Court of Appeal

*Hashtroodi *v* Hancock

[2004] EWCA Civ 652

2004 May 6; 25 Thorpe, Dyson LJJ and Bennett J

Practice — Claim form — Extension of time — Claimant's failure to serve claim form within four months of issue due to solicitors' incompetence — Whether period for service to be extended — Whether threshold requirement to show good reason for failure to serve within specified period — Whether reason for failure relevant — CPR r 7.6[1]

There is no threshold requirement that a "good reason" be shown for failure to serve a claim form within the specified period before the court can exercise its power under CPR r 7.6 to extend the period within which it may be served. However, since the power must be exercised in accordance with the overriding objective in rule 1.1, it will always be relevant for the court to determine and evaluate the reason why the claim form was not served during the specified period. If there is a very good reason an extension of time will usually be granted; the weaker the reason, the more likely the court will be to refuse the extension. If the claimant or his legal representative simply overlooked the requirement to effect service within the specified period that will be a strong reason for refusing an extension of time (post, paras 17–18, 19–20, 23).

Dictum of Dyson LJ in *Robert v Momentum Services Ltd* [2003] 1 WLR 1577, para 33, CA applied.

Kleinwort Benson Ltd v Barbrak Ltd [1987] AC 597, HL(E) and *Waddon v Whitecroft Scovell Ltd* [1988] 1 WLR 309, HL(E) distinguished.

Where, therefore, the defendant appealed against the refusal of his application to set aside an order extending time for service of a claim form—

Held, allowing the appeal, since the only reason for the failure to serve the claim form within the specified period was the incompetence of the claimant's solicitors, time for service would not be extended (post, paras 35, 36–37, 39).

The following cases are referred to in the judgment of the court:

Banks v Cox (unreported) 17 July 2000; Court of Appeal (Civil Division) Transcript No 1476 of 2000, CA
Biguzzi v Rank Leisure plc [1999] 1 WLR 1926; [1999] 4 All ER 934, CA
Garratt v Saxby (Practice Note) [2004] EWCA Civ 34; [2004] 1 WLR 2152, CA
Godwin v Swindon Borough Council [2001] EWCA Civ 1478; [2002] 1 WLR 997; [2001] 4 All ER 641, CA
Hickey v Marks (unreported) 6 July 2000; Court of Appeal (Civil Division) Transcript No 1469 of 2000, CA
Kleinwort Benson Ltd v Barbrak Ltd [1987] AC 597; [1987] 2 WLR 1053; [1987] 2 All ER 289, HL(E)
Ladd v Marshall [1954] 1 WLR 1489; [1954] 3 All ER 745, CA
Robert v Momentum Services Ltd [2003] EWCA Civ 299; [2003] 1 WLR 1577; [2003] 2 All ER 74, CA
Stewart v Engel [2000] 1 WLR 2268; [2000] 3 All ER 518, CA
Vinos v Marks & Spencer plc [2001] 3 All ER 784, CA
Waddon v Whitecroft Scovell Ltd [1988] 1 WLR 309; [1988] 1 All ER 996, HL(E)

[1] CPR r 7.6: see post, para 4.

The following additional cases were cited in argument:

Anderton v Clwyd County Council (No 2) [2002] EWCA Civ 933; [2002] 1 WLR 3174; [2002] 3 All ER 813, CA

Austin v Newcastle Chronicle and Journal Ltd [2001] EWCA Civ 834, CA

Chabba v Turbogame Ltd [2001] EWCA Civ 1073, CA

Mason v First Leisure Corpn plc [2003] EWHC 1814 (QB)

Wilkey v British Broadcasting Corpn [2002] EWCA Civ 1561; [2003] 1 WLR 1; [2002] 4 All ER 1177, CA

APPEAL from Deputy Master Eastman

By a claim form issued on 13 January 2003 the claimant, Mahmood Hashtroodi, claimed damages against the defendant, Terence Hancock in respect of injuries sustained in a road traffic accident on 21 January 2000. On 9 May 2003, one clear working day before the expiry of the validity of the claim form, the claimant applied without notice under CPR r 7.6(2) for the time for the service of the claim form to be extended until 3 June 2003. Master Tennant granted the application. On 23 May 2003, the claimant's solicitors purported to serve the claim form and response pack by DX but they were never received by the defendant's solicitors. On 2 June 2003 the defendant issued an application pursuant to CPR r 23.10 to set aside the order of Master Tennant on the grounds that the claimant had no good grounds for extending the time for service of the claim form. On 9 June 2003 the defendant issued an application to strike out the claim pursuant to CPR r 3.4 on the ground that neither the claim form nor response pack had been served by 3 June in accordance with order of Master Tennant. On 13 June 2003 Deputy Master Eastman dismissed both applications.

