 and its failure to serve its claim form by 10 September 2020;

    ii) pursuant to CPR 3.10, 1.2 and 3.1(2)(m) the Court should exercise its general power to rectify an error of procedure being Boxwood's failure to comply with the order dated 7 April 2020; and

    iii) the order dated 7 April 2020 at paragraph 1 be varied such that the claim form served on 14 September 2020 can be regarded as having been properly served.

20. The court has had the benefit of the following witness statements:

    i) four witness statements made by Mathilda Traill of Ashfords LLP, dated 24 March 2020, 6 April 2020, 23 September 2020 and 22 November 2020 respectively;

    ii) three witness statements made by Neil Hunter, a consultant solicitor at Systech Solicitors, dated 2 April 2020, 6 April 2020 and 23 September 2020 respectively.

21. The circumstances in which Boxwood failed to serve the claim form by 10 September 2020 were explained in the third witness statement of Ms Traill:

> "13. On 8 September 2020, a trainee solicitor in our department served the Particulars of Claim by email (timed at 15.38) and by first class post at the [Systech Solicitors' address]. …
>
> 14. Regrettably, however, we omitted to serve the Claim Form. The Particulars of Claim were returned to us on 14 September 2020 with the following label on the envelope indicating "addressee gone away"…
>
> 15. I then looked to see which address we had used to serve the Claim Form and realised that we had not served it.
>
> 16. Typically, during 'normal' working times (by which I mean pre Covid-19 lockdown restrictions), we receive Orders in hard copy from the Court even if the case is being conducted via CE-File (although this is not always consistent). These hard copies are given to the matter partner who will then ensure that the relevant dates and actions are entered, with appropriate timed

> reminders, into a key dates diary that is accessible to the whole team. Extracts from this collective diary are circulated to the whole team on a weekly basis and in advance of deadlines. The same diary entries are usually replicated in the individual diaries of the fee earners involved in the specific matter so that nothing is missed. In this case, given that everyone was in lockdown, we only received the Order electronically (albeit some district registries were still issuing hard copy orders). Unfortunately, it was not added to everyone's diaries in the way that it normally would have been. The relevant dates were only added to my diary, and during the week of service, I was away on annual leave. Normally this would not be a problem, because my holiday cover would note the date for service of the Claim Form which would also have appeared in their diary pursuant to the entries that would normally have been made upon first receipt of the Order. However, as I said, that did not happen in this case, so the need to serve the Claim Form alongside the Particulars of Claim simply slipped through the net.
>
> 17. After I realised our mistake on 14 September 2014, we served the Claim Form (and Particulars of Claim) by email timed at 14.24 that same day.
>
> …
>
> 27. The Covid-19 pandemic disrupted our usual working arrangements for ensuring that we comply with Orders. I am sure that if we had all been working in the office as usual over the summer months, this would have been avoided, because it would have been properly diarised, or someone would have noticed during the course of our day-to-day engagement, interaction and meetings which have been absent for so long."

Parties' submissions

22. Mr Bowdery QC, leading counsel for Boxwood, submits that the failure to serve the claim form by 10 September 2020 amounted to a breach of the order dated 7 April 2020, rather than a failure to comply with CPR 7.5 and/or 7.6. Therefore, the Court has jurisdiction to grant relief from sanctions under CPR 3.9, 1.2 and/or 3.1(2)(m); alternatively, power to rectify an error of procedure under CPR 3.10, 1.2 and/or 3.1(2)(m); alternatively, power to vary the order dated 7 April 2020 so that the claim form served on 14 September 2020 can be regarded as having been properly served.

23. Applying the three-stage test set out in *Denton v TH White Ltd* [2014] 1 WLR 3926 for an application under CPR 3.9, Mr Bowdery submits that the failure was not a serious and/or significant failure to comply with the order of 7 April 2020. The

particulars of claim were served within the specified time, so that Gleeson had full details of the claim against them, and the claim form was served as soon as the mistake was identified. The failure to serve the claim form was inadvertent and wholly accidental. The oversight was rectified quickly within a matter of days. There was no prejudice to Gleeson. The claim form was filed on CE-file when issued on 24 March 2020, allowing Gleeson to view and download it; indeed they must have seen it when filing evidence for the purpose of opposing the initial application to extend time and stay the proceedings. Therefore, from at least April 2020, Gleeson had full awareness of the proceedings, allowing them to issue seventeen claim forms against other parties, and from 10 September 2020 they had full particulars of the claim against them. The proceedings have been stayed from 13 September 2020, allowing the parties to comply with the pre-action protocol. In all the circumstances, this would be an appropriate case in which to allow a further short period of time to validate service of the claim form.

24. Mr Owen, counsel for Gleeson, submits that CPR 7.6 provides a complete code for extensions of time for service of a claim form. The order dated 7 April 2020 extended time for service of the claim form to 10 September 2020 pursuant to CPR 7.6. As the application for a further extension of time for service of the claim form was made after the end of the period specified by CPR 7.5 and after the date set out in the order made under CPR 7.6, the court could make such an order only if the claimant had taken all reasonable steps to comply with CPR 7.5 but been unable to do so, and acted promptly in making the application. There has been no application by Boxwood for an extension of time under CPR 7.6(3) because it recognises that it would be unable to satisfy the conditions required to enable the court to grant relief. In these circumstances, the court does not have any discretion to grant an extension of time for service of the claim form or the other relief sought.

