Case No: HT-2021-000192

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2021] EWHC 1782 (TCC)

Royal Courts of Justice
Rolls Building
London, EC4Y 1NL

Date: 29/06/2021

Before:
MRS JUSTICE O'FARRELL DBE

- -

Between:

THE QUEEN (on the application of THE GOOD LAW PROJECT)	**Claimant**
- and -	
THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE	**Defendant**
- and –	
PHARMACEUTICALS DIRECT LIMITED	**Interested Party**

- -
- -

Jason Coppel QC (instructed by **Bindmans LLP**) for the **Claimant**
Ewan West and **Jonathan Lewis** (instructed by **Government Legal Department**) for the **Defendant**
Louis Browne QC and **Anja Lansbergen-Mills** (instructed by **Brabners LLP**) for the Interested Party

Hearing date: 16th June 2021

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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 Tuesday 29th June 2021 at 2pm"**

MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. This matter arises out of a claim for judicial review, whereby the Claimant seeks to challenge the lawfulness of the Defendant's decisions to award contracts for the supply of personal protective equipment ("PPE") to the Interested Party.

2. There are four applications before the court:

    i) the Claimant's application for permission to serve an amended Statement of Facts and Grounds;

    ii) the Claimant's application for an order under CPR 6.15 that would render valid any late service of its claim form; alternatively, an extension of time for such service;

    iii) the Defendant's application for an order that the claim form be set aside for want of jurisdiction by reason of the late service of the claim form;

    iv) the Defendant's application for the claim to be stayed until resolution of other claims in which the Claimant has challenged the award of PPE contract.

3. The applications are opposed. It is agreed that the court should determine the Defendant's jurisdiction challenge and the Claimant's application for relief under CPR 6.15 or an extension of time ("the Jurisdiction Applications") before considering the other matters.

4. The central issue is whether there was valid service of the claim form in these proceedings; if not, whether the court should rectify any deficiency or extend time for service of the claim form.

Background facts

5. On 4 July 2020, the Defendant entered into a contract with the Interested Party for the supply of PPE, namely, FFP3 Meixin 2016V respirators, with a value of £102.6 million ("the Contract"). The Contract was awarded under the negotiated procedure without prior publication pursuant to regulation 32(2)(c) of the Public Contracts Regulations 2015 ("the PCR 2015").

6. On 29 March 2021 the Contract was published on the Contracts Finder service.

7. On Thursday 8 April 2021, the Claimant's solicitors ("Bindmans") sent a pre-action letter to the Government Legal Department ("the GLD"). The letter was sent by email to the following addresses:

    i) TheTreasurySolicitor@governmentlegal.gov.uk; and

    ii) newproceedings@governmentlegal.gov.uk.

8. The Claimant was aware that any challenge by way of judicial review would have to be made promptly, stating in the letter:

> "Pursuant to CPR r. 54.5(6), where an application for judicial review relates to a decision governed by the PCR 2015, the claim form must be filed within the time required by reg. 92(2) of those Regulations, that being within 30 days beginning with the date when the Claimant "first knew or ought to have known that grounds for starting the proceedings had arisen.". The Claimant notes, pending the Defendant's response to this letter, that this may require action by the Claimant to issue proceedings on a protective basis at short notice. The Claimant very much hopes this can be avoided by the Defendant responding to this letter in a prompt, reasonable, candid and transparent manner …"

9. On 12 April 2021, Mr Olsen of the GLD replied:

> "We refer to your letter before action, dated 8 April 2021, and confirm that we are instructed to act for the proposed Defendant in relation to this matter.
>
> We ask that in future all correspondence in this matter is sent by email to the Government Legal Department marked for the attention of Warrick Olsen… copying the GLD individuals included in the email attaching this letter.
>
> You have requested a response to your letter by 4pm on 15 April 2021. We do not consider the aims of the protocol will be achieved by stipulating such a restrictive deadline for the proposed Defendant to respond.
>
> As you are aware the protocol provides that a Defendant should normally respond to a letter before action within 14 days. We anticipate that we will require 14 days to investigate the matter and provide our client's response.
>
> We anticipate providing our client's substantive response on or before 22 April 2021 …"

