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Case No: HT-2021-000291

Neutral Citation Number: [2021] EWHC 2618 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 1 October 2021

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

CITYSPRINT UK LIMITED
Claimant

- and –

BARTS HEALTH NHS TRUST
Defendant

Ligia Osepciu (instructed by **FG Solicitors Ltd**)
for the Claimant
Ewan West (instructed by **Bevan Brittan LLP**)
for the Defendant

Hearing Date: 27 September 2021

Mr Justice Fraser:

1. In these proceedings each party advances a number of different applications, but they are all connected to, and aimed at, the same issue or groups of issues. They all concern whether service of the claim form and Particulars of Claim were performed in accordance with the rules, and hence regularly. The Defendant is an NHS trust and wished to award a contract (the "Contract") for the provision of pathology transport and logistics services to the East South East London Pathology Network (the "Partnership"), which is formed of three NHS Trusts: the Defendant, Homerton University Hospital NHS Foundation Trust (HUH), and Lewisham and Greenwich NHS Trust (LGT). The Claimant is the incumbent provider of pathology transport and logistics services to the Defendant under a contract that is due to expire on 30 September 2021. The Claimant wished to participate in the ongoing provision of these services and accordingly participated in the competitive tender for the Contract. This was governed by the Public Contracts Regulations 2015 ("PCR 2015"). However, by letter of 17 June 2021, the Claimant was informed that its bid had been unsuccessful that the Contract would instead be awarded to a rival, e-Courier.

2. The Claimant wished to bring a procurement challenge under PCR 2015. It is the way that this was done, or purported to be done, that lies at the heart of these applications. Essentially, the Defendant's case is that the Claimant failed to issue and serve these proceedings within the time, and by the methods, permitted by PCR 2015 and/or the Civil Procedure Rules, and seeks declarations to this effect. Amongst other things, this will have the result that the automatic suspension imposed upon the Contract award to e-Courier will be lifted, and these proceedings will not proceed and will be brought to an end. The Claimant seeks to minimise the non-compliance or failures, and have sufficient extensions granted, or alternative ways of serving proceedings granted or rectified by the court, such that the proceedings can continue as though they were validly issued in time and served in accordance with the rules.

3. Some factual narration is required in order to put these applications into their proper context. Upon being notified of its lack of success in the Standstill Letter of 17 June 2021, the Claimant notified the Defendant that it was not content with the outcome of the competition. Correspondence ensued, and at that point the Claimant was acting for itself. Bevan Brittan LLP ("BB LLP") were and are acting for the Defendant, and on 15 July 2021 a Standstill Agreement was entered into between the parties to give them time to consider matters. As those involved in procurement challenges know, the time for issuing proceedings is very short and a Standstill Agreement was no doubt sensible.

4. Its effect is agreed and by reason of its terms, any claim form had to be issued on or before 27 July 2021. That was the last day this could be done under the terms of the Standstill Agreement. This was five days after a substantive response was received to a particular letter written by the Claimant. That date is agreed as being the last day upon which the Claimant could have issued proceedings under PCR 2015. On that day, the following happened. The Claimant asked BB LLP if it was instructed to accept service of proceedings on behalf of the Defendant, and stated its intention to issue proceedings. The Claimant also must have instructed solicitors, and the Claimant's solicitors ("FGS") filed the claim form with HMCTS E-Filing Service at 1532 hours on 27 July 2021, and paid the court fee requested of £10,000. The e-filing response received from the court stated "The following electronic filing(s) were

successfully submitted." Under Filing Type on that response, the response states that the electronic filing in question was "Claim Form (Part 7)". At 1727 hours, an unsealed copy was sent to BB LLP by FGS by email.

5. As it happens, the claim form actually sought both monetary and non-monetary relief. Accordingly, the fee that was paid electronically by FGS when it lodged the document electronically using the E-Filing Service was £528 too little. FGS had paid the £10,000 fee generated by the system. The actual fee should have been £10,528. The court staff thereafter (on 29 July 2021) sent an email to FGS stating that a further £528 was due, and asking for details of the PBA Account from which this could be taken. This is a type of central account used by solicitors, which permits the court to debit it for fees if the solicitors give that authority, and it is widely used. That email was sent at 1517 hours, so fewer than 24 hours after FGS had submitted the document online and paid the sum of £10,000.