The material procedural rules

25. CPR 7.2 provides:

> "(1) Proceedings are started when the court issues a claim form at the request of the claimant.
>
> (2) A claim form is issued on the date entered on the form by the court."

26. CPR 7.5(1) provides:

> "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."

27. In this case, the methods of service selected were (a) email and (b) first class post; the table identified the relevant steps required as (a) sending the email and (b) posting.

28. CPR 7.6 makes provision for extensions of time to be granted for service of a claim form:

> "(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."

29. CPR 1.2 provides:

> "The court must seek to give effect to the overriding objective when it –
>
> (a) exercises any power given to it by the Rules …"

30. CPR 3.1 sets out the Court's general case management powers, including at (2):

> "Except where these rules provide otherwise, the court may –
> …
>
> (m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective …"

31. CPR 3.9 empowers the Court to grant relief from sanctions:

> "(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."

32. CPR 3.10 gives the court a general power to rectify matters where there has been an error of procedure:

> "Where there has been an error of procedure such as a failure to comply with a rule or practice direction –
>
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
>
> (b) the court may make an order to remedy the error."

Applicable legal principles

33. In *Vinos v Marks & Spencer plc* [2001] 3 All ER 784 the Court of Appeal considered whether any extension of time should be granted under CPR 7.6 in circumstances where the defendant had been notified of the issue of a claim form but the claim form had not been served within four months as required by CPR 7.5 and the application was made after expiry of that period. The court refused to grant relief on the basis that it did not have power to do so, as explained by May LJ at [20]:

> "The meaning of rule 7.6(3) is plain. The court has power to extend the time for serving the claim form after the period for its service has run out "only if" the stipulated conditions are fulfilled. That means that the court does not have power to do so otherwise. The discretionary power in the rules to extend time periods - rule 3.1(2)(a) − does not apply because of the introductory words. The general words of Rule 3.10 cannot extend to enable the court to do what rule 7.6(3) specifically forbids, nor to extend time when the specific provision of the rules which enables extensions of time specifically does not extend to making this extension of time. What Mr Vinos in substance needs is an extension of time - calling it correcting an error does not change its substance. Interpretation to achieve the overriding objective does not enable the court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored. It would be erroneous to say that, because Mr Vinos' case is a deserving

> case, the rules must be interpreted to accommodate his particular case. The first question for this court is, not whether Mr Vinos should have a discretionary extension of time, but whether there is power under the Civil Procedure Rules to extend the period for service of a claim form if the application is made after the period has run out and the conditions of rule 7.6(3) do not apply. The merits of Mr Vinos' particular case are not relevant to that question. Rule 3.10 concerns correcting errors which the parties have made, but it does not by itself contribute to the interpretation of other explicit rules. If you then look up from the wording of the rules and at a broader horizon, one of the main aims of the Civil Procedure Rules and their overriding objective is that civil litigation should be undertaken and pursued with proper expedition. Criticism of Mr Vinos' solicitors in this case may be muted and limited to one error capable of being represented as small; but there are statutory limitation periods for bringing proceedings. It is unsatisfactory with a personal injury claim to allow almost three years to elapse and to start proceedings at the very last moment. If you do, it is in my judgment generally in accordance with the overriding objective that you should be required to progress the proceedings speedily and within time limits. Four months is in most cases more than adequate for serving a claim form. There is nothing unjust in a system which says that, if you leave issuing proceedings to the last moment and then do not comply with this particular time requirement and do not satisfy the conditions in rule 7.6(3), your claim is lost and a new claim will be statute barred. You have had three years and four months to get things in order. Sensible negotiations are to be encouraged, but protracted negotiations generally are not. In the present case, there may have been an acknowledged position between the parties that the defendants' insurers would pay compensation; but it is not suggested that they acted in any way which disabled the defendants in law or equity from relying on the statutory limitation provisions and on the Civil Procedure Rules as properly interpreted."

34. Peter Gibson LJ agreed, stating at [27]:

> "A principle of construction is that general words do not derogate from specific words. Where there is an unqualified specific provision, a general provision is not to be taken to override that specific provision. Rule 7.6 is a specific sub-code dealing with the extension of time in all cases where the time limits in rule 7.5 have not been or are likely not to be met. The sub-code sets out in some detail what the claimant must do if he wants an extension of time and the circumstances in which the court may exercise the discretion conferred on it to extend the time: rule 7.6(3). That the circumstances specified in sub-paragraphs (a), (b) and (c) of rule 7.6(3) are the sole relevant

> conditions for the discretion to be exercisable seems to me to be made crystal clear by the words "only if". It is plain that the general power in paragraph 3.1(2)(a) to extend time cannot override rule 7.6. Nor, in my judgment, could the general power in rule 3.10 to remedy a failure to comply with a rule be pressed into service to perform the like function of, in effect, extending time. Even though rule 3.10 differs from rule 3.1(2) in not having wording to the effect of "except where the rules provide otherwise", that is too slight an indication to make rule 3.10 override the unambiguous and restrictive conditions of rule 7.6(3)."