10. That letter was sent by email from Mr Olsen's GLD address. The email footer notified recipients that GLD accepts service by email and directed them to a Government webpage giving further details. The webpage is entitled: "Serve the Treasury Solicitor with legal proceedings" and states:

> "New Legal Proceedings which are required to be served upon The Treasury Solicitor can be served as follows:
>
> By email at: newproceedings@govermentlegal.gov.uk for all new legal proceedings issued in the UK except for new immigration proceedings.
>
> …

> The email addresses above are for the service of new proceedings only: any other correspondence addressed to it will be deleted unread. For all proceedings (including in the Supreme Court) once a GLD case officer has been allocated the case all subsequent service, save for formal costs claims in Immigration proceedings (see above), should be effected on their, or any nominated successor's, GLD email address)."

11. On 13 April 2021 Bindmans sent an email to Mr Olsen, stating:

> "We write further to your letter of 12 April 2021 indicating that you expect to be able to respond to our pre-action letter of 8 April 2021 by 22 April. This is 14 days after our letter in respect of a case that, as you are aware, has to be filed within 30 days. It is also just three working days before the court deadline.
>
> In these circumstances, we consider that it may well be necessary for our client to file a protective claim ahead of the limitation date, along with a consent order for an immediate stay to allow us to properly consider any response and engage in further pre-action correspondence if appropriate, with a timetable for filing full grounds and evidence, and summary grounds of response, if the claim cannot be resolved through correspondence.
>
> Please confirm that, in light of the delay to the response to the pre-action letter, your client would be willing to agree to such a consent order, in the event that our client does choose to pursue this claim following receipt of the response."

12. On 15 April 2021 Mr Olsen of the GLD replied, reiterating the need for fourteen days to respond to the pre-action letter and suggesting that an agreed stay was premature pending that response.

13. On 22 April 2021, the GLD provided its substantive response to the pre-action letter, stating:

> "We ask that in future all correspondence in this matter is sent by email to the Government Legal Department marked for the attention of Warrick Olsen… copying the GLD individuals included in the email attaching this letter.
>
> New legal proceedings in England which are required to be served on the Treasury Solicitor may be served electronically via email to the following email address: newproceedings@governmentlegal.gov.uk . We request that any new legal proceedings served in relation to this matter via that email address are also copied to the individuals included in the email attaching this letter…"

14. By letter dated 23 April 2021 Bindmans again raised the suggestion that the claim, when issued, should be stayed with an agreed timetable for the filing of full pleadings and

evidence by the parties. The issue of a potential limitation issue was addressed as follows:

> "For completeness, we note that you have suggested, for the first time, in your letter of 22 April, that time somehow started to run upon your receipt of a letter from this firm dated 18 March 2021 referring to "contracts awarded to PDL". This is clearly unsustainable. Our letter of 18 March 2021 dealt with "any contracts which were awarded and then subsequently cancelled, and include, but are not limited to, any contracts awarded to Pharmaceuticals Direct Limited." It is accordingly clear that we were referring to the contracts (or contract negotiations) referred to in paragraphs 17 and 18. Our client had no knowledge of the contracts subsequently awarded to PDL until the CAN of 29 March 2021. We would therefore invite you to accept that limitation expires on 27 April 2021. Even if your client maintains its position, this is a matter which can be dealt with within the litigation once issued. It does not affect the desirability of the stay referred to above"

15. By letter dated 27 April 2021 the GLD agreed to a stay of any proceedings but on the basis that such stay would remain in place, pending the outcome of other ongoing PPE challenges brought by the Claimant against the Defendant.