6. As it happens, FGS does not have a PBA Account. The trainee solicitor acting on the case contacted the court immediately, explained this, and an agreement was reached that the £528 would be paid to HMCTS by cheque. The trainee took a detailed file note of her conversation with the court staff, and checked with the court staff that the non-payment of this part of the overall fee would not invalidate the issue of the claim form. She also explained to the court staff that the claim form had been lodged on the last day for issue. She was assured all was well. After receipt of the £528, the sealed claim form was uploaded by the court to the CE-file system. Although under "Approved Date" the date that appears on CE-file is 29 July 2021, which is the date of the conversation I have referred to at [5] above, the £528 was received by the court on 30 July 2021. The claim form itself has the electronic seal upon it, applied by the E-Filing system the day that the submission was checked by the Issue Team as being in order (which is what generates the e-filing response saying a document has been "successfully submitted"). That electronic seal is clearly dated 27 July 2021.

7. I pause here to record that one of the many witness statements on these applications is from the trainee solicitor who was involved in filing the claim form originally, and remedying the £528 issue that I have recited in paragraph 6. She was subject to some criticism in a consequential witness statement by Ms Heard for BB LLP, and rather less by Mr West in his oral submissions. I wish to make it clear that I do not consider any of the criticism made of her to be justified. When she used the E-Filing Service to lodge the claim form, the system requested a fee of £10,000. That was what was paid electronically. As she explains in her evidence, and I accept, there was no ability for FGS to pay a higher fee at that point in the process. Although the claim for that fee was generated automatically, and might have been generated in a different amount by the system, had she ticked a different combination of drop-down boxes, I am not persuaded that she did anything wrong, or was at fault. Even if she was – and this is putting it at its very highest for the Defendant - this is exactly the sort of minor mistake which can be corrected administratively, as indeed corrected it was. It does not invalidate the issue of the claim form, a point correctly explained to her by the court staff when she understandably asked that very question of them on 28 July 2021. She made a detailed and careful file note of this conversation and has exhibited it to her evidence. The way this has been seized upon by BB LLP is somewhat regrettable.

8. On 28 July 2021, BB LLP sent FGS a letter by email which acknowledged receipt of the letter of 27 July 2021, confirmed receipt of the unsealed claim form (which had

been sent the evening before), and provided confirmation that BB LLP were instructed to accept service of proceedings. It also stated that service of the sealed claim form and Particulars of Claim were awaited, and provided a general reservation of rights.

9. FGS then calculated the 7 days within which service of both the claim form and the Particulars of Claim is required, as commencing from 29 July 2021 (which appears under "Approved Date" on the CE-file system) and not the date on the electronic seal itself. FGS therefore calculated that it had until 5 August 2021 to serve the claim form and particulars, rather than the date of 3 August 2021 which a calculation commencing from 27 July 2021 would have provided. FGS therefore served the claim form on 5 August 2021 by serving upon BB LLP (as it was required to do, given BB LLP had stated it would accept service of proceedings) but did so using email. It did not ask the necessary questions under Practice Direction 6A permitting it to do so. Nor do any of the emails from BB LLP state (in the footer, or anywhere) that email service is acceptable to BB LLP. This is not mentioned.

10. Practice Direction 6A paragraphs 4.1 and 4.2 specify the requirements necessary for service by email. This is set out in CPR Part 6.3(1)(d), which states that a claim form may be served by electronic means provided this is done "*in accordance with Practice Direction 6A*." Accordingly, the Defendant maintains that where Practice Direction 6A is not complied with, a claim form may not be served by electronic means.

11. The relevant part of PD 6A is paragraph 4. This materially provides (in relation to email):

"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)—

…

4.1(1)(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

…

4.2 Where a party intends to serve a document by electronic means (other than by fax) that party must first ask the party who is to be served whether there are any limitations

to the recipient's agreement to accept service by such means (for example, the format in which documents are to be sent and the maximum size of attachments that may be received)."

12. This was not complied with. BB LLP had been asked if they were instructed to accept service on behalf of the Defendant, and had said they were. BB LLP had not indicated that it would accept service by email. No indications were made providing the information required for paragraphs 4.1(1)(a) or (b) of PD 6A.

13. Regulation 94(1) PCR 2015 provides that:

> *"(1) Where proceedings are started, the economic operator must serve the claim form on the contracting authority within 7 days after the date of issue"*

14. The Claimant therefore has the following difficulties in terms of these applications and service of the claim form. It may also have similar difficulties so far as the Particulars of Claim are concerned, but for present purposes, and initially, I can concentrate upon the situation regarding the claim form. There are three issues, or groups of issues.

Timing and dates

15. The issues on timing amount to these. Either the claim form was issued in time for limitation purposes, namely on 27 July 2021, in which case the service of the sealed claim form was accomplished after 9 days, and not within the 7 days required; OR the claim form should be taken as being issued on 29 July 2021 (the Approved Date on the CE-portal, the date of the conversation referred to at [5] above). That latter scenario would mean service (if otherwise valid) would be within 7 days, but would put the claim form out of time as the period under the Standstill Agreement expired on 27 July 2021. There are no temporal gymnastics that would enable the Claimant to maintain that both acts – issue of the sealed claim form, and service – took place in accordance with the rules and PCR 2015. Given the 9 day interval, one of these two acts was out of time. However, Ms Osepciu relies upon the service of the unsealed claim form on 27 July 2021 as one way out of the Claimant's difficulties. I shall deal with this below.