35. In *Kaur v CTP Limited* [2001] CP Rep. 34 a similar issue arose on an application for relief from sanctions pursuant to CPR 3.9 in respect of the late service of a claim form. Having considered the Court of Appeal judgment in *Vinos*, Waller LJ stated at [19]:

> "It will be noted that there was no reference in that judgment to 3.9. But the reasoning of the court is compelling and, if the situation were that 7.6 applies to the situation which exists in this case, then, as it seems to me, the same reasoning there adopted by the court for saying that no relief could be claimed under 3.10 would be as applicable to 3.9. It may be that 3.9 was not referred to on the basis that it really had no application, since it applied only to situations in which a court had imposed a sanction. It is unnecessary to reach a final conclusion on that, but that certainly seems a possible interpretation of 3.9. But in any event if the situation were, as accepted, that 7.6 applied, it is clear in my view that the reasoning of the two-man court in that case would apply as much to 3.9 as it did to 3.10."

36. In *Elmes v Hygrade Food Products plc* [2001] CP Rep 71 the Court of Appeal considered this question in the context of service of proceedings on the defendant's insurers instead of the defendant. The claimant's efforts to persuade the court that CPR 3.10 and 6.8 could be applied to deem such service effective were rejected per Simon Brown LJ at [13]:

> "Attractively though the argument is put and tempting though it is to try and find some way of denying the defendants the windfall of a good Limitation Act defence, thereby throwing the relevant liability upon the claimant's solicitors' insurers, I, for my part, have no doubt that it must be rejected. The fatal flaw in the argument is this. It necessarily implies that rule 6.8, the rule which provides for service by an alternative method, can be applied retrospectively. If one asks what order the court is to make to rectify the mistake made here by the claimant's solicitors, it can only be an order under 3.10 that an order for alternative service, not in fact made under 6.8, shall be deemed to have been made. But the plain fact is that no rule 6.8 order here was made and, of course, there was never an application for alternative service, let alone for an order dispensing with

> service. Nor, it seems to me worth observing, would it ever have been proper to make any such order in this case. Mr. Porter acknowledges as much. As he observes, but for the mistake there would never have been any necessity for such an order."

37. In *Godwin v Swindon BC* [2002] 1 WLR 997 the Court of Appeal considered again the application of CPR 7.6 to the exclusion of other, more general rules, where the claimant posted the claim form within the extended time period granted by the county court but the deemed delivery provision in CPR 6.7 resulted in the claim form being served late. May LJ stated at [50]:

> "… The heart of the matter, in my view, is that a person who has by mistake failed to serve the claim form within the time period permitted by rule 7.5(2) in substance needs an extension of time to do so. If an application for an extension of time is not made before the current time period has expired, rule 7.6(3) prescribes the only circumstances in which the court has the power to grant such an extension. Just as *Vinos v Marks & Spencer plc* [2001] 3 All ER 784 decides that the general words of rule 3.10 cannot extend to enable the court to do what rules 7.6(3) specifically forbids, I do not consider that rules 6.1(b) or 6.9 can extend to enable the court to dispense with service when what would be done is in substance that which rule 7.6(3) forbids. If rule 6.9 did so extend it would be tantamount to giving the court a discretionary power to dispense with statutory limitation provisions... I do consider that rule 6.9 does not extend to extricate a claimant from the consequences of late service of the claim form where limitation is critical and rule 7.6(3) does not avail the claimant."

38. In *Steele v Mooney* [2005] 1 WLR 2819 the claimant failed to serve the claim form within the four month period stipulated in CPR 7.5. Prior to expiry of the period for service, the claimant sent a draft consent order to the defendants, providing for: (a) an extension of time for service of the particulars of claim and supporting documents, and (b) permission to serve the particulars of claim and supporting documents, including the claim form, by an extended date. The third defendant signed and returned the draft consent order, the second defendant indicated that an application would be required to the court to extend time for service of the claim form and the first defendant made no response. The claimant made the application to the court, requesting an extension of time for the particulars of claim and supporting documentation but, by mistake, did not include reference to an extension of time for service of the claim form. The court made orders on two occasions, on each occasion extending time for service of the particulars of claim and supporting documentation as requested. The Court of Appeal held that the District Judge was entitled to remedy the mistake pursuant to CPR 3.10. In giving the judgment of the court, Dyson LJ stated:

> "[19] In our judgment, it is clear that a failure to serve a claim form within the period specified by rule 7.5(2) is a procedural error (unless the claimant obtains an extension of time under rule 7.6(2) or (3)). This was implicitly accepted to be the

position in *Vinos*, where the argument proceeded on the basis that the failure to serve the claim form in accordance with rule 7.5(2) would have been a procedural error capable of being remedied under rule 3.10 but for the prohibition in rule 7.6(3).