16. On 27 April 2021, the Claimant filed the claim in the Administrative Court, challenging the lawfulness of the Contract. The grounds of challenge were identified as:

    i) breach of the duties of equal treatment and transparency contrary to the PCR 2015;

    ii) breach of the common law duty to act without apparent bias.

17. Also on 27 April 2021, Bindmans emailed the unsealed claim form to the 'newproceedings' email address, with copies sent to Mr Olsen and the other identified GLD individuals, stating:

> "Please find attached, by way of service:
>
> 1. Letter for the attention of Mr Warrick Olsen, who is copied into this email, and to whom we will also send a copy of this letter directly;
>
> 2. Unsealed claim form and continuation sheet; and
>
> 3. Paginated bundle of documents.
>
> The claim form and bundle of documents have been lodged at the court today."

18. The letter and documents were also sent directly by Bindmans to Mr Olsen by email:

> "Further to earlier correspondence in this matter, and the email that has just been sent to the 'newproceedings' email address as requested, please find attached letter for your attention, as well as unsealed claim form and bundle."

19. The attached letter stated:

> "… a protective claim has been filed at Court today, 27 April 2021… A copy of the sealed claim form will be served to you electronically in due course given the Court's working arrangements …
>
> Our understanding is that the Government Legal Department is accepting service by email, but please let us know as soon as possible if that is incorrect …"

20. On 28 April 2021, the court issued the claim form, by printing the court seal on the form and allocating it a claim number.

21. On the same day, Bindmans emailed the sealed claim form to the three named GLD individuals. The sealed claim form was not sent to the 'newproceedings' email address. Mr Olsen confirmed receipt of the claim.

22. It is common ground that time for service of the claim form expired on 5 May 2021.

23. By letter dated 6 May 2021 the GLD raised the issue of validity of service of the claim form with Bindmans:

> "Paragraph 4 of our client's letter of response dated 22 April 2021 confirmed that new legal proceedings which are required to be served on the Treasury Solicitor may be served electronically via email to newproceedings@governmentlegal.gov.uk.
>
> Your client's claim is required to be served on the Treasury Solicitor.
>
> We have been unable to locate any record of the sealed claim form issued in respect of this matter being sent to that email address or being served by other means.
>
> We would be grateful if you would confirm the manner in which proper service of your client's claim form was effected."

24. Bindmans responded on the same day:

> "These proceedings were served shortly after filing by emailing them to newproceedings@governmentlegal.gov.uk on 27 April 2021 at 15:54. They were sent to the personal email addresses of the solicitors handling the matter three minutes later. Mr Olsen acknowledged receipt on 16:51.

> The sealed claim form was received from the Court the following day and was sent to the solicitors handling the matter for GLD at 13:44. Receipt was acknowledged by Mr Olsen at 13:47.
>
> We therefore consider:
>
> (i) the Defendant was validly served with the proceedings in accordance with its instructions – there is no suggestion that all future service/correspondence must be provided to the "newproceedings" address once the initial proceedings had been served at that address; and
>
> (ii) in any event, the Defendant's solicitors received and acknowledged both the original service of the unsealed claim form and associated bundle, as well as the sealed claim form, such that there can be no question of the Defendant not being aware of the claim or of having suffered any prejudice whatsoever.
>
> We would therefore invite you to accept that valid service has been effected. Alternatively, we attach with this letter a copy of the sealed claim form, and would invite you to accept valid service accordingly."

25. On 6 May 2021 a copy of the sealed claim form was sent to the 'newproceedings' email address.

The Jurisdiction Applications

26. On 19 May 2021 the Claimant issued an application, seeking an order that:

    i) pursuant to CPR 6.15, the steps already taken by the Claimant to bring the claim form to the attention of the Defendant and Interested Party constitute good service;

    ii) alternatively, an extension of time to serve the claim form to (a) 10 May 2021 for the Defendant and (b) 17 May 2021 for the Interested Party.