Method of service

16. In both of the above scenarios concerning timing, the Claimant has the hurdle that it sent both the claim form and the Particulars of Claim to BB LLP on 5 August 2021 by email, without having complied with the requirements of PD 6A, and in particular without BB LLP indicating (either before 5 August 2021, or at any time since) that although it was instructed to accept service on behalf of the Defendant, it would accept email service of proceedings.

Relief

17. As a result of (and after) consideration of both these areas, is the Claimant entitled either to an extension of time, or such order as is necessary permitting alternative service, to remedy any or all of its problems under "timing and dates" and/or "method of service"?

18. I shall take these three separate areas in turn.

Timing and dates

19. The Claimant in its written submissions for the hearing appeared to hedge its bets somewhat in terms of its case concerning timing. Ms Osepciu also did her level best to persuade me of the Claimant's case in terms of the relevant dates, but with all due respect to her arguments, the Claimant cannot have it both ways. To be fair to Ms Osecpiu, she accepted this. The period between 27 July 2021 (the date when the claim form was sealed electronically) and 5 August 2021 (when the sealed claim form was sent to BB LLP by email) is 9 days. From whichever date one uses to start to calculate that period, it is required by PCR 2015 to be 7 days. It is simply not possible to construct a scenario in which both the claim form were issued within the period required by the Standstill Agreement, and the sealed claim form and particulars were served within 7 days of issue. The Claimant will fail at either end of the 7 day period, given the interval is 9 days.

20. Firstly, there is no sensible way, in my judgment, for the date of issue of the claim form to be construed as anything other than the date provided on the electronic seal on the document itself. That is the first point that needs to be resolved on these applications. That date of issue is 27 July 2021. It is applied by the E-Filing System once a member of the court staff has checked and approved submission of the documents. It is that process that generates the e-filing response from the court that stated "The following electronic filing(s) were successfully submitted." The seal is applied electronically and dated when that happens. This date is on the face of the claim form.

21. Mr West did attempt to persuade me that as a result of the partial non-payment of £528, the date of the claim form should be taken as 29 July 2021, and not the date on the seal. This was to assist the Defendant in terms of its case on limitation. I reject that attempt. The Defendant submitted evidence to demonstrate, by way of screen shots, that the trainee solicitor at FGS must have failed to have ticked the correct drop down boxes, which meant that E-Filing system generated a fee of only £10,000, rather than £10,528. I am not persuaded of these submissions for the following reasons.

22. CPR Part 7.2(2) provides that:

> *"(2) A claim form is issued on the date entered on the form by the court."*

23. CPR Part 7.12 provides that a practice direction may make provision for a claimant to start a claim by requesting the issue of a claim form electronically. CPR 7.12(3) then provides that:

> *"(3) The practice direction may disapply or modify these Rules as appropriate in relation to claims started electronically."*

24. The relevant practice direction is PD51O, paragraph 5.4(2) of which provides that:

> *"the date and time of payment will also be the date and time of issue for all claim forms and other originating processes submitted using Electronic Working*".

25. Paragraph 5.4(5) then provides that

> *"The date and time of issue or the date and time of filing of a document submitted using Electronic Working will not be delayed by Acceptance, unless the submission fails Acceptance because the filing error is more serious than an error of procedure, or the Court orders that it has failed Acceptance for some other reason."*

26. "Acceptance" is defined in paragraph 5.3(1) thus:

> *"Submission of any document using Electronic Working will generate an automated notification acknowledging that the document has been submitted and is being reviewed by the Court prior to being accepted (the "Acceptance")"*

27. Acceptance was generated in this case by the notification that the submission had been successful. The submission to the court by way of e-filing on 27 July 2021 did not fail Acceptance, and I am not prepared to order that it failed Acceptance. It was clearly accepted and the electronic acknowledgment said that the submission had been successful. Further, the underpayment of £528 was clearly an error of procedure (and a minor one at that). Practice Direction 51O clearly anticipates simple errors of procedure, such as the one that occurred in this case. This does not invalidate issue of the claim form, and it does not lead to a different date being applied to that document than the one clearly stated on its face in the electronic seal applied by the court system when it was issued.

