Neutral Citation Number: [2019] EWCA Civ 1103

Case No: C1/2018/0628

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE FOSKETT [2018] EWHC 526 QB & 346 QB

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/06/2019

Before :

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE HADDON-CAVE
and
SIR TIMOTHY LLOYD

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Between :

(1) AL-ZAHRA (PVT) HOSPITAL **(2) GULF MEDICAL PROJECTS COMPANY** **(3) DR SHAMA NAWAZ** **(4) DR GANU NAIK** **(5) DR FADIA SUHAIL ALWAN** **(also known as DR FADYA SUHAIL AL RAYES)** **(6) DR ELHAM AHMED** **(7) PROFESSOR NOHA ZAKI** **(8) INTERNATIONAL RADIOLOGY CENTRE**	**Appellants/ Defendants (1-6)**
- and -	
DDM	**Respondent /Claimant**

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Mr Andrew Davis (instructed by **Kennedys Law LLP**) for the **Appellants/Defendants (1-6)**
Ms Elizabeth-Anne Gumbel QC (instructed by **Leigh Day**) for the **Respondent/Claimant**

Hearing date : 19th March 2019

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Approved Judgment

LORD JUSTICE HADDON-CAVE:

Introduction

1. This appeal concerns the correctness of decisions relating to permission to extend time for service of a claim form out of the jurisdiction.

2. The Appellants appeal the decision of Foskett J dated 23rd February 2018, whereby he allowed an appeal against a decision of Master Cook dated 12th July 2017. Master Cook had held that the first extension of time granted by him on 25th September 2015 for service out of the jurisdiction of the claim form by the Claimant had been properly granted but the second extension of time granted by him on 17th October 2016 had not been properly granted. On appeal, Foskett J held that both extensions of time had been properly granted.

3. The substantive proceedings in this case relate to a 'wrongful birth' claim brought by the Respondent in this appeal in respect of her daughter's ante-natal care in Dubai, the United Arab Emirates ("UAE"). An anonymity order remains in place in respect of the Respondent, DDM, who will be referred to as "the Claimant". For convenience, the Appellants will be referred to in the judgment respectively as "the Defendants". It should be noted that the Seventh and Eighth Defendants in the substantive proceedings have not appealed.

Background facts

4. The Claimant was born in 1975. She became pregnant with her first child whilst living and working in Dubai, UAE. Between 5th March 2012 and 27th June 2012, she underwent a series of scans and medical examinations carried out in Dubai. No foetal abnormalities were detected in these procedures. On 2nd July 2012, the Claimant returned to the UK where she now lives.

5. On 10th July 2012, the Claimant underwent a foetal ultrasound scan in Grantham where foetal abnormalities of the heart and kidney were diagnosed. The Claimant's pregnancy was then close to term and she could not reasonably undergo a termination of pregnancy any longer.

6. On 13th July 2012, the abnormalities were identified as 22q chromosome deletion (Di George Syndrome). The gestation of the pregnancy was then 35 weeks.

7. On 6th August 2012, the Claimant's daughter ("Baby M") was born in Leicester Royal Infirmary. She suffers from Di George Syndrome and has very severe disabilities.

8. In June 2013, the Claimant instructed Leigh Day, solicitors, to investigate bringing a claim against those responsible for the Claimant's ante-natal care in the UAE.

Procedural history

9. It is necessary to set out the procedural history of this matter in some detail.

10. On 23rd January 2014, Leigh Day notified the First Defendant of a possible claim by the Claimant. The Claimant's solicitor, Ms Nicola Wainwright, wrote to the First Defendant, Al-Zahra Hospital, notifying them of the potential claim against them and requesting

disclosure of the Claimant's medical records and other relevant documentation. Ms Wainwright also requested the contact details for the other potential defendants (namely, the individual doctors who had treated the Claimant) and for confirmation as to with whom liability lay for any negligence and for their insurance details. This letter was faxed to the legal department at Al-Zahra Hospital. Ms Wainwright received a response saying the full fax had not been received and so the letter was faxed again on 27th January 2014. However, she received no further response and on 10th and 28th February 2014, she sent letters chasing the First Defendant for a response.

11. On 13th February 2014, the First Defendant's insurers advised them "not to respond" to correspondence about a possible claim but to pass any further correspondence to the insurers unanswered for their attention.

12. On 22nd December 2014, Leigh Day notified the Third to Sixth Defendants of a possible claim by the Claimant. Ms Wainwright sent letters addressed to the individual doctors whose names appeared on the scan reports which the Claimant had obtained from the UAE: Dr Naik (the Fourth Defendant), Dr Alwan (the Fifth Defendant) and Dr Ahmed (the Sixth Defendant) and her treating Obstetrician in the UAE, Dr Nawaz (the Third Defendant). All the letters were sent "care of" the Al-Zahra Hospital. She asked them to provide her with details of their insurers, to confirm whether they held anyone or any other body liable for any negligence in regard to the Claimant's care and to provide her with copy records and a copy of the contract under which the Claimant was treated. Ms Wainwright received no responses. On 20th April 2015, she sent further copies of her letter to the Fourth, Fifth and Sixth Defendants and wrote to the Seventh Defendant on the same date.

13. On 8th July 2015, the Claimant issued a Claim Form.

<u>First extension by Master Cook on 25th September 2015</u>

14. On 9th July 2015, the Claimant applied for service out of the jurisdiction and for an extension of time for service of the Claim Form until 10th December 2016 (*i.e.* an additional 11 months beyond the 6 months allowed by the Civil Procedure Rules ("CPR") for service abroad). The Claimant's application was supported by a witness statement of the Claimant's solicitor, Nicola Wainwright of Leigh Day, dated 9th July 2015 ("Wainwright I"). Ms Wainwright gave the following reasons for seeking the extension:

> "EXTENSION OF TIME FOR FILING A SCHEDULE OF LOSS AND DAMAGE AND MEDICAL EVIDENCE
>
> 35. In accordance with sections 4.2 and 4.3 of the Practice Direction to Part 16 of the Civil Procedure Rules the Claimant is required to attach to her Particulars of Claim a Schedule of past and future expenses and losses which she claims and medical evidence of injuries suffered. I am issuing protectively in this case in order to protect the Claimant's position before limitation expires and I have not yet been able to quantify the Claimant's claim. In the circumstances I seek an extension of time to file a Schedule of Loss and Damage and any medical evidence in support of the Particulars of Claim to 10 December 2015.

> EXTENSION OF TIME FOR SERVICE OF THE CLAIM FORM, PARTICULARS OF CLAIM AND SUPPORTING DOCUMENTS
>
> 36. The Claimant also seeks an extension of time for service of the Claim Form, Particulars of Claim and supporting documentation to 10 December 2016. As the Claimant is seeking permission to serve out of the jurisdiction the usual time limit for service is 6 months. However, we have been advised by the Royal Courts of Justice Process Section that it is likely to take more than 6 months and maybe more than 12 months for service to be effected in the UAE and therefore the Claimant seeks an extension of time for service of proceedings at this stage."