27. On 25 May 2021 the Defendant issued an application, seeking an order that the claim form issued on 28 April 2021 be set aside on the basis that the court is without jurisdiction to hear the claim because the claim form was not served within the time allowed by CPR 54.7.

28. The following witness statements have been served in respect of the Jurisdiction Applications:

    i) Jamie David Potter of Bindmans, dated 19 May 2021;

    ii) Warrick Olsen of GLD, dated 21 May 2021;

    iii) Paul Graham Lunt of Brabners LLP, dated 14 June 2021.

Position of the interested party

29. It is common ground that valid service of the claim form was not effected on the Interested Party by 5 May 2021. On 28 April 2021 the sealed claim form was sent to Mr Lunt of Brabners LLP, solicitors for the Interested Party. Such service was invalid because Mr Lunt had not communicated to the Claimant that he was authorised to accept service on behalf of the Interested Party or that service by email was permitted. On 29 April 2021 the Claimant sent the sealed claim form and bundle to Mr Lunt by recorded delivery. On 13 May 2021 the Claimant sent the sealed claim form and bundle to the Interested Party by recorded delivery. Therefore, the deemed date of service on the Interested Party was 17 May 2021.

30. Mr Browne QC, leading counsel for the Interested Party, submits that there was no valid service on the Interested Party. However, he accepts that the material issue is whether there was valid service on the Defendant, or whether any defect in that service should be rectified. If there is no valid service of the claim on the Defendant, there are no valid proceedings in which the Interested Party might participate. However, if there are valid proceedings against the Defendant, regardless of any failure on the part of the Claimant to serve the Interested Party on time, it would wish to have an opportunity to participate in the proceedings.

The material procedural rules

31. 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."

32. CPR 54.5 sets out the time limits for filing a claim form in judicial review proceedings, including at CPR 54.5(6):

> "Where the application for judicial review relates to a decision governed by the Public Contracts Regulations 2015, the claim form must be filed within the time within which an economic operator would have been required by regulation 92(2) of those Regulations (and disregarding the rest of that regulation) to start any proceedings under those regulations in respect of that decision. "

33. CPR 54.7 provides:

> "The claim form must be served on –
>
> (a) the defendant; and
>
> (b) unless the court otherwise directs, any person the claimant considers to be an interested party,
>
> within 7 days after the date of issue."

34. CPR 6.3 specifies methods of service of a claim form, including at 6.3(1)(d) electronic communication in accordance with Practice Direction 6A.

35. Practice Direction 6A states at paragraph 4.1:

> "Subject to the provisions of rule 6.23(5) and (6), where a document is to be served by fax or other electronic means—
>
> (1) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving -
>
> (a) that the party to be served or the solicitor is willing to accept service by fax or other electronic means; and
>
> (b) the fax number, e-mail address or other electronic identification to which it must be sent; and
>
> (2) the following are to be taken as sufficient written indications for the purposes of paragraph 4.1(1) -
>
> (a) a fax number set out on the writing paper of the solicitor acting for the party to be served;
>
> (b) an e-mail address set out on the writing paper of the solicitor acting for the party to be served but only where it is stated that the e-mail address may be used for service; or
>
> (c) a fax number, e-mail address or electronic identification set out on a statement of case or a response to a claim filed with the court."

36. CPR 6.15 provides:

> "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.
>
> (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."

37. CPR 7.5 requires a claim form to be served by a step taken within four months of the date of issue (if serving within the jurisdiction). In this case CPR 7.5 does not apply because specific provision is made for service of a claim form in judicial review proceedings in CPR 54.7.

38. 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."

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

> "Except where these rules provide otherwise, the court may – …
>
> (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired) …"

40. 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. "

Procedural irregularity or invalid service

41. The claim form was issued on 28 April 2021. CPR 54.7 provided that the claim form was required to be served within seven days, that is, by 5 May 2021. On 6 May 2021 the sealed claim form was emailed to the 'newproceedings' email address.