28. Further, the phrase in PD 51O, which states "date and time of payment", does not deal specifically with this type of situation where the payment made upon e-filing is slightly too low. I do not consider that in this situation it would be correct to construe this part of the Practice Direction as overruling the clear terms of CPR 7.2(2). It would also, in my judgment, in the factual circumstances of this specific case, to find that payment of £10,000, rather than £10,528, would lead to invalidation of the issue date of 27 July 2021 applied to the court seal, and substitution of a different, later date, as the date of issue.

29. I would further observe that potential chaos lies ahead if dates of claim forms are generally or routinely taken as those other than the dates on the face of the documents themselves, included in the official electronic court seal, based on the type of documents submitted in this case and what occurred in this case. Of course there might potentially be exceptional circumstances when this is permissible - it is not possible to entirely prescriptive - but given the date is applied electronically to the seal I consider that such circumstances would be likely to be most unusual. The court has the power to order that an electronic submission has failed acceptance but there is nothing to justify such an order in this case. A number of exhibits must be trawled through, to track exactly what happened, who said what to whom (and who wrote which emails to whom) in order to conclude that the date on the seal should be ignored in preference to a different, later date. I do not consider that would be the correct, or just, course for the court to adopt. The slight underpayment of the relevant fee - £10,000 rather than £10,528 – is not sufficient, in my judgment, to justify any approach to the correct date of issue of the claim form being any other date than the

one included and stated on the electronic seal. This conclusion is entirely in accordance with CPR Part 7.2(2).

30. Ms Osepciu does, however, find herself on the horns of dilemma, because such a finding, although helpful to her cause on limitation, is less than helpful in terms of compliance with the 7 day period for service under Regulation 94(1), unless she can rely upon the unsealed version of the claim form sent to BB LLP on 27 July 2021.

31. The service on 5 August 2021 was simply late. Mr Graham of FGS appears to have thought that he had 7 days, and that he should calculate that from 29 July 2021. He was mistaken, although that mistake was made at least partly (if not wholly) as a result of confusion arising from the date displayed on the CE-file system, which gives the "approved" date as 29 July 2021 (the date the conversation at [5] about the outstanding £528 took place). The date on the seal was clearly identified on the face of the claim form. That would only be displayed to somebody viewing the CE-file if the document itself were clicked on and viewed, rather than the date above the document at event ID-1. Time limits in procurement cases are short, and deliberately so, and dates for service are calculated from date of issue. Given my finding on the date of issue is 27 July 2021, the date for service was on, or before, 3 August 2021.

32. Ms Osepciu sought to rely upon the case of ***Heron Bros Ltd v Central Bedfordshire Council*** [2015] EWHC 604 (TCC) *per* Edwards-Stuart J at [29]-[33]. This case considered the equivalent regulation 47F of the Public Contracts Regulations 2006, as amended. These were the earlier version of the Regulations that became PCR 2015. That judgment held that the reference to "*the claim form*" in the equivalent of Regulation 94(1) was to be construed as a reference to any copy of an issued claim form, whether sealed or unsealed. She relied upon that to demonstrate that the sending of the unsealed claim form by FGS at 1727 on 27 July 2021 to BB LLP was sufficient to constitute service for the purposes of the Regulations.

33. I am not persuaded by her argument relying upon that case for the following reasons. Firstly, it is not possible to have a different method or type or date of service of a claim form under PCR than it is under the CPR. Regulation 94(5) of PCR 2015 states the following:

> "(5) In this regulation, "serve" means serve in accordance with rules of court, and for the purposes of this regulation a claim form is deemed to be served on the day on which it is deemed by rules of court to be served."

34. For a claim form to be served under PCR 2015 therefore, it must be served in accordance with the CPR. There are provisions in the CPR to correct errors in procedure. Whatever the position under the 2006 predecessor version of the regulations, therefore, it is clear to me that under PCR 2015 the date of service for the claim form under Regulation 94 must be the same date as the date of service of the claim under the CPR.

35. Mr West submitted that the ratio in ***Heron Bros Ltd v Central Bedfordshire Council*** was wrong and ought not to be followed or applied. Given the ratio does not help the Claimant in any event, it is not necessary to decide this point in any event. The reasoning of the court in ***Heron*** depends upon a submission at [11] in that case, identified by Mr West as a concession, that there could be a *different* approach under

the Regulations than under the CPR. Such a concession is not made in the instant case. I would confine the reasoning of ***Heron*** to its own particular facts.

36. However, Ms Osepciu also sought to rely upon another first instance case, namely ***Dory Acquisitions Designated Activity Company v Ionnis Frangos*** [2020] EWHC 240 (Comm), a decision of Bryan J for an order under CPR 3.10(b) rectifying the Claimant's error of procedure so as to treat email service of the unsealed Claim Form on BB LLP on 27 July 2021 as valid. I shall return to that below when I consider relief.