15. On 5th August 2015, *i.e.* 3 years after the birth of Baby M, limitation expired under English law and UAE law (both of which have 3-year limitation periods in personal injury cases).

16. On 25th September 2015, Master Cook dealt with the Claimant's application on paper without a hearing and granted the Claimant permission to serve the Particulars of Claim out of the jurisdiction and granted an extension of time to serve proceedings to 10th December 2016. Master Cook's order also provided that the Defendants had 22 days from the date of service for lodging an Acknowledgement of Service.

<u>Second extension by Master Cook on 17th October 2016</u>

17. Over a year later, on 4th October 2016, the Claimant applied for a further extension of time for service of the claim form until 10th June 2017. The reasons given for seeking the extension were contained in Box 10 of the application form:

> "This is a claim in clinical negligence arising from antenatal care the Claimant received in the United Arab Emirates.
>
> Court proceedings were issued on 8 July 2015 and on 25 September 2015 Master Cook made an Order permitting the Claimant to serve proceedings on the Defendants to this action out of the jurisdiction.
>
> The same Order extended the time of service of the Claim Form and Particulars of Claim to 10 December 2016.
>
> Unfortunately, there have been delays in arranging for service of the documents and although the papers are now ready to serve the Foreign Process Service has indicated it is likely to take 8 months to effect service in the UAE and therefore we are requesting a further extension of time for service of the Claim Form, Particulars of Claim and supporting documentation. A draft order is attached.

> This Application is made without notice because the Defendants are all based in the UAE and to date have not responded to any correspondence."

There was no separate witness statement from Ms Wainwright in support of the Claimant's application on this occasion.

18. On 17th October 2016, an Order of Master Cook granted the Claimant's further application on paper without a hearing and extended time for service of the proceedings to 10th June 2017.

Service effected in Dubai in 2017

19. Thereafter, service of the proceedings was effected in Dubai upon the First Defendant on 8th February 2017, upon the Fourth Defendant on 12th February 2017, upon the Second Defendant on 16th March 2017, and upon the Third Defendant on 11th April 2017.

20. On 6th April 2017, Kennedys Law LLP, solicitors in London, were instructed by the First to Fourth Defendants *via* Kennedys Dubai office. Kennedys instructions included acting for the Fifth and Sixth Defendants who, at all material times, had been employed by the First Defendant.

21. On 7th April 2017, an Acknowledgment of Service was filed on behalf of the First to Fourth Defendants (out of time). A protective Acknowledgment of Service was also filed on behalf of by the Fifth and Sixth Defendants on 19th April 2017.

Defendants' application to set aside service dated 20th April 2017

22. On 20th April 2017, the Defendants filed an application for the following orders: (i) an extension of time to serve the Acknowledgment of Service, (ii) disclosure of the applications, evidence and submissions lodged by the Claimant in support of her applications for service out of the jurisdiction, (iii) disclosure of similar materials filed by the Claimant in support of her extensions for time for service of the proceedings abroad, (iv) permission to serve evidence in support of the application, (v) an order setting aside the extensions of time granted to the Claimant for service out of the jurisdiction, and (vi) a declaration that the English court had no jurisdiction to the claim. The Defendants' application was supported by a statement of Ms Rachel Moore of Kennedys Law LLP. Ms Moore explained that the Defendants sought disclosure of the evidence provided to the court by the Claimant in support of her applications for extensions of time for service out of the jurisdiction. Ms Moore said that her clients sought "permission to file and serve further evidence in support of this application, if so advised, following sight of those documents – within, say, a further 21 days".

Claimant's further applications

23. On 16th May 2017, the Claimant applied for an extension of time for service in respect of two further defendants (the Seventh and Eighth Defendants).

24. On 4th July 2017, the Claimant filed an application for relief under CPR 3.1 for permission to serve proceedings on the Defendants out of the jurisdiction on a fresh basis and to dispense with re-service. The application was supported by a witness statement

of Ms Wainwright dated 4th July 2017 ("Wainwright II") which explained that the Claimant had originally obtained service out of the jurisdiction on the Defendants in error under CPR 3.1(3) of PD6B ("necessary or proper party") but should have relied upon CPR3.1(9)(a) ("damage was sustained… within the jurisdiction"). Ms Wainwright also addressed some of the points raised by the Defendants in their application dated 20th April 2017. She explained that the Claimant "had made repeated efforts to contact the Defendants prior to issuing the Court Proceedings". As regards the Defendants' application to set aside the Claimant's orders for extending time for service she said:

> "51. It is presently unclear whether the First to Sixth Defendants intend to pursue this limb of their application. The Claimant would respectfully seek permission to make oral submissions in response, should this be pursued."

Hearing before Master Cook on 12th July 2017

25. A hearing of the various applications was fixed before Master Cook on 12th July 2017.

26. On 11th July 2017, the day before the hearing, the parties exchanged skeleton arguments. The Defendants stated in their skeleton that it seemed "most unlikely" that all the applications could be heard in the time allotted and submitted that the Master ought to hear the Defendants' applications (i) to extend time for service of the Acknowledgement of Service and (ii) to set aside the extensions of time granted by Master Cook for service of the proceedings. The Defendants explained that, because they had only received the Claimant's original evidence in support of the applications for extensions on 4th July 2017, Kennedys had not yet been able to investigate the new factual matters raised in Wainwright II and had not had a reasonable opportunity to put in evidence in response. The Defendants' skeleton further submitted:

> "6. However, none of that prevents the Court from hearing at least the limbs of the Defendants' applications [(i) and (ii)] above. The review of the applications to extend time for service of the claim form is a review of the existing evidence. The other applications could be heard on another occasion, if necessary, when there is sufficient time." (emphasis added)

27. The Claimant's skeleton focussed primarily on the Claimant's CPR 3.1 application to correct the procedural error. In relation to the Defendants' application to set aside the extensions of time, the Claimant said that it was not clear whether the Defendants intended to pursue their application to set aside the Claimant's extensions of time:

> "Application to set aside extensions of time
>
> 42. It is not clear whether D1-6 intend to pursue this limb of their application in light of the disclosure of application notices and evidence in support which has now been provided.
>
> 43. In any event, C submits that the extensions of time granted on 25/9/2015 and 17/10/2016 were appropriate and justified and should not be set aside. As explained in the

> application notices and evidence resulting in those orders, extensions of time were necessitated by the reliance on the procedures of the British consular authorities in the UAE for service of proceedings. The extensions were also granted against a background of non-response by the Defendants (deliberate or otherwise) as described at paragraphs 27-37 WS Wainwright 4/7/2017 and above."