[20] But procedural errors are not confined to failures to comply with a rule or practice direction. A party may take a procedural step which is permitted by the rules and practice directions, but which he takes in error. A party may by mistake do X when he intended to do Y, where both X and Y are procedural steps and both are permissible. There can be no doubt that the making of an application for an extension of time for taking some step in the litigation process is a procedural step, and that an application for an extension of time for service of the claim form (whether under rule 7.6(2) or (3)) is a procedural step, as is an application for an extension of time for service of the particulars of claim under the general power provided by rule 3.1(2) (see *Totty v Snowden* [2001] EWCA Civ 1415, [2001] 4 All ER 577). If a claimant applies for an extension of time for service of the particulars of claim when he intends to apply for an extension of time for service of the claim form, he makes an error of procedure.

…

[28] The applications for an extension of time were clearly intended to be applications for an extension of time for service of the claim form, but by mistake they referred to the wrong, albeit closely related, document ie the particulars of claim. Our reference to what was intended is not to Ms Watkins' subjective state of mind. It is to what she must be taken to have intended on an objective assessment of the terms in which the applications were expressed and all the surrounding circumstances. If the error were a failure to make an application for an extension of time at all within the period specified by rule 7.5(2), then an application to remedy that error would in substance be an application for an extension of time after the expiry of the specified period, and would fail for the reasons stated in *Vinos*: it would in substance be an application for an extension of time for service of the claim form after the expiry of the time for service in circumstances where such an extension of time would be prohibited by rule 7.6(3). But for the reasons that we have given, the application of 18 February 2004 was not in substance an application for an extension of time for service of the claim form. It was in substance an application to correct the applications for an extension of time which were made within the time specified for service by rule 7.5(2) and which by mistake did not refer to the claim form. To remedy the error contained in the applications (and resultant orders) does not circumvent the prohibition in rule 7.6(3).

…

> [34] It follows that rule 7.6(2) does not preclude the granting of relief under rule 3.10."

39. The case of *Phillips v Nussberger* [2008] 1 WLR 180 (HL) concerned administrative errors in serving claim forms out of the jurisdiction. In that case, a German translation of the claim form was served on the second defendant (but not the English sealed claim form) and no documents were served on the third defendant (through an error by the Swiss postal service). Proceedings were then issued by the defendants against the claimants in Switzerland. The issue was whether the attempt to serve the English proceedings was effective, despite the defects in process, so that the English court was first seised of the matter and should exercise jurisdiction. The House of Lords determined the case by dispensing with service pursuant to CPR 6.9 but Lord Brown considered an alternative route through CPR 3.10 (b):

> "[30] In these circumstances essentially two questions fall for your Lordships' consideration: first, is there power in the court by virtue of CPR rr 3.10 and 6.9 to determine that the service of documents actually effected on 19 January 2005 constituted sufficient service for the court then to be seised of the proceedings as definitively pending before it under the Dresser rule? Secondly, if so, ought the court in its discretion to exercise that power?
>
> [31] I have already set out the relevant rules. It seems to me at least arguable that even without resort to rule 6.9 the court could simply order under paragraph (b) of rule 3.10 that the second and third defendants are to be regarded as properly served, certainly for the purposes of seisin. The "error of procedure" here was, of course, the omission of the English language claim form from the package of documents served: there was in this regard "a failure to comply with the rule" (rule 7.5). But that, says paragraph (a) of rule 3.10, "does not invalidate any step taken in the proceedings unless the court so orders". The relevant "step" taken here was service of the proceedings out of the jurisdiction.
>
> [32] It seems to me that this was essentially the view taken by the majority of the Court of Appeal (McCowan LJ and Sir John Megaw, Lloyd LJ dissenting) in *Golden Ocean Assurance Ltd v Martin (The Goldean Mariner)* [1990] 2 Lloyd's Rep 215. Several defendants were there served out of the jurisdiction with copies of the writ, but in each case the wrong copy, addressed not to him but to a different defendant. Another defendant, by an oversight, was served with no writ at all, only a form of acknowledgment of service. The court's procedure at that time was governed by the Rules of the Supreme Court and the rule in point was RSC Ord 2, r 1. For present purposes I can see no material differences between that rule and CPR r 3.10. All three members of the court accepted that RSC Ord 2, r 1

> was a most beneficial provision, to be given wide effect. The majority held that service, the step in the proceedings which had plainly been attempted, was to be regarded as valid in the case of all of the above defendants. In the case of the defendants served with the wrong copy writs, Lloyd LJ, at p.219, accepted that the court had a discretion: "The service was grossly defective. But service, or purported service, it remained." Unlike the majority, however, he would not have exercised that discretion in the claimant's favour. As to the defendant served only with an acknowledgment of service, Lloyd LJ, at pp.218—219, thought it
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> > "an omission which is so serious that . . . [i]t cannot be described '. . . as a failure to comply with the requirements of the Rules by reason of something left undone.' . . . The service of the form of acknowledgment cannot make up for the absence of the writ."
>
> The majority thought otherwise."