37. In terms of timing therefore, my conclusions are as follows:
1. The date of the claim form is the date of the seal, namely 27 July 2021. This is the date of issue and that was within the time period under PCR 2015 because it was within the time agreed in the Standstill Agreement.
2. That document was not served in its sealed form within the 7 days required because instead of being served by 3 August 2021, it was served on 5 August 2021. The reason for this was the mis-calculation that the period of 7 days ran from 29 July 2021, the date "approved" shown on the CE-portal, and not the date on the claim form.
3. However, an unsealed version of it had been sent by FGS to BB LLP on 27 July 2021, albeit that this version did not have the court seal on its face.
4. The unsealed version was, in terms of the timing, sent to BB LLP after the claim form submitted to the court had been accepted, after notification had been sent to FGS that it had been "successfully submitted", and after the electronic seal had been applied to the claim form on the E-Filing System. The proceedings were therefore on foot or alive when that was done.

38. It is necessary therefore to turn to consider the method of service.

Method of service

39. Other than the general assumption made by FGS that BB LLP would (or ought to) accept service by electronic means, FGS did not comply with the Practice Direction that governs electronic service. Various submissions have been made based on the wording of some email responses to FGS during the period, but nowhere in any of them is a statement that BB LLP would do so. Indeed, very shortly after the sealed claim form and particulars were sent on 5 August 2021 at 1551 hours, an email of response was sent back by BB LLP at 1617 hours stating "we note that have not agreed to accept service by way of email." BB LLP were clearly and instantly alive to the point. FGS were not, until BB LLP brought it to their attention.

40. The explanation given by FGS about the use of email is not entirely comprehensive. Mr Graham's 2nd statement at paragraph 15, when dealing with assertions in the evidence of BB LLP that FGS should have asked if service by email would be accepted, states "I do not accept this position" and also states that "furthermore, [BB LLP] did not unequivocally tell us that they were rejecting service by email". Paragraphs 43 and 44 of his 1st statement asserts (following paragraph 42) that the method of service was correct, and again states that BB LLP did not tell FGS that they would not accept service by email. He also relies upon email communications from BB LLP on other matters. This evidence shows a lack of understanding on his part of the Practice Direction which governs such matters which I have reproduced above.

41. There was not a great deal of contact between solicitors in this case in the period prior to 5 August 2021 – it only started on 27 July 2021 – and it was certainly insufficient to constitute some sort of course of dealing, or something of that nature, even if that were sufficient (which in my judgment it is not). The fact that email is being used for communication generally does not mean that it can automatically be used for service, and the Practice Direction is clear. Service of documents, in particular claim forms, is obviously important. The Practice Direction should be complied with and here was not. Whether that amounts to it being ignored, or a lack of knowledge of its contents, does not much matter. I would characterise it as the latter rather than the former. Whether that is something that should be cured or rectified by order of the court must come in the following section of this judgment.

Relief

42. This is the main battleground between the parties, once their other arguments concerning proper date of claim form, timing and method have been disposed of. Although no fewer than eight different provisions of the CPR are relied upon in the Claimant's application notice, Mr West for the Defendant maintains that the correct rule to apply (if the court were minded to grant the Claimant relief) is CPR Part 7.6, and not the ones relied upon by the Claimant. Ms Osepciu relies upon the provisions of CPR Part 3.10 as the main provision, but advances a number of others in the alternative.

43. The following points are, in my judgment, important ones when coming to consider relief:

1. The unsealed claim form was sent by FGS to BB LLP on 27 July 2021 at 1727. The sealed version was not at that stage available, and could not be downloaded from the CE-file system. This is because of the fee issue to which I have already referred. The sealed version was not available for FGS to serve by any means until 29 July 2021, which is the date it was made available on CE-file. This was the date of the conversation referred to at [5] regarding the sum of £528 that was outstanding.
2. There was no difference at all between the unsealed version provided on 27 July 2021 and the sealed version sent on 5 August 2021. They were identical.
3. The claim form was given an "Approved" date on the CE-file portal of 29 July 2021. The date of 27 July 2021 is only visible if one clicks on the document itself and looks at the seal. Therefore the court system itself, in one place, gives a date of the document which could, on one view, understandably lead a solicitor to conclude that was the date of issue.
4. Both versions of the claim form (unsealed on 27 July 2021, and sealed which was sent on 5 August 2021) which were sent by FGS to BB LLP included Brief Details of Claim that ran to 18 paragraphs and clearly set out the basis of the claim. They were identical, and relatively comprehensive.
5. BB LLP acknowledged receipt of the unsealed version on 28 July 2021 and there is no doubt it was received. The Defendant therefore was fully aware of the claim, and the details of it, from then onwards.
6. BB LLP were instructed to accept service of proceedings, had been specifically asked this, and had communicated it. FGS therefore "served" upon the correct party, the Defendant's solicitors.