28. On 12th July 2017, a hearing took place before Master Cook. The Claimant made an oral application for an adjournment of the Defendants' application to set aside the extensions of time in order to give her time to serve further evidence. This application was refused by Master Cook. There was no transcript of the reasons for Master Cook's refusal of the Claimant's application for an adjournment. Master Cook appears to have proceeded to hear the Defendants' applications to set aside the two extensions of time for service of the proceedings on the basis that, if successful, they would be determinative of the claim. Master Cook held that the first extension of time had been properly granted but that the second extension had not and set it aside.

Appeal and cross-appeal to High Court

29. The Claimant appealed Master Cook's decision to set aside the second extension to the High Court. The Defendants cross-appealed to overturn Master Cook's decision in respect of the first extension.

30. On 1st August 2017, the Claimant served a further witness statement from Ms Wainwright ("Wainwright III") explaining in detail the procedural history of the matter and the reasons for the steps taken by Leigh Day.

Foskett J's decision dated 23rd February 2018

31. On 23rd February 2018, Foskett J handed down his judgment whereby he found that both extensions of time for service of the proceedings had been properly granted by Master Cook, *i.e.* he upheld Master Cook's decision of 12th July 2017 confirming the first extension and overturned Master Cook's decision setting aside the second extension (see further below).

32. On 19th March 2019, the Defendants' appeal in respect of Foskett J's judgment came before this Court.

Judgments below

Master Cook's judgment dated 12th July 2017

33. In his *ex tempore* judgment delivered between 2:00pm and 2:45pm, Master Cook carefully summarised the background facts and the procedural history and referred to CPR 7.5, 7.6 and 8.2 and various authorities to which he was referred. He then made the following general observation:

> "11. In short, no practitioner should now be unaware of the dangers of seeking to extend the life of a claim form on a without notice basis in circumstances where a limitation

> period is fast approaching. It seems to me that the cases have made very clear the potential danger involved. This must, in my judgment, highlight the need to comply with the requirements of the Practice Direction and to ensure that good reason is shown for any extension sought."

34. Master Cook said this when dismissing the Defendants' challenge to the first extension:

> "15. The starting point it seems to me is that the claimant is entitled to the period provided by the Rules. It seems to me that in this case it was always known that an application would have to be made to extend that six month period and the application was made in time. The difficulty here arose as a result of the enquiry made to the Foreign Process Unit at this court which indicated that the UAE in common with a number of other jurisdictions experiences particular delay in achieving service. The information related by Miss Wainwright is that she was told it may take up to 12 months for service to be achieved. Certainly in my experience as a Master of the Queen's Bench Division, that is precisely what I would expect from this particular jurisdiction and it is no doubt for that reason that on the papers I was prepared to accept that it would take a period of 12 months to effect proper service in the UAE. Therefore, in my judgment this was a case where the claimant should have the benefit of an extended period of time beyond the six months provided in the Rules."

35. Master Cook said this when upholding the Defendants' challenge to the second extension which he set aside:

> "17. The application of the 4 October was, as I have indicated, made on the papers without a hearing and, on that basis, I would have expected a detailed witness statement in support of the application notice or at least a very full account of why it was that the claimant was in a position not to be able to complete service within the original extension granted. This is a requirement that is brought even more into focus by the fact that by now, on any view, the limitation period had expired so the claimant was not just seeking an extension of time for service but effectively an extension of the applicable limitation period.
>
> 18. The information given by Miss Wainwright at box 10 of the application notice is, in my judgment, sparse to say the least. That is a description which I think Mr Booth was forced to concede as accurate. The claimant's solicitor failed, it seems to me, in the evidence to explain why there had been further delays in arranging for the service of the documents. There is no explanation of why it is that the papers were only now ready to be served by the Foreign

Process Service. There is no explanation, in view of the fact that the information from the court seemed to indicate that it is now likely to take eight months, why service could not have been achieved within the preceding period which was in excess of eight months. In other words, it seems to me that there was a complete failure to comply with the requirements of Practice Direction 7.A and that there was not a full explanation why the claim had not been served. The period of time which had elapsed under the first order is simply not addressed and that, in my judgment, is fatal when it comes to a review of this application.

19. In the circumstances, I have concluded that the second order which was granted on the basis of the application notice alone, should be set aside on the basis the court was simply not provided with the required and/or sufficient information to enable it to understand why a further extension of time for service was being sought. This result seems to me to be supported by law which I have referred to and which makes crystal clear that such applications should be properly supported by evidence which complies with the Rules. I also bear in mind the comments made by Cox J in the case of [*Foran v Secret Surgery* [2016] EWHC 1029 (QB)] to the effect that it is not good practice to submit such an application on paper and in circumstances where time limits are running out, such applications should normally be dealt with by way of an urgent hearing or on the telephone and at which the appropriateness of granting relief should be carefully considered (see paragraph 21 of her judgment).

20. I have had full regard to the fact that this is a potentially large claim. That on the face of it the claimant may well have an arguable case and that the loss of this action may well give rise to either further satellite application or to applications under Section 33. However, it seems to me, on the basis of the authorities, such considerations are in these circumstances otiose. The protection that is offered to a defendant, particularly where limitation period is expired or expiring, is that the original application should be sufficiently supported by evidence and scrutinised and only in the clearest of cases, or where there is good reason or good reasons, should the extension be granted. For all of these reasons it seems to me that I must set aside the order of 17 October 2016. I decline to set aside the original order of 25 September." (emphasis added)

36. Master Cook made no mention of Wainwright II. He appears to have determined the question of the validity of the extensions purely on the material which was previously

before him when he originally considered the Claimant's applications on the papers on 25th September 2015 and 17th October 2016.

Foskett J's judgment dated 23rd February 2018

37. In his judgment dated 23rd February 2018, Foskett J partially set aside Master Cook's decision of 12th July 2017 and held that both extensions of time granted by Master Cook to the Claimant for service out of the jurisdiction had been properly granted. There were four main stages to Foskett J's analysis:

    (1) First, Foskett J held Master Cook erred in refusing the Claimant an adjournment and the opportunity to file further evidence in support of the Claimant's applications for an extension of time to serve the claim form on the Defendants out of the jurisdiction in the UAE.

    (2) Second, Foskett J held that in view of Master Cook's error, it was open to the Court on appeal to rehear and remake the decisions.

    (3) Third, Foskett J held that in the light of all the evidence, including the further witness statement of Ms Wainwright (Wainwright III), Master Cook was right originally to have granted the two extensions and wrong to have revoked the second extension.

    (4) Fourth, Foskett J held that Master Cook should have dealt with the Acknowledgement of Service issue and granted the Defendants relief from sanctions and an extension of time for service of the Acknowledgement of Service.