40. In *Integral Petroleum v SCU Finanz AG* [2014] EWHC 702 (Comm), the issue arose in the context of service of the particulars of claim rather than originating service. Popplewell J (as he then was) confirmed that Lord Brown's obiter comments in *Phillips v Nussberger* established that CPR 3.10 should be construed as of wide effect so as to be available to be used beneficially where the defect has no prejudicial effect on the other party. However, he suggested that a more cautious approach might be adopted where the error concerned service of originating process:

> "[29] … I have some difficulty in treating an "error of procedure" in CPR 3.10 as encompassing circumstances where there is no purported service of any document of any kind, particularly where CPR 3.10(a) automatically validates subsequent steps in the proceedings if CPR 3.10 is engaged. I would be inclined for my part to treat the remedy in such case as lying, if at all, with the discretionary power to dispense with service under CPR 6.9. Nevertheless, the reference by Lord Brown in [31] to CPR 3.10(b) applying to the third defendant, Nefer, is indicative of the view of the Judicial Committee that CPR 3.10 is a beneficial provision to be given very wide effect indeed.
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> …
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> [37] This case is not concerned with service of originating process but service of particulars of claim. To my mind this is a significant distinction. A narrower approach to CPR3.10 is justified when it is sought to be applied to the service of originating process, because such service is what establishes in personam jurisdiction over the defendant. *Phillips v Nussberger* indicates that even for service of originating process the rule is to be given a wide effect, and that is so

> where the application of the rule affects the establishment of in personam jurisdiction in one of two competing jurisdictions. But the effect to be given to CPR 3.10 is even wider when concerned with documents which are other than those by which the proceedings are commenced. What the rules are concerned with in relation to the service of such subsequent documents is simply bringing them to the attention of the other party in circumstances in which that other party knows or should realise that a step has been taken which may have procedural consequences. This contrasts with the service of originating process which fulfils other functions: it establishes in personam jurisdiction, and it is what engages a wide range of powers in the Court, such as those under s.37 of the Senior Courts Act 1981 and under an inherent jurisdiction. CPR 3.10 is particularly apposite for treating as valid a step whose whole function is to bring a document to the attention of the opposing party where such function has been fulfilled. It prevents a triumph of form over substance."

41. In *Bank of Baroda v Nawany Marine Shipping FZE* [2017] 2 All ER (Comm) 763 Sara Cockerill QC (then sitting as a Deputy High Court Judge) considered whether CPR 3.10 could be used to remedy defective service where one copy of the claim form and four response packs were served on process agents for the five defendants in respect of three separate claims. It was common ground that a separate claim form and response pack should have been served for each defendant. The learned judge in that case summarised the relevant principles at [17]:

> " … i) Lord Brown's dictum can be taken as an indication of the view of the Judicial Committee that CPR 3.10 is a beneficial provision to be given very wide effect;
>
> ii) This enables it to be used beneficially where a defect has had no prejudicial effect on the other party and prevents the triumph of form over substance;
>
> iii) The key in considering whether a defect can be cured under this provision is to analyse whether there is "an error of procedure" which might otherwise invalidate a step taken in the proceedings. Thus, the benefit of CPR 3.10 will be less easy to obtain where there has been no attempt at a procedural step (e.g. a complete failure of service) or the step taken is not permitted by or within the rules at all."

42. The principles to be applied to applications for relief from mistakes in service of a claim form were considered by the Supreme Court in *Barton v Wright Hassall LLP* [2018] 1 WLR 1119. The case concerned a litigant in person who purported to serve a claim form on the defendant's solicitors by email, without obtaining any prior consent. It was common ground that this was not good service and the claim form expired unserved on the following day. The court dismissed the appeal, declining to exercise its power retrospectively to permit service of the claim form by an alternative method under CPR 6.15 for the reasons explained by Lord Sumption:

"[8] The Civil Procedure Rules contain a number of provisions empowering the court to waive compliance with procedural conditions or the ordinary consequences of non-compliance. The most significant is to be found in CPR 3.9, which confers a power to relieve a litigant from any "sanctions" imposed for failure to comply with a rule, practice direction or court order. These powers are conferred in wholly general terms, although there is a substantial body of case law on the manner in which they should be exercised … CPR rule 6.15 is rather different. It is directed specifically to the rules governing service of a claim form. They give rise to special considerations which do not necessarily apply to other formal documents or to other rules or orders of the court. The main difference is that the disciplinary factor is less important. The rules governing service of a claim form do not impose duties, in the sense in which, say, the rules governing the time for the service of evidence, impose a duty. They are simply conditions on which the court will take cognisance of the matter at all. Although the court may dispense with service altogether or make interlocutory orders before it has happened if necessary, as a general rule service of originating process is the act by which the defendant is subjected to the court's jurisdiction.