44. CPR Part 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."

45. CPR Part 6.3 specifies methods of service of a claim form, including at 6.3(1)(d) electronic communication in accordance with Practice Direction 6A (which I have already referred to above). Part of that states that what is permitted is:

"4.1(2)(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."

46. CPR Part 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."

47. CPR Part 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). CPR Part 7.5 does not apply to all cases, because (for example) specific provision is made for service of claim forms in judicial review proceedings in CPR Part 54.7. In the instant case, the service requirements are set out in PCR 2015, which requires service within 7 days under Regulation 92(2). That same shorter time limit also applies, under CPR Part 54.5(6), "where the application for judicial review relates to a decision governed by the Public Contracts Regulations 2015". Such cases do sometimes arise, although I refer to that rule here simply for completeness. The short point is that the longer period of four months does not apply to claims under these regulations, which have much shorter service periods, and deliberately so.

48. CPR Part 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."

49. CPR Part 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) …"

50. CPR Part 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. "

51. I should point out that the Claimant issued these applications on 11 August 2021. That is about 7 days after BB LLP notified FGS that it was challenging effective service. Mr West submitted that this was not sufficiently promptly, but I do not accept that. I consider that the applications were issued within a time period that in all the circumstances was reasonable, proportionate and sufficiently prompt.

52. Ms Osepciu relies on the timing of the sending of the unsealed claim form (about two hours after the claim form was sealed following approval by the Issue Team at the court of the documents that were submitted) as constituting an error of procedure, and seeks thereby to avoid what was said to be obstacle to reliance on CPR Part 3.10 by O'Farrell J in ***R (the Good Law Project) v Secretary of State for Health and Social Care and*** (*"**Pharmaceuticals Direct**"*) [2021] EWHC 1782 (TCC). In that case the sending of the unsealed claim form preceded its issue by the court, so the judge held that there were no proceedings in which a step could have been taken which would entitle CPR Part 3.10 to be used. Ms Osepciu characterises the sending of the unsealed claim form in the instant case as a "step in these proceedings", as it followed the sealing of the claim form, and hence the proceedings were extant at that point. She submits that any error therein is capable of being rectified under CPR Part 3.10. This is in contrast to the position of the claim form in the ***Pharmaceuticals Direct*** case,

which was issued on 28 April 2021, but sent unsealed the day before on 27 April 2021, and hence before the proceedings had commenced.

53. I consider that to be an attractive argument, which I accept, for these reasons. The timing makes it clear that the sealed claim form was already in existence when the unsealed copy was sent. The sealed claim form was simply not available to FGS to download at 1727 on 27 July 2021, even though it had been issued. That is because of the outstanding payment required of £528. The proceedings had, however, clearly been commenced by then, because the claim form had been issued and the seal had been applied. This therefore means there were not "non-existent proceedings", the term used by O'Farrell J in the ***Pharmaceuticals Direct*** case. My decision on this point is also consistent with that of Bryan J in ***Dory Acquisitions Designated Activity Company v Ionnis Frangos*** [2020] EWHC 240 (Comm). In that case also, although a sealed claim form had been issued, an unsealed claim form was served afterwards and CPR Part 3.10 was used to correct that. CPR Part 3.10 cannot be used to correct deficiencies in proceedings which have not already started. But if they are in existence, a state or condition which commences when the seal is applied to the claim form, then the rule is potentially available. That is the case here.

54. My conclusion on this point means that CPR Part 3.10 is potentially available to the Claimant. The error of procedure made by the Claimant is two-fold. It is firstly, serving the unsealed rather than the sealed claim form; and secondly, serving it by email (that latter error applying both to the unsealed claim form sent on 27 July 2021, and the sealed version provided on 5 August 2021).

55. Firstly, the reason the unsealed version was sent on 27 July 2021 was because the sealed version was not available, as I have explained. Had the fee issue not been outstanding, the sealed version would have been available, and doubtless that would have been sent by FGS to BB LLP. The court staff acted promptly in drawing the outstanding fee to the attention of FGS on 28 July 2021, but given FGS do not have a PBA Account, it took a little time (but not much longer) for the fee to be paid. I do not consider that much criticism can be levied at FGS for failing to serve a sealed claim form when the sealed version, although issued, could not be accessed and downloaded by it through the CE-file system or portal. It is also not a requirement for solicitors to have a PBA Account in order to conduct litigation. It is good practice, but it is not a strict requirement. I do not consider that FGS should be potentially penalised for not having one. The £10,000 was paid electronically, and that is all that FGS were able to pay electronically given the way the E-Filing System generated the fee. The court staff told the trainee solicitor a cheque would be acceptable for the outstanding £528, and this was paid very promptly.