38. At paragraph [63] of his Judgment Foskett J said:

> "[63] ……It follows that, to the extent that it is relevant and material, the hearing before Master Cook on 12 July 2017 was a rehearing of the issue whether to grant the extensions of time, not a review of his earlier decisions, and the appeal to me is (unusually) itself a rehearing of the application considered by Master Cook on 12 July 2017, albeit giving Master Cook's decision due weight…."

39. Foskett J's conclusions are to be found at paragraphs [72]-[86]. He explained the reasons for concluding that Master Cook had failed to appreciate that the nature of the hearing before him was a rehearing rather than a review in paragraphs [72]-[73]:

> "[72] Nothing has been said to me in the hearing of this appeal to suggest that the Master was reminded of the nature of the hearing before him which was that of a rehearing, not merely a review of his earlier decisions ….. As I have indicated, he approached the task he set himself by simply reviewing the material presented to him when he made the two extension orders. Whilst that is undoubtedly a significant part of the exercise, it is not necessarily the sole part. Whilst I differ from an experienced Master on a matter of this nature with

considerable diffidence, I respectfully consider that the decision to refuse an adjournment to enable further evidence to be proffered on behalf of the Claimant to have been an error. I do not think it can simply be characterised as a case management decision with which, in the normal course of events, a Judge on appeal would not interfere: it was something that went to the heart of the exercise he was called on to perform and the decision not to permit further evidence to be given does suggest that the focus of the hearing, with the encouragement of the 1-6 Defendants, became too narrow."

[73] It was, of course, entirely right to say that the information given in the second Application Notice (see paragraph 36 above) was "sparse". That of itself might have suggested that more could indeed have been said. Undoubtedly, more should have been said as Practice Direction 7A requires (see paragraph 55 above), but the word used in the Practice Direction is "should", not "must". This suggests a marginally less strict requirement than the word "must" would convey (c.f. Practice Direction 2D). But irrespective of that consideration, a request for an opportunity to make good any omissions in the material, particularly where the interests of a seriously disabled child were engaged, ought, in my view, to have been granted. It is, of course, quite right to say the rules are in place to encourage disciplined practice so that the efficient despatch of court business can be achieved; but, if on examination, the reality is that there were truly good grounds for having granted the second extension order, it offends the primary requirement to deal with cases "justly" to ignore the reality. If the Master had been reminded of the nature of the hearing, I think it likely that he would have taken the step of adjourning to permit the reception of further evidence on behalf of the Claimant."Foskett J commented upon the decision of Cox J in *Foran* (*supra*) as follows:

"[78] …I respectfully question whether the 6-month period allowed for service outside the jurisdiction does cater in all circumstances for the difficulties of effecting service through the FPS [Foreign Process Section] process. Cox J expressed the view [in *Foran*] that the 6-month period was a "generous provision". I think that if she was aware of some of the periods that apparently need to be allowed for service (see, e.g., Master Cook's observations on service on the UAE at paragraph 68 above), I am not sure, with respect, whether she would have expressed that view in quite such positive terms."

40. Foskett J explained the approach that he took to remaking the decision of Master Cook in paragraphs [82] and [83] as follows:

"[82] I consider that I should now exercise the jurisdiction that he was being invited to exercise. I now have the material that the Master should have had and, whilst it might be possible to be

> critical of certain passages of time that were allowed to pass by the Claimant's solicitors when trying to put together the Claimant's case, the truth is that all the preparations had been hampered by the failure of the Defendants to respond to any of the correspondence from the Claimant's solicitors. It is said that this position of failing to reply was adopted by the Defendants who had been "properly advised under UAE law not to do so" (as it was put in Mr Davis's Skeleton Argument). I have three observations about that: (i) the evidence is that the requirement for a notarised and Attested Power of Attorney showing the authority of the Claimant's solicitors to act was "generally" (not "invariably") required under UAE law and no evidence that the requirement actually applied in this case has been advanced; (ii) the University of Sharjah did not take that line when contacted by the Claimant's solicitors; (iii) it surely was not beyond the capacity of the insurers and/or lawyers in the UAE to write a polite letter to the Claimant's solicitors indicating that such a requirement had to be complied with before it would be possible to enter into any form of correspondence. True it is that the Claimant's solicitors did not obtain any advice about this, but it was not unreasonable, in my view, to have anticipated some kind of communication from the insurers and/or lawyers along the lines I have indicated. The insurers and/or lawyers only had to perform an Internet search and, had they not known it before, they would have realised that the Claimant's solicitors were a well-known firm of English lawyers.
>
> [83] For my part, I consider that Master Cook was right to grant the two extensions he did grant. I would have said that, for the reasons he gave in the judgment under appeal, the material he had available prior to granting the first extension order was sufficient for him to do so. Were we both to be wrong about that, the further information given in Ms Wainwright's witness statement of 1 August 2017 would have made good any deficiency. Her witness statement would certainly have made good any deficiency in the material put forward on 4 October 2016 because all the requirements of paragraph 8.2 of the 7A Practice Direction were met (see paragraph 55 above) and, to the extent that it may be relevant, the terms of r. 7.6(3) on the basis that all reasonable steps to serve were taken by relying upon the FPS process and that any delays were materially contributed to by the failure of the Defendants or their representatives to respond to communications sent by obviously reputable English lawyers."

41. Foskett J held that Master Cook should have dealt with the Defendants' application for an extension of time to serve their Acknowledgements of Service since it went to the jurisdiction of the court to entertain the Defendants' application to set aside the extension of time for service of the claim form. Foskett J concluded however that, in the circumstances, relief from sanctions should have been granted and, therefore, the

Defendants' application to set aside the extensions should be treated as having been considered properly [84].

Civil Procedure Rules

CPR 7.5 and 7.6

42. The relevant rules regarding the service of claim forms out of the jurisdiction are CPR 7.5(2) and 7.6, supported by Practice Direction 7A.

43. CPR 7.5 (2) provides as follows:

> "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."

44. CPR 7.6 provides as follows:

> "(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."

45. The relevant part of Practice Direction 7A provides as follows:

> "8.1 An application under rule 7.6 (for an extension of time for serving a claim form under rule 7.6(1)) must be made in accordance with Part 23 and supported by evidence.
>
> 8.2 The evidence should state:
>
> (1) all the circumstances relied on,
>
> (2) the date of issue of the claim,
>
> (3) the expiry date of any rule 7.6 extension, and
>
> (4) a full explanation as to why the claim has not been served.
>
> (For information regarding (1) written evidence see Part 32 and Practice Direction 32 and (2) service of the claim form see Part 6 and Practice Directions 6A and 6B.)"

CPR 11

46. CPR 11 (now CPR 21) provides as follows in relation to acknowledgments of service:

> "(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."