42. Mr West, counsel for the Defendant, submits that the Claimant failed to effect valid service of the claim form. The Defendant stipulated that it only accepted electronic service at the 'newproceedings' email address. An unsealed claim form was sent to the 'newproceedings' address on 27 April 2021 but that did not constitute service. On 28 April 2021 the sealed claim form was sent to the Defendant but not to the 'newproceedings' email address. The sealed claim form was emailed to the 'newproceedings' email address on 6 May 2021 but that was outside the seven day period for service of the claim form stipulated by CPR 54.7. Therefore, there was no valid service of the claim form.

43. Mr Coppel QC, leading counsel for the Claimant, submits that the unsealed claim form sent to the 'newproceedings' email address on 27 April 2021 was served in accordance with CPR 54.7. The absence of a court seal and number amounted to a procedural irregularity but the court could correct such irregularity pursuant to CPR 3.10. The irregularity did not cause any prejudice to the Defendant, who was not deprived of any knowledge of the nature of the claim against it or of the fact that proceedings had been or were about to be started. The Claimant relies on CPR 3.10, not as the basis for its application to extend time for service of the claim form, but in response to the Defendant's jurisdictional challenge that irregular service of the claim form was invalid.

44. The court rejects the Claimant's case that there was irregular, but otherwise valid, service. The unsealed claim form was sent to the Defendant on 27 April 2021. The claim form was issued by the court office on 28 April 2021. Therefore, when the unsealed claim form was sent to the Defendant at the correct email address, proceedings had not been started. There could not be service of a claim form in respect of non-existent proceedings.

45. Reliance on CPR 3.10 does not assist the Claimant. Although CPR 3.10 gives the court wide, general powers to rectify errors of procedure, the rule provides that the error does not invalidate any step taken in the proceedings (unless the court so orders); the power conferred is to remedy that error. The difficulty faced by the Claimant is that sending the unsealed claim form to the Defendant did not constitute a step in the proceedings because, at that date, there were no proceedings. Even if the defect on the face of the claim form were corrected, it could not be deemed served prior to the issue of proceedings. Retrospective service prior to commencement of proceedings would lead to procedural chaos.

46. Mr Coppel prays in aid the decision of Edwards-Stuart J in *Heron Bros Ltd v Central Bedfordshire Council* [2015] EWHC 604 (TCC) in support of his submission that an unsealed claim form amounts to an irregularity that can be cured. The case concerned a procurement challenge, albeit under different regulations. The salient facts were that on 31 October 2014 the claimant sent the unsealed claim form to the court and a copy to the defendant. On 3 November the claimant sent the defendant an e-mail, attaching a copy of its letter to the court with its enclosures. On the same date, the court sealed and issued the claim form but failed to post it to the claimant until 10 November. Following receipt of the sealed claim form on 14 November, the claimant posted it to

the defendant. The defendant applied to have the claim struck out on the ground that the claim form had not been served within seven days of the date of issue as prescribed by the relevant regulations. The court held that the unsealed copy of the claim form emailed to the defendant on 3 November was to be treated as a claim form for the purposes of the regulations, the absence of a seal or number on the claim form amounted to an irregularity, but the irregularity could be cured by court, particularly as the court was at fault in failing to send the sealed claim form to the claimant within the prescribed seven days.

47. The decision in *Heron* does not assist the Claimant because it is distinguishable on its facts. Firstly, in *Heron*, the material requirement for service of the claim form was contained in the procurement regulations and not the CPR (hence, the CPR power to extend time for service did not apply to the statutory time limit, as explained by Lord Neuberger in *Mucelli v Albania* [2009] 1 WLR 276 (HL) at [74]). The text of the relevant regulations was construed by Edwards-Stuart J as requiring service of "the claim form" within the statutory time limit, rather than "the sealed claim form".