56. One therefore returns to the question of whether, in all the circumstances, under CPR Part 3.10 the court should make an order under its wide and general powers to rectify errors of procedure. I have dealt with the first error of procedure, namely sending the unsealed claim form. I therefore turn to the second, namely using email rather than other methods of service. Mr West's submissions are that, given BB LLP had not identified that service by email was permitted, other methods of service (which would include, for example, post) should have been adopted. Whilst that submission is technically accurate on a reading of the rules, it would be surprising, given the strict time limits in procurement cases, if an error of this type (namely using email rather than post) would be something that the court would not be minded to correct under

CPR Part 3.10 in the circumstances of this procurement case. A Standstill Agreement had been reached, and within time BB LLP were told by FGS that a claim had been submitted to the court, and they were given an identical version of it (albeit unsealed). Certainly on the peculiar facts of this case, and before considering the other side of the coin, I am minded to correct this error with the necessary order under CPR Part 3.10. The claim form sent on 27 July 2021 was obviously received by BB LLP, who clearly acknowledged receipt on 28 July 2021 and stated that "we await service of the sealed claim form and Particulars of Claim". That letter was sent by email which said "please see attached correspondence".

57. Balanced against that, of course, must be proper consideration of any prejudice caused to the Defendant as a result of the errors. Here, there is the prejudice of losing a limitation defence. That can be prejudice, as held in other cases such as the ***Pharmaceuticals Direct*** case and also others including ***LSREF 3 Tiger Falkirk v Paragon*** [2021] EWHC 2063 (TCC). However, neither of those cases involved a "mistake" by the court itself in the sense of the CE-file (which is maintained by the court) showing a different, and later, date to the one in the seal on the claim form itself. In the circumstances of this case, I do not consider that the overall prejudice is substantial. FGS took all reasonable steps to bring the contents of the claim to the attention of BB LLP, who were instructed to accept service of proceedings. The actual claim form – albeit unsealed – was sent within time. The sealed claim form was sent too, although 7 days after the date of that document clearly shown on the CE-file system or portal, and not 7 days after the date of the seal on the document.

58. Mr West sought to persuade me that the prejudice to the Defendant was the imposition of the automatic suspension. I do not accept that constitutes prejudice as a result of the errors referred to. The automatic suspension is imposed by PCR 2015 not upon issue of the claim form, but upon notification to a public body of the existence of a claim. Further and in any event, the Defendant could have issued an application to lift the automatic suspension had it so wished. Mr West submitted that in this case it could not do so, as by doing so it would be submitting to the jurisdiction of the court and this would prejudice its challenge to proper service. I do not accept that either. Firstly, an application can be made without prejudice to the other applications such as those before the court here. Secondly, not only is this available, it is widely done in other cases, for example in the ***Pharmaceuticals Direct*** case itself. Thirdly, the court could even be asked to list the applications together, with the application to lift the suspension being dependent on the outcome of the challenge to service. The evidence relied upon by the Defendant from Mr Brown and Ms Gresham amounts to consequences of the proceedings themselves, not of the error or errors themselves.

59. The only possible prejudice here to the Defendant is having to face a claim, which is reasonably arguable on its face, where the unsealed claim form was sent on 27 July 2021, the sealed claim form sent 7 days after the date on the CE-file system (but not 7 days after the date of the seal), and because email was used rather than other methods of service. That is not prejudice as a result of the procedural error. I do not consider that sufficient in the Defendant's favour to justify refusing to make an order under CPR Part 3.10. In my judgment, the Defendant is attempting to take opportunistic advantage of limited errors of procedure to achieve a technical knock- out. Rather ironically, the Defendant would be content if post had been used (which takes longer, but entitles the Claimant to use deemed service provisions) but not, as was used, email. That is a curious position in all the circumstances of this case.

60. The effect of an order under CPR 3.10 in respect of the claim form is not to extend time. This means that consideration of the exceptional reasons required to extend time in statutory time limits do not arise so far as the claim form is concerned. Mr West relied on a number of cases in terms of persuading me not to extend time. In ***Mucelli v Albania*** [2009] 1 W.L.R. 276, the House of Lords held (at [74]) that the powers in the CPR could not be invoked to extend a statutory time limit or avoid service required by statute, unless the statute so provides. In ***Pomiechowski v Poland*** [2012] 1 W.L.R. 1604 the Supreme Court held that in order to achieve compliance with Article 6.1 ECHR a statutory time limit might be capable of being extended but only in exceptional circumstances. That approach was subsequently applied in ***Adesina v Nursing and Midwifery Council*** [2013] 1 W.L.R. 3156. However, given I am not extending time in respect of the claim form, such considerations do not arise in this respect. I am simply making an order that service of unsealed claim form on 27 July 2021 should count as though it was service of sealed version of the exact same document.