…

[9] What constitutes "good reason" for validating the non-compliant service of a claim form is essentially a matter of factual evaluation, which does not lend itself to over-analysis or copious citation of authority…

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

…

[16] The first point to be made is that it cannot be enough that Mr Barton's mode of service successfully brought the claim form to the attention of Berrymans. As Lord Clarke pointed out in *Abela v Baadarani*, this is likely to be a necessary condition for an order under CPR rule 6.15, but it is not a sufficient one. Although the purpose of service is to bring the contents of the claim form to the attention of the defendant, the manner in

> which this is done is also important. Rules of court must identify some formal step which can be treated as making him aware of it. This is because a bright line rule is necessary in order to determine the exact point from which time runs for the taking of further steps or the entry of judgment in default of them. Service of the claim form within its period of validity may have significant implications for the operation of any relevant limitation period, as they do in this case. Time stops running for limitation purposes when the claim form is issued. The period of validity of the claim form is therefore equivalent to an extension of the limitation period before the proceedings can effectively begin. It is important that there should be a finite limit on that extension. An order under CPR rule 6.15 necessarily has the effect of further extending it. For these reasons it has never been enough that the defendant should be aware of the contents of an originating document such as a claim form. Otherwise any unauthorised mode of service would be acceptable, notwithstanding that it fulfilled none of the other purposes of serving originating process.
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> …
>
> [21] … I agree with the general point that it is not necessarily a condition of success in an application for retrospective validation that the claimant should have left no stone unturned. It is enough that he has taken such steps as are reasonable in the circumstances to serve the claim form within its period of validity. But in the present case there was no problem about service. The problem was that Mr Barton made no attempt to serve in accordance with the rules. All that he did was employ a mode of service which he should have appreciated was not in accordance with the rules. I note in passing that if Mr Barton had made no attempt whatever to serve the claim form, but simply allowed it to expire, an application to extend its life under CPR rule 7.6(3) would have failed because it could not have been said that he had "taken all reasonable steps to comply with rule 7.5 but has been unable to do so." It is not easy to see why the result should be any different when he made no attempt to serve it by any method permitted by the rules."

43. In *Dory Acquisitions Designated Activity Company v Ioannis Frangos* [2020] EWHC 240 (Comm) the claimant sought a declaration that proceedings were validly served on the defendant in circumstances where the claim form served did not have a court seal or claim number on its face. Bryan J rectified the irregularity in the claim form by applying CPR 3.10:

> "[76] The guidance of the House of Lords in *Phillips v Nussberger* and subsequent cases can be summarised as follows:

> (1) The guidance in *Phillips v Nussberger* is authoritative obiter dicta.
>
> (2) CPR rule 3.10 is a beneficial provision to be given a very wide effect. It can be used beneficially where a defect has no prejudicial effect to the other party and to prevent the triumph of style over substance. (See *Bank of Baroda* at [17].) CPR rule 3.10 can apply even where the defect constitutes a failure to serve sufficient claim forms on defendants or a failure to deliver the correct claim form to the correct defendants or even where a defendant received no claim form at all, only an acknowledgement of service form in the context of service of claim forms on multiple defendants (see the *Goldean Mariner* [1990] 2 Lloyd's Reports 215 discussed in *Phillips v Nussberger, Integral Petroleum* and *the Bank of Baroda*). This interpretation of CPR rule 3.10 applies to originating processes as much as it does to other procedural steps (see *Bank of Baroda* at [19]).
>
> (3) In view of this broad guidance, the most important question in determining whether CPR rule 3.10 applies is whether there has been an error of procedure which might otherwise invalidate a procedural step. This would be more difficult where there has been, for example, a complete failure of service *Bank of Baroda* at [17]).
>
> (4) Another important factor to consider is whether the defendant has suffered any prejudice as a result of the procedural error. The court has in the past used its powers under CPR rule 3.10 to remedy service of an unsealed claim form without a claim number where the service of that claim did not deprive the defendant of any knowledge of the fact that the proceedings had been or were about to be started or the nature of the claim against it (see *Heron Bros Limited v Central Bedfordshire Council* [2015] EWHC 604 (TCC), at [16] and below).
>
> (5) Whether the defect was the fault of the applicant is considered, but it is a subsidiary factor."

44. In *Piepenbrock v Associated Newspapers Ltd & others* [2020] EWHC 1708 (QB), the claimant's wife purported to serve the claim form by email on solicitors for the defendants, without obtaining confirmation that they were instructed to accept service or that service could be effected by email. The purported service was invalid and the four month period for service of the claim form expired. Nicklin J refused the claimant's application under CPR 7.6(3) for a retrospective extension of time to serve the claim form, also rejecting the alternative grounds under CPR 6.15 and 6.16, CPR 3.9 and CPR 3.10, relying on the decisions in *Integral* and *Bank of Baroda* (above). Having considered those cases, Nicklin J stated:

> "[81] These two cases were decided before the Supreme Court decision in *Barton.* The comments as to whether CPR 3.10 can validate an error in serving a Claim Form are strictly *obiter* and there is a consistent line of authority that suggests that CPR 3.10 cannot be used to rescue a claimant who, having failed to serve the Claim Form by a permitted method, cannot bring him/herself within CPR 7.6, 6.15 or 6.16: see *Vinos*; *Kaur* …
>
> [82] My conclusion is that CPR 3.10 cannot assist the Claimant in this case:
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> i) I consider that *Barton* is a clear statement of the underlying principles as to the importance of serving the Claim Form in accordance with the CPR.
>
> ii) CPR 3.10 was not referred to in *Barton* yet, if the argument as to the width of the rule were correct, it would appear to have been an obvious solution to Mr Barton's predicament. In my view, the analysis of Lord Sumption as to why CPR 3.9 is inapt would apply equally to CPR 3.10.
>
> iii) If CPR 3.10 is given an interpretation that permits the Court, retrospectively, to validate service not in accordance with the CPR on the basis that there has been a "*failure to comply with a rule*", then that would make CPR 6.15(2) redundant. That would be a surprising result as the terms of CPR 6.15(2) are of specific operation whereas CPR 3.10 is of general application. Further, as noted in *Godwin* the effect would be "*tantamount to giving the court a discretionary power to dispense with statutory limitation periods*". This would be contrary to the clear policy statement in *Barton*.
>
> iv) *Steele -v- Mooney* [18]-[19] appears to contain the clearest pre-*Barton* statement that CPR 3.10 cannot be used in this way.
>
> a) CPR 3.10 gives the court a discretion. This must be exercised in accordance with the overriding objective of dealing with cases justly. If remedying one party's error will cause injustice to the other party, then the court is unlikely to grant relief under the rule. This gives the court the necessary control to ensure that the apparently wide scope of rule 3.10 does not cause unfairness.
>
> b) The general language of rule 3.10 cannot be used to achieve something that is prohibited under another rule. This is the principle established by *Vinos*…

45. Following the oral hearing of the application in this case, judgment was handed down on another case in which this issue was considered, namely, *Ideal Shopping Direct Ltd & Others v Visa Europe Ltd & Others* [2020] EWHC 3399 (Ch). I am grateful to the parties for their diligence and co-operation in drawing to the Court's attention this

further authority. The claimants served unsealed claim forms by the agreed extended date for service but the sealed claim forms were served after expiry of that date. Morgan J refused to grant relief under CPR 6.15, providing for alternative means of service, or 6.16 by dispensing with service. Having considered the authorities on CPR 3.10, he stated at [92]:

> "Having considered the authorities, I conclude that I should follow the approach in *Piepenbrock* and hold that rule 3.10 does not enable me to find (under rule 3.10(a)) that there has, after all, been valid service on the Defendants or that I should make an order (under rule 3.10(b)) remedying the Claimants' error as to service. If it is not possible to distinguish *Integral Petroleum* or *Bank of Baroda* as to the scope of rule 3.10, then I would have to choose between those two decisions and the decision in *Piepenbrock*. I find the reasoning in *Piepenbrock* to be more persuasive and I would follow it. It may be that it is my duty to follow *Piepenbrock* unless I considered that it was wrong: see *Colchester Estates v Carlton plc* [1986] Ch 80. As to that, I do not think *Piepenbrock* is wrong."

46. Drawing together the principles that are relevant for determining the application before the court, they can be summarised as follows:

i) If a claimant applies for an extension of time for service of the claim form and such application is made after the period for service specified in CPR 7.5(1), or after any alternative period for service ordered under CPR 7.6, the court's power to grant such extension is circumscribed by the conditions set out in CPR 7.6(3): *Barton v Wright Hassall* at [8] & [21]; *Vinos v Marks & Spencer* at [20] & [27].

ii) The court has a wide, general power under CPR 3.10 to correct an error of procedure so that such error does not invalidate any step taken in the proceedings: *Phillips v Nussberger* at [30]-[32]*; Steele v Mooney* [19]-[20].

iii) In the cases cited where the power under CPR 3.10 was exercised, there was a relevant, defective step that could be corrected: *Steele v Mooney* (defective wording of application for an extension of time); *Phillips v Nussberger*, *Bank of Baroda*, *Dory* (ineffective steps taken to serve the claim form on the defendants); *Integral* (defective service of particulars of claim). Doubts have been expressed as to whether CPR 3.10 could or would be used where no relevant procedural step was taken: *Integral* at [29]; *Bank of Baroda* at [17]; *Dory* at [76].

iv) The court also has a wide, general power under CPR 3.9 to grant relief from any sanction imposed for a failure to comply with any rule, practice direction or court order: *Denton v White* [2014] 1 WLR 3926 at [23] – [36].

v) A claimant is not entitled to rely on the wide, general powers under CPR 3.10 or CPR 3.9 to circumvent the specific conditions set out in CPR 7.6(3) for extending the period for service of a claim form: *Vinos v Marks & Spencer plc* at [20] & [27]; *Kaur v CTP* at [19]; *Elmes v Hygrade* at [13]; *Godwin v*

Swindon BC at [50]; *Steele v Mooney* at [19] & [28]; *Piepenbrock* at [81] & [82]; *Ideal v Visa* at [92].