48. Secondly, reference was made to the observations of Lord Mance JSC in *Pomiechowski v District Council of Legnica, Poland* [2012] 1 WLR 1604 (CA), which supported a generous view to be taken in respect of service of an unsealed notice of appeal within the prescribed time, considering it to amount to an irregularity that, in appropriate cases, could be cured by the court. But the procedural rules for service of the notice of appeal do not confer jurisdiction on the court, unlike service of originating process; rights of appeal are governed by legislation.

49. Thirdly, on the facts in *Heron*, the unsealed claim form was served on the defendant, either on 3 November 2014, when sent by email, or 5 November 2014, by deemed service. On either case, the documents were served within seven days of the start of proceedings, when the claim form was issued on 3 November 2014. It was not suggested in that case that sending the unsealed claim form to the defendant on 31 October 2014, prior to the issue of proceedings, could amount to regular or irregular service of the claim form.

50. Finally, in *Heron* late service of the sealed claim form was the result of fault that lay with both the court and claimant:

> "[61] Since there was a clear failure by the TCC Registry to return the documents promptly it seems to me that it would not be right for the court to decline to cure the irregularity notwithstanding the fact that the problem was brought about in perhaps equal measure by the failures of [the claimant's solicitors]."

51. Similarly, the Claimant's reliance on *Dory Acquisitions Designated Activity Company v Ionnis Frangos* [2020] EWHC 240 (Comm) does not assist. In *Dory*, an application for summary judgment which the defendant and its legal representatives chose not to attend, 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. The irregularity in the claim form was rectified by Bryan J by the application of CPR 3.10. However, in *Dory*, as in *Heron*, the claim form was

issued before the unsealed claim form was sent to the defendant's solicitors, so the irregularity concerned a step in the proceedings:

> "[71] It is clear (and accepted) that the attempted service on 14 November 2019 was not valid service in that the claim form served was unsealed and lacked a claim number. This was so notwithstanding the fact that it must have been apparent to the Guarantor's solicitors that the claim form had been issued, as was clear from the "E-filing submission confirmation" which was provided at the same time and which recorded the "filing-claim form part 7" together with payment of the appropriate court fee."

52. In summary, the sending of the unsealed claim form to the Defendant on 27 April 2021 did not constitute a step in the proceedings and the court does not have power under CPR 3.10 to correct the irregularity.

53. It follows that there was no valid service of the claim form on the Defendant within the prescribed time limit.

Alternative service under CPR 6.15

54. Mr Coppel submits that there is a good reason for the exercise of the court's power under CPR 6.15 to order that the steps taken by the Claimant to serve the claim form on the Defendant prior to 5 May 2021 constituted good service. The Claimant accepts that service on the Defendant did not fully comply with CPR 6.3(1)(d), read with Practice Direction PD6A, paragraph 4.1, because the sealed claim form was not sent to the 'newproceedings' email address. However, the Defendant, through the Treasury Solicitor's nominated case-officer, was made fully aware of the existence and contents of the sealed claim form on the date that proceedings were commenced, and via what the Claimant believed to be formal service. The purposes of formal service were fully achieved. The Claimant's non-compliance was minor and technical in circumstances where the unsealed claim form and claim bundle were sent to the 'newproceedings' email address and the sealed claim form was sent to the alternative email addresses to which Mr Olsen, the nominated case officer, had requested that proceedings be sent.

55. Mr Coppel submits that the Defendant will suffer no prejudice as a result of validation of service of the claim form. The Defendant is playing "technical games". Mr Olsen engaged fully with Bindmans prior to the expiry of the seven day period for service of the claim form and only objected to service the day after that period had expired.

56. Mr West submits that there is no good reason to authorise service by an alternative method, pursuant to CPR 6.15. The Claimant has not advanced any good reason why its attempted service on 27 or 28 April 2021 should be validated under CPR 6.15. It is accepted that the Defendant had knowledge of the proceedings by service on Mr Olsen and the other named individuals but that alone does not provide a good reason for alternative service under CPR 6.15. This is not a case in which the Claimant should have had any difficulties in effecting valid service. It made a careless mistake in emailing the claim form to the wrong address. If the court were to grant the Claimant's application, the Defendant would suffer prejudice in that it would be deprived of an accrued limitation defence to the claim.