Part 52 of the CPR

47. Rule 52.21 provides:

> "(1) Every appeal will be limited to a review of the decision of the lower court unless—

> (a) a practice direction makes different provision for a particular category of appeal; or
>
> (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
>
> (2) Unless it orders otherwise, the appeal court will not receive—
>
> (a) oral evidence; or
>
> (b) evidence which was not before the lower court.
>
> (3) The appeal court will allow an appeal where the decision of the lower court was—
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
>
> (4) The appeal court may draw any inference of fact which it considers justified on the evidence.
>
> (5) At the hearing of the appeal, a party may not rely on a matter not contained in that party's appeal notice unless the court gives permission."

Authorities

48. There are numerous authorities dealing with the correct approach to the exercise of discretion to extend time for the service of proceedings under CPR 7.6. I set out the principles to be derived from three of the most important authorities.

(1) *Hashtroodi v Hancock* [2004]

49. First, *Hashtroodi v Hancock* [2004] 1 WLR 3206, which concerned an appeal against a Deputy Master's refusal to set aside a "without notice" extension of time for service of a claim form which had been granted by another Master. The following principles can be derived from the judgment of the court given by Dyson LJ:

    (1) There is no threshold requirement, or implied condition, that a "good reason" must be shown for failure to serve a claim form within the specific period before the court can exercise its power to extend time under CPR r 7.6 [17].

    (2) The court's power to extend time (simply) has to be exercised in accordance with the overriding objective under CPR r 1.2(b) [18].

    (3) As a matter of common sense, it is not possible to deal with an application for an extension of time under CPR r 7.6(2) "justly" without knowing why the claimant has failed to serve the claim form within the specified period [18].

(4) Under the CPR, a more calibrated approach is to be adopted: where a very good reason is shown for the failure to serve the claim form within the specified period, an extension of time will usually be granted; and generally, the weaker the reason, the more likely the court will be to refuse to grant the extension [19].

(5) If the reason why the claimant has not served the claim form within the specified period is that he (or his legal representative) simply overlooked the matter, that will be a strong reason for the court refusing to grant an extension of time for service [20].

(6) The Woolf reforms aimed to introduce more disciplined approach to the conduct of civil litigation by insisting that time limits be adhered to unless there is good reason for a departure. Dyson LJ cited Lord Woolf MR in the *Biguzzi case* [1999] 1 WLR 1926: "If the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant" [20].

(7) It should be remembered that the time limits (three years and four months) are generous and the claim form does not have to contain full details of the claim. Dyson LJ cited May LJ in *Vinos v Marks & Spencer plc* [2001] 3 All ER 784, 790, para 20: "…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" [21].

(8) In summary, the discretion should be exercised in accordance with the overriding objective, and that the reason for the failure to serve within the specified period is a highly material factor [22].

50. Dyson LJ also cited (at [18]) with approval the following passage from Professor Zuckerman, *Civil Procedure*, p. 180, para. 4.121:

> "For it is only fair to ask whether the applicant is seeking the court's help to overcome a genuine problem that he has encountered in carrying out service or whether he is seeking relief from the consequences of his own neglect. A claimant who has experienced difficulty should normally be entitled to the court's help, but an applicant who has merely left service too late is not entitled to as much consideration. Whether the limitation period has expired is also of considerable importance. If an extension is sought beyond four months after the expiry of the limitation period, the claimant is effectively asking the court to disturb a defendant who is by now entitled to assume that his rights can no longer be disputed."

(2) *Hoddinott v Persimmon Homes* (Wessex) Ltd [2008]

51. Second, *Hoddinott v Persimmon Homes (Wessex) Ltd* [2008] 1 WLR 806 which concerned an application to extend time for service of proceedings after expiry of the four month specified period. The following further principles can be derived from the judgment of the court given by Dyson LJ:

(1) Where there is no good reason for the failure to serve the claim form within the four months' period, the court still retains a discretion to grant an extension of time, but is unlikely to do so [40].

(2) Where a claimant applies for, and obtains, an extension of time for service of the claim form without giving notice to the defendant, he does so at his peril: he should know that the order may be set aside and he cannot be heard to say that he was 'lulled into a sense of false security' and blame the court for making the order in the first place [50].

(3) Where an extension of time might disturb a defendant who was entitled to assume his rights could no longer be disputed (because of a time bar), this was a matter of "considerable importance" when deciding whether or not to grant an extension (citing *Hashtroodi*'s case at [18]) [52].

(4) The court should scrutinise with care applications to grant an extension of time for service of the claim form [55].

(5) Where an application is made *after* the end of the four month period, the application must be dismissed unless the three conditions specified in CPR 7.6(3) are satisfied. The fact that the claim is not yet time-barred is irrelevant [55].

(6) Where an application is made *before* the expiry of the four month period, the fact that the claim is clearly not yet time-barred is a relevant consideration [55].

(3) *Cecil v Bayat* [2011]

52. Third, *Cecil v Bayat* [2011] EWCA Civ 135 which concerned multiple applications for extensions of time in circumstances where the claim would otherwise have been time-barred. The further principles can be derived from the judgment of Stanley Burnton LJ (with whom Rix and Wilson LJJ agreed):

(1) Where an application is made before the expiry of the four month period, but a limitation defence of the defendant may, or will, be prejudiced, the claimant should have to show, at the very least, that he has taken reasonable steps [48].

(2) In the law of limitation, a miss is as good as a mile. The primary question is whether, if an extension of time is granted, the defendant will, or may be, deprived of a limitation defence [54].

(3) It is relevant that the effect of a refusal to extend time will deprive the claimant of what may be a good claim; but (by the same token) the stronger the claim, the more important the defendant's limitation defence, which should not be circumvented by an extension of time save in exceptional circumstances [55].

53. In his concurring judgment, Rix LJ emphasised the importance of limitation and the strictness of the CPR 7.6 regime. He pointed out that limitation had been described as a "fundamental right" of a defendant by Lord Browne-Wilkinson in *Dagnell v JL Freedman & Co* [1993] 1 WLR 388. After reviewing the authorities on CPR 7.6, he stated that "the general regime is a strict one, and that will be particularly the case where

limitation is involved" and cited the following passage from the judgment of Mummery LJ in *Anderton v Clwyd County Council (No.2)* [2002] 1 WLR 3174 at [2]:

> "[2] [T]here will be very few (if any) acceptable excuses for future failures to observe the rules for service of the claim form. The courts will be entitled to adopt a strict approach, even though the consequences appear to be harsh in individual cases".

54. It will be evident, therefore, that a recurrent theme emphasised by the authorities is the strict approach that CPR 7.6 was intended to introduce to the grant of extensions of time for the service of claim forms.