Application of CPR 7.6(3)

47. The court does not have power to grant any extension of time for service of the claim form under CPR 7.6(3). Firstly, Boxwood has made no application for an extension of time under CPR 7.6. Secondly, as must be recognised by Boxwood, if any such application were made, the conditions in CPR 7.6(3) would not be met. CPR 7.6(3) provides that *"the court may make such an order only if … (b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so".* The unfortunate mistake by Boxwood's solicitors resulted in no steps being taken to serve the claim form by 10 September 2020. Therefore, Boxwood could not establish that it took all reasonable steps to serve the claim form within the extended time period ordered by the court. Finally, the words used in CPR 7.6(3) are clear. The court does not have power to extend the time for service of the claim form where the specified conditions have not been met.

Application under CPR 3.10

48. Boxwood is not entitled to rely on the court's general power under CPR 3.10 to correct a procedural error so as to validate its failure to serve the claim form within the prescribed period. As set out above, a claimant is not entitled to rely on the wide, general powers under CPR 3.10 to circumvent the specific conditions set out in CPR 7.6(3) for extending the period for service of a claim form. Boxwood defines the procedural error as its failure to comply with the order dated 7 April 2020 and seeks to vary that order to validate late service of the claim form. This characterisation of the mistake does not change its substance, namely, a failure to serve the claim form within the period specified by the court pursuant to CPR 7.6. The remedy required would constitute an extension of time to that period. The court would have power to grant such extension of time only if the conditions set out in CPR 7.6(3) were satisfied. For the reason set out above, Boxwood would be unable to satisfy the conditions in CPR 7.6(3). It follows that the court would not have power to vary the order dated 7 April 2020, thereby retrospectively extending time for service of the claim form.

49. Even if the court had discretion to grant relief under CPR 3.10, this would not be an appropriate case in which to do so. Firstly, CPR 3.10 expressly provides that an error of procedure does not invalidate a step taken in the proceedings unless the court so orders. However, in this case, the relevant step in the proceedings, service of the claim form within the specified time period for service, was not taken at all.

50. Secondly, as set out above, in *Integral* at [29], *Bank of Baroda* at [17] and *Dory* at [76(3)], each of the learned judges doubted whether the court's discretion would be exercised where there had been a total failure to serve originating process. The rationale for different considerations to be applied to originating process was explained as the 'bright line rule' by Lord Sumption in *Barton v Wright Hassall* at [16].

51. Thirdly, Gleeson would suffer prejudice if the order of 7 April 2020 were varied retrospectively to extend time for service of the claim form because they would be

deprived of potential limitation defences. Mr Bowdery raises a number of meritorious points in Boxwood's favour. Gleeson had notice of the issue of the claim form 1 April 2020, when the disputed application for a stay was considered by the court. The claim form was at all material times on CE-file; it could be read and downloaded by Gleeson. Gleeson had the opportunity and took advantage of that opportunity to issue some seventeen claim forms against various sub-contractors and consultants on 24 March 2020 (albeit prior to notice of the claim form having been issued by Boxwood), preserving their ability to pass on these claims to other parties. As at 10 September 2020 Gleeson had received fully pleaded particulars of claim, together with initial disclosure, enabling them to understand the nature and scope of the claims against them. Knowledge of the claims by Gleeson is a necessary, but not sufficient, factor for the court to consider when exercising any discretion to grant relief. In this case, Gleeson would suffer prejudice if the court granted the relief sought because they would be deprived of any limitation defence that has accrued since March 2020. Although that might not be conclusive, it would be a very powerful argument against extending time for service of the claim form.

Application under CPR 3.9

52. As set out above, Boxwood is not entitled to rely on the general powers under CPR 3.9 to circumvent the specific conditions set out in CPR 7.6(3) for extending the period for service of a claim form.

53. In any event, even if the court had power to grant relief from sanctions under CPR 3.9, it would not exercise such discretion to extend time for service of the claim form in this case.

54. When considering an application for relief from sanctions under CPR 3.9, the court follows the guidance set out in *Denton v White* (above) and considers in three stages (i) the seriousness and significance of the failure, (ii) the reason for the default and (iii) all the circumstances of the case, so as to enable the court to deal justly with the application.

55. As to the first stage, the breach of CPR 7.5 and the order dated 7 April 2020 was serious and significant. In the absence of service of a valid claim form, Gleeson were not subject to the court's jurisdiction. The delay was a matter of days, rather than minutes.

56. As to the second stage, the reason for the breach was a genuine mistake made by the claimant's solicitors and/or a diary error. A full account has been given by Ms Traill as to the circumstances in which the mistake was made. I accept that working away from the office during the pandemic would reduce the oversight of more junior practitioners that would be normally present and could allow mistakes to slip through the net. However, having issued proceedings in circumstances where limitation was a live issue and where Gleeson had objected to the requested extensions of time for service of those proceedings, it was incumbent on the solicitors to ensure that the extended dates ordered by the court were met.

57. As to the third stage, when considering all the circumstances, the same factors as set out above in respect of CPR 3.10 would arise. In particular, it would not be

appropriate in this case to deprive Gleeson of any accrued limitation defence by extending time for service of the claim form.

58. The court's other general case management powers and the overriding objective would not lead to any different conclusion.

Conclusion

59. For the reasons set out above, the claimant's application is dismissed.

60. All consequential or other matters, if not agreed, will be dealt with by the Court at a further hearing to be fixed by the parties.