57. The ambit of CPR 6.15 and 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] UKSC 12. 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."

58. Lord Briggs (in a dissenting opinion) emphasised the significance of service of originating process, even where the defendant is aware of the proceedings:

> "[28] While I would not wish in any way to depart from Lord Clarke JSC's dictum in the Abela case [2013] 1 WLR 2043 that the most important purpose of service is to ensure that the contents of the claim form (or other originating document) are brought to the attention of the person to be served, there is a second important general purpose. That is to notify the recipient that the claim has not merely been formulated but actually commenced as against the relevant defendant, and upon a particular day. In other words it is important that the communication of the contents of the document is by way of service, rather than, for example, just for information. This is because service is that which engages the court's jurisdiction over the recipient, and because important time consequences flow from the date of service, such as the stopping of the running of limitation periods and the starting of the running of time for the recipient's response, failing which the claimant may in appropriate cases obtain default judgment. "
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> …
>
> [31]That the presence of one or more … adverse factors may frequently outweigh the full achievement of the purposes behind the rules as to service so as to lead the court to refuse validation is necessitated by the following matters. First, compliance with the rules is now part of the Overriding Objective, although I agree with Lord Sumption that the maintenance of good discipline may be of less importance in this context than in the context of relief from sanctions. Secondly, service of a claim form (or other originating process) is an important stage in civil procedure, with potentially serious consequences, as summarised above. Thirdly, if the identification of good reason were limited to the question whether all the underlying purposes of service had been achieved, claimants could choose to ignore the rules so long as they achieved those purposes by another route of their own devising. That would be a step on the road to procedural anarchy."

59. The key principles that can be drawn from *Barton* for the purposes of this case are as follows.

    i) Service of originating process can be distinguished from other procedural steps because it is the act by which the defendant is subjected to the court's jurisdiction. For that reason, a "bright line rule" is necessary to determine the exact point, from which time runs for subsequent steps in the proceedings, or to confirm the point at which time stops running for the purposes of limitation.

    ii) An order under CPR 6.15, validating the non-compliant service of a claim form, may enable a claimant to escape the serious consequences that would otherwise follow, including the expiry of a material limitation period.

iii) For that reason, it is likely to be necessary, but not sufficient, for the claimant to establish that the defendant was aware of the existence and content of the claim form within the specified time for service.

iv) When considering whether to exercise the court's power under CPR 6.15, the issue is whether, on the facts of the case, there is good reason to make the order permitting alternative service; there do not need to be exceptional circumstances.

v) The main relevant factors are likely to be: (a) whether the claimant has taken reasonable steps to effect service in accordance with the rules; (b) whether the defendant or its solicitor was aware of the contents of the claim form within the prescribed time limit for service; and (c) whether the defendant would suffer prejudice by retrospective validation of a non-compliant service of the claim form.

60. The above principles in *Barton* have been applied in recent first instance decisions.

61. 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.

62. In *Ideal Shopping Direct Ltd & Others v Visa Europe Ltd & Others* [2020] EWHC 3399 (Ch) 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.

63. In *Boxwood Leisure Ltd v Gleeson Construction Services Ltd* [2021] EWHC 947 (TCC), where the claimant served particulars of claim but failed to serve the claim form by the extended date for service through errors on the part of its solicitors, this court refused to grant relief under CPR 7.6, 3.9, 3.10 or 3.1(2)(m) in respect of the late service of the claim form.