Fresh evidence on appeal

55. On the question of the approach to the admission of fresh evidence on appeal, we were referred to *E I Dupont de Nemours & Co v S T Dupont* [2006] 1 WLR 2793. The principles on which the appeal court will admit fresh evidence under CPR 52 are well understood (see also the judgment of Hale LJ in *Hertfordshire Investments Limited v Bubb* [2000] 1 WLR 2318 at 2325D–H [95]). However, in the light of our conclusions below on the issue of the Judge's entitlement to admit Wainwright III, nothing turns on these principles.

Grounds of appeal

56. The Defendants' Grounds of Appeal can be summarised as follows:

    (1) The Judge was wrong to admit fresh evidence on the appeal which was not available to the Master and failed to pay any regard to apply the principles in *Ladd v Marshall* and/or the requirements of the CPR (Grounds 1-4).

    (2) The Judge failed properly to scrutinise the evidence which was before the Court on the original applications to extend time for service of the claim form (Ground 5).

    (3) The Judge failed properly to scrutinise the fresh evidence which he admitted for the purpose of considering what steps the Claimant's solicitor could and should have taken prior to the deadline for service (Ground 6).

    (4) The Judge failed to apply the restrictive nature of extensions of time for service of the claim form and to take proper account of the fact that (a) it was incumbent upon the Claimant's solicitors to consider from an early stage the issue of service of the claim form and (b) but for the admitted (but unexplained) delays, the claim form could have been served (even) within the period of the original extension (Grounds 7-9).

    (5) The Judge wrongly sought to distinguish the approach of the court in *Foran v. Secret Surgery* [2016] EWHC 1029 (QB).

Submissions

Defendants' case

57. The Defendants' case was that both extensions of time granted by Master Cook on 25th September 2015 and 17th October 2016 were wrongly granted. Accordingly, the Defendants argued in this appeal that Foskett J was (a) wrong not to have overturned Master Cook's first extension granted on 25th September 2016 and (b) wrong to have set aside the second part of Master Cook's judgment of 12th July 2017 whereby Master Cook reversed his original order of 17th October 2016 granting the second extension.

58. Mr Davis submitted in summary that (i) Foskett J was wrong to find that the ability of the Court to receive further evidence on a re-hearing was "largely unconstrained" ([65]); (ii) Foskett J failed to have proper regard to the requirements of CPR PD 7A 8.2 which requires a party applying for an extension of time to put forward evidence of "all the circumstances relied upon" and "a full explanation as to why the claim has not been served"; (iii) Foskett J failed to have regard to the principles of *Ladd v Marshall* (*supra*) when allowing in the new evidence; and (iv) in any event, Foskett J failed to give adequate scrutiny to the Claimant's new evidence (*i.e.* Wainwright III) which failed to give an adequate explanation for the delays.

Claimant's case

59. The Claimant's case was that Foskett J's decision was correct and should be upheld. Ms Gumbel QC submitted that Foskett J was right to have held that both extensions had been correctly granted and Master Cook had been wrong in his judgment of 12th July 2017 to reverse his second extension. Ms Gumbel QC put forward two main reasons. First, the hearing before Master Cook on 12th July 2017 to set aside the extensions of time should have been by way of rehearing not a mere review. At a rehearing the Master should have given both sides the opportunity to submit evidence and he failed to do so; and had Master Cook seen the further evidence submitted by the Claimant that was considered by Foskett J (*i.e.* Wainwright III) he would not and should not have reversed his order of 4th October 2016. Second, the Defendants' application to set aside the order of 4th October 2016 regarding the second extension was an application as to jurisdiction. The Defendants needed an extension of time under CPR 11(1) to cure their late service of their Acknowledgment of Service. The Master failed to consider the second application first.

Analysis

Summary of Foskett J's reasoning

60. Foskett J held that both extensions of time had been properly granted and Master Cook had erred in setting aside his second extension granted on 17th October 2016. Foskett J's reasoning for this conclusion can be summarised as follows. First, there was nothing to suggest that Master Cook had been reminded that the nature of the hearing before him was that of a rehearing, not merely a review ([72]). Second, the Master's decision to refuse an adjournment cannot, in the circumstances, be characterised as merely a 'case management' decision as submitted, but it went to the heart of the exercise the Master was called upon to perform ([72]). Third, whilst it was right to say that the information given in the Claimant's second application for an extension was "sparse", the word used in PD7A was "should" not "must" which suggested a marginally less strict requirement

than "must" would convey ([73]). Fourth, whilst the rules were in place to encourage disciplined practice, it offended against the overriding principle to deal with cases "justly" – particularly in a case involving a seriously disabled child - to ignore the reality that there were good grounds for having granted the second extension ([73]). Fifth, further, the complete failure of the Defendants to respond to the Claimant's various communications ought to have weighed heavily against the otherwise important consideration of the expiry of the limitation period ([80]). Sixth, Foskett J disagreed with Cox J's analysis in *Foran* (*supra*) where she decided that the fact that service was to be effected in a foreign jurisdiction was irrelevant to the question of whether or not to extend time for service, or (in any event) at least was catered for in the 6 month period allowed for service out of the jurisdiction ([76]-[80]).

Admission of further evidence

Was Foskett J right to hold that Master Cook erred in refusing an adjournment for the Claimant to file further evidence?

61. A key finding by Foskett J was that Master Cook erred in refusing an adjournment and denying himself the opportunity to see the Claimant's further evidence that could have made a difference to the outcome of the hearing (*i.e.* Wainwright III) [81].

62. Master Cook's judgment is silent as to the basis upon which he refused the Claimant's application for an adjournment; and there is no transcript or note of any reasons which he might have given for refusing the adjournment.

63. Foskett J noted that it was agreed that the Claimant made an application before Master Cook for an adjournment in order to file further evidence. He commented that he did not know what precisely was said in support of the application but understood that it was resisted by the Defendants and refused by Master Cook. Foskett J continued: "I imagine that the Master felt he could deal with the issue on the basis of the evidence before him" [49].

64. Foskett J held that Master Cook erred in refusing an adjournment and denying himself the opportunity to see the Claimant's further material that could have made a difference to the outcome of the hearing (*i.e.* Wainwright III) ([81]). Foskett J's reasoning was twofold. First, there was nothing to suggest that Master Cook had been reminded that the nature of the hearing before him was that of a rehearing, not merely a review ([72]). Second, the Master's decision to refuse an adjournment cannot, in the circumstances, be characterised as merely a 'case management' decision as submitted, but it went to the heart of the exercise the Master was called upon to perform [72].

65. I am not persuaded that Foskett J's latter reason provided a sufficient basis for reversing the Master's decision to refuse an adjournment. Master Cook took what was on any view a 'case management' decision well within the purview of his general case management powers.