61. It is also not necessary to consider alternative service under CPR Part 6.15. However, were I to do so, and considering the approach of the Supreme Court in ***Barton v Wright Hassall LLP*** [2018] UKSC 12, the principles in that case were discussed by O'Farrell J in ***Pharmaceuticals Direct*** at [57]-[59] and by me in ***LSREF 3 Tiger Falkirk Ltd SARL v Paragon Building Consultancy Ltd*** [2021] EWHC 2063 (TCC). O'Farrell J distilled the relevant principles as follows at [60]:

> "*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.*"

62. Each of the three factors at [60(v)] are, or would be, answered in favour of the Claimant. Reasonable steps were taken; BB LLP was clearly aware of the contents of

the claim form within the prescribed time; and there would be no prejudice to the Defendant.

63. Another way of considering the matter in overall terms is as follows. FGS started proceedings by issuing the claim form through the E-Filing System on the date required, 27 July 2021. Although the sealed copy was not available to FGS on that day, the same document that had been submitted to the court (and which was already sealed by that time) was sent in its unsealed version to BB LLP about two hours later. The document with the seal on its face was not made available on CE-file until 29 July 2021, which showed the date of the document at ID-event 1 as 29 July 2021. The copy with the seal was sent to BB LLP on 5 August 2021, 7 days later than the date at ID-event 1 on CE-file, but 9 days later than the date on the electronic seal. No prejudice has been caused to the Defendant by any of these factors. Is the Claimant entitled to the necessary orders under the CPR to remedy this unusual state of affairs concerning the claim form as a matter of justice? I have concluded that the Claimant is so entitled.

64. Consideration is therefore required of the situation regarding the Particulars of Claim. This should have been served within 7 days of the issue of the claim form, so although the same issue arises, there is a further aspect in that an extension of time is also required. The Claimant's Application also seeks a retrospective extension of time pursuant to CPR Part 3.1(2)(a) and/or relief from sanctions pursuant to CPR Part 3.9 in respect of its later service of the Particulars of Claim. I do not consider relief from sanctions is relevant. An extension of time is required. I have summarised Mr West's submissions at [63] above concerning statutory time limits. I accept exceptional circumstances are required. However, the error in calculation of the time limit arose as a result of the date under the "approved" column on the CE-file being 29 July 2021, and not 27 July 2021 for the reasons already fully explained. The CE-file is maintained by the court, and forms part of the publicly available information provided by the court to the parties. In my judgment, it is an exceptional circumstance that such information, provided by the court, identified the claim form as being approved on 29 July 2021 even though it was dated 27 July 2021. This justifies an extension of time of the 2 days – which is only 48 hours or so – required by the Claimant. The correct order is to extend time as necessary for service of the Particulars of Claim, and also to permit (or retrospectively approve) electronic service. It would be somewhat illogical to grant the relevant orders for the claim form, and to refuse to make such a necessary consequential order for the Particulars of Claim, although I have considered the two matters separately and applied my mind to the relevant tests separately too.

65. I would observe that, given City Sprint was writing letters itself to BB LLP on 27 July 2021, including asking legal questions such as whether BB LLP was instructed to accept service of proceedings, it is likely that FGS were only instructed at the very last minute in order to meet the deadline in the Standstill Agreement. The very short time periods that would have been available to FGS firstly to issue the claim form, and then serve that important document, and the particulars, are likely to have been even more shortened in this case as a result of that. Very short timeframes are imposed on procurement challenges, and if FGS were instructed very late in the process, those short timeframes would have become even shorter. However, these short time frames are imposed for an important reason. Procurement challenges give rise to the automatic suspension, which imposes a brake – literally – on the economic

activities of those public bodies conducting the procurements. This judgment should not be interpreted as the court being indulgent towards widespread failures to comply with such time limits, nor failures to comply with the Practice Direction on electronic service. It is simply because of the particular (potentially unique) facts of this case that the necessary orders under the relevant provisions of the CPR, including under CPR Part 3.10 in respect of the unsealed version of the claim form, have been made in the Claimant's favour.

66. Finally, I would emphasise the unusual facts of this particular case. The court has been presented with a number of cases recently in which proceedings have been sent electronically to another party without the Practice Direction for doing so having been fully complied with. The ***Pharmaceuticals Direct*** case is another recent example. Defendants and their advisers who are alive to the precise technicalities are therefore able to take these points. One way to avoid this occurring with what is becoming repetitive regularity is for litigation solicitors to acquaint, or re-acquaint, themselves with the full requirements of Practice Direction 6A before they serve documents electronically.