64. Applying those principles to this case, it is clear that the Claimant did not take reasonable steps to effect service in accordance with the rules. The Defendant stated that it would accept service by email but was very clear that such service must be effected through the 'newproceedings' email address. The use of a designated email address for new proceedings would ensure certainty for the Defendant in respect of all and any new claims. The Claimant did not take any step to serve the sealed claim form by the specified method within the stipulated period set out in CPR 54.7. It is common ground that the Defendant was aware of the contents of the claim form within the prescribed time limit for service but satisfying that criterion alone is not sufficient to justify the exercise of CPR 6.15. The Claimant's position is that the Defendant would suffer no prejudice by retrospective validation of the non-compliant service of the claim

form but, if the court granted the relief sought, the Defendant would suffer prejudice because it would be deprived of any limitation defence that has accrued.

65. Weighing up those factors, the Claimant has not established good reason for the court to exercise its power under CPR 6.15 to authorise alternative service of the claim form.

Extension of time

66. The Claimant's alternative application is for an extension of time to serve the claim form to 10 May 2021 (although an extension is in fact required only until 6 May 2021). The Claimant sent the sealed claim form by email to the 'newproceedings' email address on 6 May 2021, the day after expiry of the seven-day period for service. The application is made pursuant to CPR 3.1(2)(a) and/or by analogy CPR 7.6. The Claimant relies upon it having taken all reasonable steps to comply with the relevant service rule by way of serving the Defendant and Interested Party's solicitors immediately upon the claim form being issued and subsequently taking steps to rectify the alleged errors in service upon them being drawn to its attention. The Claimant has also acted promptly in making this application after receiving confirmation from the Defendant that it would not consent to an order validating service.

67. The Defendant opposes the Claimant's alternative application for an extension of time in which to serve the claim form under CPR 3.1(2)(a) (and/or by analogy CPR 7.6). This application is made after the time limit for service to be effected has expired. The Claimant would not satisfy the pre-conditions set out in CPR 7.6(3) where an application for an extension has been made after the expiry of the deadline because it could not show that it has taken all reasonable steps to comply with rule 7.5 but has been unable to do so. As an application under CPR 7.6(3) in relation to CPR 7.5 would be doomed to fail, there is no reason why an application under CPR 3.1(2) in relation to CPR 54.7 should be treated any differently. If anything, as CPR 54.7 imposes a seven-day deadline, compared to a CPR 7.5's four-month deadline, the Court should be even more reluctant to grant an extension to a deliberately short deadline.

68. If CPR 7.6 applied, the court would not have power to extend time for service of the claim form because the conditions in CPR 7.6(3) would not be met. For the reasons set out above, the Claimant could not establish that it took all reasonable steps to serve the claim form within the specified time period.

69. Mr Coppel correctly points out that CPR 7.6 is not applicable; it is concerned with service of a claim form under CPR 7.5 and does not apply to service of a claim form in judicial review proceedings under CPR 54.7. A similar provision could have been inserted into CPR 54 but there is no such provision. No authority has been identified in which the court has applied CPR 7.6 when considering an application to extend the time set out in CPR 54.7.

70. Mr Coppel submits, therefore, that it is open to the court to extend time for service of the claim form under CPR 3.1(2)(a), having regard to the guidelines set out in *Denton v White* [2014] 1 WLR 3926, namely, (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.

71. Applying the guidance in *Denton v White*, in my judgment it would not be appropriate for the court to extend time for service in this case. The failure to effect valid service within the time specified by CPR 54.7 was serious and significant. In the absence of service of a valid claim form, the Defendant was not subject to the court's jurisdiction. The delay was one day but against the benchmark of seven days. The reason for the failure was a careless mistake made by the solicitors acting for the Claimant. Extending time for service of the claim form would deprive the Defendant of any accrued limitation defence. A material circumstance in this case is the very tight deadline imposed by the PCR 2015 for an economic operator, or other person, to challenge the lawfulness of a decision in respect of a public procurement contract. In those circumstances, it would not be appropriate to grant an extension of time.

Conclusion

72. For the reasons set out above, the Claimant's application is dismissed and the Defendant's application to set aside the claim form succeeds.

73. 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.