66. However, in my view, there is force in Foskett J's first reason, namely that Master Cook approached the hearing on 12th July 2017 on the basis that it was a (mere) review not a rehearing. Master Cook had been encouraged to this view by the Defendants' skeleton argument dated 11th July 2017 which submitted in terms: "The review of the applications to extend time for service of the claim form is a review of the existing evidence" (see

above). It seems clear that Master Cook approached the task before him on this basis: in paragraph [16] of his judgment, Master Cook spoke in terms of carrying "a review" of the Claimant's application(s) for an adjournment. He made no reference to Wainwright II.

67. In my view, Foskett J was correct to hold that, if and in so far as Master Cook approached the hearing before him as a review rather than a rehearing, Master Cook was in error. Foskett J appropriately cited (at [62]) the following passage from paragraph [33] of Dyson LJ's judgment in *Hashtroodi* in which Dyson LJ made it clear that an application under CPR 23.10(1) to set aside an order obtained without notice should involve a rehearing not a mere review:

> "[33] It is common ground that in the events which have occurred here, the appeal to this court is a rehearing, rather than a review of the decision of [the deputy master who considered the application to set aside the extension order of the Master]. This is because … an application under CPR 23.10(1) to set aside an order obtained without notice should involve a rehearing of the issue, and not a review of the decision that it is sought to set aside; but, in the present case, the deputy master conducted the application as if it were a review of the decision of [the Master]." (emphasis added)

68. On this basis, Foskett J was correct to conclude that Master Cook had misdirected himself as to the nature of the hearing before him; and it was, therefore, open to Foskett J to remake the relevant decisions determined by Master Cook, including the question of admitting further evidence from the Claimant.

Was Foskett J right to admit Wainwright III?

69. When turning to the question of the admission of further evidence, Foskett J cited *Dupont* (*supra*) as regards the nature of a rehearing on appeal (see above). In particular, as regards the power to admit fresh evidence under Rule 52.11(2) applying equally to appeals by way of review or rehearing (*Dupont* at [96]).

70. Foskett J continued:

> "[64] In real terms, therefore, there appears to be little practical difference between the approach of the appellate court whether the exercise is a rehearing or merely a review. It does not appear that the ability of the appellate court to receive further evidence is constrained save, perhaps, to the extent that caution will always need to be shown to avoid "second bites at the cherry" when there is a clear requirement within the rules for the evidence to be in a particular form or to deal with a particular issue: cf. *Sharab v Al-Saud [2009] EWCA Civ 353*, [52]. But, as I have indicated (see paragraph 62 above), the consideration I must give to the appeal is in the form of a rehearing of a decision that itself ought to have been by way of rehearing of the issue that was first resolved on a "without notice" basis. It does seem to me that if the power of the appellate court to receive further

> evidence on the issue is relatively unconstrained, so too must be the power of the tribunal hearing an application to set aside an extension order previously made. I use the expression "relatively unconstrained" deliberately: I do not consider that the provisions of the overriding objective permit a complete "free for all" in terms of new material, but ultimately the court must reach a just result and it may be advisable, particularly in a case such as the present where the interests of a young child are concerned, to receive the fresh material offered in the first instance and then, of course, to subject it to appropriate scrutiny to see what effect it has on the evidential basis for making the decision."

71. As Foskett J pointed out, in remaking Master Cooke's decision on admitting further evidence, the consideration he was required to give on appeal was in the form of a rehearing of a decision that itself ought to have been by way of rehearing of the issue that was first resolved on a "without notice" basis. Therefore, the particular considerations as to the admission of fresh evidence on appeal under CPR 52.11 and *Ladd v. Marshall* identified by May LJ in *Dupont* (*supra*) do not arise.

72. Foskett J was entitled to exercise the discretion to admit further evidence afresh, unconstrained by the decision below. He concluded that, in all the circumstances of the case, it would be appropriate to admit Wainwright III. His reasons included the fact that the present case concerns the interests of a young disabled child (see paragraphs [64] and [73]). Whilst the nature of the subject claim is relevant by way of general background, the requirement to deal with cases "justly" in accordance with the overriding objective requires a necessarily objective and even-handed approach. The stronger and more deserving the claimant's claim, the more important the defendant's limitation defence (*Cecil v. Bayat* (*supra*) at [55]). The courts are required to adopt a strict approach, even though the consequences appear to be harsh in individual cases (*Anderton v. Clwyd County Council (No.2)* [2002] 1 WLR 3174 at [2]). The admission of further evidence had to be considered on its merits and in the light of the provisions of PD7A (see further below).

73. However, having made these observations, I am not persuaded that there are sufficient grounds for interfering with Foskett J's exercise of the discretion to admit fresh evidence.

Substantive issues before Foskett J

74. I turn, finally, to the substantive issues for determination before Foskett J as regards the first and second extensions on the basis that he was entitled to admit Wainwright III.

75. Foskett J held that Master Cook was right to grant both extensions of time on 25th September 2015 and 17th October 2017. Foskett J said that he would have come to the same conclusion as Master Cook as regards the first extension on the material before him [83]. And whilst the information given in the Claimant's second application was "sparse" [73], the evidence in Wainwright III would have made good any deficiency in either the first or second application [83].

Was Foskett J right to hold that the first extension had been properly granted?

76. Foskett J held that Master Cook was right to grant the first extension of time on 25th September 2015 and he would have come to the same conclusion as Master Cook as regards the first extension on the material before him [83].

77. In my view, Foskett J was right to uphold Master Cook's first extension of time on the basis of the material originally filed by the Claimant. The Claimant's first application was adequately supported by Wainwright I, paragraphs 35 and 36 of which explained that there had been difficulties in quantifying the Claimant's claim and the RCJ Process Section had advised that service in the UAE was likely to take more than 12 months (see above). In paragraph 15 of his judgment, Master Cook accepted Ms Wainwright's explanation and observed that he would have expected service in the UAE to take 12 months. In this regard, Foskett J was right to conclude that Cox J's analysis in *Foran (supra)* regarding the 6-month period allowed for service out of the jurisdiction was insufficient in the present case (paragraphs [76]-[80]). For these reasons, Foskett J was entitled to take the view that Master Cook's decision on 12th July 2017 to maintain his original extension was justified.

Was Foskett J right to hold that the second extension had been properly granted (assuming the admission of Wainwright III)?

78. In my view, Foskett J erred in principle or misdirected himself when concluding that the Claimant had justified the second extension by serving Wainwright III for the following reasons.

79. First, Foskett J was wrong to place weight, let alone considerable weight, on the fact that the Defendants had not responded to the Claimant's initial communications and to suggest that "all" the Claimant's preparations had been hampered by the Defendants' failure to respond to any of the correspondence from the Claimant's solicitors (see paragraphs [80] and [82]). It is far from clear that it did. In any event, the co-operation of foreign defendants is not necessarily always to be expected as a matter of course. Indeed, the lack of response from a foreign defendant may make it all the more important for a claimant to consider obtaining early foreign law advice. Leigh Day did not take this precaution.

80. In the present case, there was unchallenged evidence from Ms Rachel Moore of Kennedys Law LLP that the First Defendant had been expressly advised by their insurers, the Oman Insurance Company, not to respond to the Claimant's initial letter of claim dated 23rd January 2014 but to pass it and any further correspondence to insurers unanswered for their attention. This the First Defendant duly did - and subsequently received legal advice from their corporate UAE lawyers, Al Jaziri & Associates, that they should not respond to the letter of claim because the Claimant's solicitors had not provided a notarised and attested Power of Attorney showing their authority to act on behalf of the Claimant as generally required under UAE law. The First Defendant then duly passed this advice to their insurers. In the light of this advice, none of the First to Sixth Defendants responded substantively to the Claimant until, following service of the Claimant's proceedings on 8th February 2017, the First Defendant subsequently instructed Kennedys Law LLP on 6th April 2017.

81. Second, whilst he was right to hold that Master Cook was entitled to grant the first extension (see above), Foskett J failed to bear sufficiently in mind the fact that the Claimant delayed in issuing the proceedings until very shortly before the expiry of the

limitation period in August 2015. As emphasised by May LJ in *Vinos v Marks & Spencer plc*, "…if you leave issuing proceedings to the last moment and then do not comply with this particular time requirement" you will be statute-barred" (*ibid*, paragraph 20).

82. Third, as emphasised in *Hoddinnott* at paragraph [55] (*supra*), it is important that the claimant's evidence in support of an extension is "scrutinised with care". In my view, the Judge did not scrutinise or pay sufficient regard to the following facts and matters as they emerge from the evidence, including Wainwright III, as regards the delays that ensued after the expiry of the limitation period.

83. The following points are pertinent: (i) Ms Wainwright admitted that, following the issue of proceedings in the present case (on 5th July 2015), she turned to other cases which she said required her urgent attention. (ii) She was unable to recall precisely when she first contacted the Foreign Process Service ("FPS") regarding the procedure for service in the present case but said it was between 11th July and 21st September 2015, *i.e.* during a 2 ½ month period. (iii) This is, perhaps surprising given that the Claimant's solicitors did not know at this stage how long service in UAE would take and had already had to lodge an application for an extension on 8th July 2016 which would mean that they would have to effect service out of time.

84. This was followed by a series of further significant and unexplained delays on the part of the Claimant. (i) First, the Court documents were not taken to the FPS until December 2015, *i.e.* 5 months after issue of proceedings. (ii) Second, the further expert, Dr McHugo (whose views were said to be necessary in order to decide whether to proceed against "all Defendants") was not instructed until April 2016, *i.e.* 9 months after issue of proceedings. Ms Wainwright admits that the delay in her instructing Dr McHugo was because of "urgent work that was necessary on other cases". (iii) Third, the Court documents were not legalised at the UAE Embassy until July 2016, *i.e.* 12 months after issue of proceedings, (the Foreign & Commonwealth Office ("FCO") had said in December 2015 that legalisation was necessary but subsequently said in August 2016 that this was not necessary). (iv) Fourth, there was then a series of further delays during August and September 2016 involving preparation of the packs of documents, payment of the FCO fees, and the lodging of the correct documents including N224 for each claim.

85. It was in these circumstances that in October 2016, the Claimant sought a further extension, *i.e.* 14 months after issue of proceedings. Proceedings then did not begin to be served upon the Defendants until early February 2017, *i.e.* some 19 months after issue of proceedings.

86. Thus, post-issue of proceedings, there were lengthy unexplained delays by the Claimant, amounting to some 12-14 months, notwithstanding that the limitation period had already expired and that they should have been progressing the claim as quickly as possible.

<u>Acknowledgement of Service issue</u>

87. The Claimant contended that Master Cook erred in failing to deal with the Defendants' application for an extension of time under CPR 11(1) to cure their late service of their Acknowledgments of Service prior to determining the Defendants' application to set aside the Claimant's second application for an extension.

88. In my view, Foskett J was right, for the reasons he gave, to hold that relief from sanctions should have been granted and thus there was no jurisdictional bar to the Defendants' application to set aside the Claimant's second application for an extension.

Summary

89. In my view, the overall position, on proper analysis, can be summarised as follows:

(1) First, the Judge placed undue emphasis on the fact that the Defendants had been unresponsive in circumstances where the Claimant's solicitors had not taken the elementary precaution of taking expert advice as to UAE law.

(2) Second, the Judge failed sufficiently to take account of (a) the very significant periods of delay both pre-issue but particularly post-issue, (b) the lack of any or any satisfactory explanation for these periods of delay, and (c) the fact that the majority of the delays were attributable to the failures, inaction and general lack of urgency on the part of the Claimant's solicitors (as is apparent from the Claimant's own evidence, in particular Wainwright III).

(3) Third, the Judge also failed to pay sufficient regard to the expiry of limitation period and the fact that that the Claimant had chosen to issue the proceedings at the last moment.

Conclusion

90. In my view, for the above reasons, this appeal should be allowed and service of the proceedings against the First to Sixth Defendants should be set aside.

Sir Timothy Lloyd

91. I agree that the appeal should be allowed, and service of the proceedings on the First to Sixth Defendants be set aside. I consider that Master Cook was justified on 12 July 2017 in setting aside his second order extending time for service of the proceedings out of the jurisdiction, and that Foskett J should not have reversed Master Cook's order to that effect.

92. I do not need to add to what has been said by Haddon-Cave LJ about the nature of the judicial process that was involved at each of those hearings.

93. In my judgment Foskett J was clearly wrong to rely, as he did at paragraph 82 of his judgment, on the Claimant's preparations having been "hampered by the failure of the Defendants to respond to any of the correspondence from the Claimant's solicitors". In the case of a Defendant or prospective Defendant who or which is within the jurisdiction of the court, that may be a legitimate attitude. The regime of Pre-Action Protocols encourages co-operation between potential or prospective parties to litigation, and solicitors acting for prospective or actual Claimants may be entitled to expect a constructive response from prospective Defendants or their insurers or legal representatives. But if the prospective or actual Defendant is not within the jurisdiction, those acting for a Claimant cannot assume that their approaches to a foreign person or entity will receive any particular response, let alone a constructive response. From the point of view of the foreign party, there is, or at least there may be, no reason to respond.

Claimants' representatives need to bear in mind that, unless and until proceedings are validly served on the foreign Defendant, that party is under no obligation to respond at all. Correspondingly, they need to give proper attention to the requirements of the rules as regards service outside the jurisdiction, and to the practical difficulties that this may sometimes involve, with the concomitant need, in many cases, to obtain an extension of time for such service. The evidence before Master Cook on 17 October 2016 was not adequate for this purpose, nor was the deficiency made good by Wainwright II or III.

Lord Justice David Richards

94. I agree that the appeal should be allowed for the reasons given in both judgments.