By an appellant's notice and amended grounds of appeal the defendant appealed, pursuant to permission granted by Keith J on 3 October 2003, on the ground, inter alia, that the deputy master had erred in law in failing to find that the earlier case law, which required there to be a "good reason" for the claimant's failure to serve within the original period of validity and for an extension of validity of proceedings, was still good law, consistent with the overriding objective of CPR r 1.1 and relevant to an application made under CPR r 7.6(2); and that none of the reasons advance by the claimant amounted to such a "good reason". Lord Phillips of Worth Matravers MR directed that the appeal should be heard by the Court of Appeal instead of the High Court.

The facts are stated in the judgment of the court.

Christopher Purchas QC and *Steven Snowden* for the defendant.

Allan Gore QC and *Daniel Tobin* for the claimant.

Cur adv vult

25 May. The following judgment of the court was handed down.

DYSON LJ

1 This is the judgment of the court.

2 This is an appeal by the defendant from the decision of Deputy Master Eastman who on 13 June 2003 (a) refused to set aside a "without notice" extension of time for service of the claim form which the claimant had been granted by Master Tennant, and (b) dismissed the defendant's application

that the action should be struck out on the grounds that the claim form had not been properly served even within the extended time for service. In view of the importance of the first decision, Lord Phillips of Worth Matravers MR directed that the appeal should be heard by the Court of Appeal instead of the High Court.

The proper interpretation of CPR r 7.6(2)

3 The issue raised by the appeal against the first decision concerns the principles by which the court should determine whether to extend the time for service of a claim form where the application is made within the period for serving the claim form specified by CPR r 7.5 and the claim has become statute-barred within that period. There appears to be no authority on this issue.

4 CPR r 7.5(2) provides: "The general rule is that a claim form must be served within four months after the date of issue." CPR r 7.6 provides:

> "(1) The claimant may apply for an order extending the period within which the claim form may be served.
>
> "(2) The general rule is that an application to extend the time for service must be made—(a) within the period for serving the claim form specified by rule 7.5; or (b) where an order had 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 service of the claim form 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 been unable to serve the claim form; (b) the claimant has taken all reasonable steps to serve the claim form but has been unable to do so; and (c) in either case, the claimant has acted promptly in making the application."

5 Before 1962, the power of the High Court to extend the validity of a writ was governed by RSC Ord 8, r 1, which provided that no writ should remain in force for more than 12 months, but that:

> "the plaintiff may, before the expiration of the 12 months, apply to the court or a judge for leave to renew the writ; and the court or judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original . . . writ of summons be renewed for six months . . ."

6 In 1962, the previous Ord 8, r 1 was replaced by a new Ord 6, r 8 which remained until the CPR came into force. Ord 6, r 8 provided that a writ was valid in the first instance for 12 months beginning with the date of its issue, and

> "(2) Where a writ has not been served on a defendant, the court may by order extend the validity of the writ from time to time for such period, not exceeding 12 months at any one time . . . as may be specified in the order, if an application for an extension is made to the court before that day or such later day (if any) as the court may allow."

7 It was no longer a condition of allowing an extension of the validity of the writ that the court should be satisfied that reasonable efforts had been

made to serve, or that there was some other good reason for granting an extension of time.

8 Ord 6, r 8 generated a great deal of litigation. In what circumstances should the court extend the time for service of a writ? The authorities and principles were reviewed by the House of Lords in *Kleinwort Benson Ltd v Barbrak Ltd* [1987] AC 597. Their Lordships decided that Ord 6, r 8 had to be construed against the background of the earlier rule, and that: "there must be implied in the new rule, as a matter of construction, a condition that the power to extend shall only be exercised for good reason": per Lord Brandon of Oakbrook, at p 622.

9 As for what could properly be regarded as amounting to a "good reason", Lord Brandon of Oakbrook said, at p 622H, that it was not possible to define or circumscribe the scope of that expression. "Whether there is or is not good reason in any particular case must depend on all the circumstances of that case, and must therefore be left to the judgment of the judge . . ." He added that the decision whether an extension should be allowed or disallowed was a discretionary one, and that, in exercising the discretion, the judge was entitled to have regard to the balance of hardship. In *Waddon v Whitecroft Scovell Ltd* [1988] 1 WLR 309, the House of Lords said that normally the showing of good reason for failure to serve the writ during the original period of its validity would be a necessary step to establishing good reason for the grant of an extension: see per Lord Brandon, at p 314.

10 There were "intricate and numerous" authorities under Ord 6, r 8: see *Adrian Zuckerman's Civil Procedure* (2003), p 180. Thus, for example, it was held that a clear agreement between the parties that service should be deferred was a good reason for extending time; whereas the mere fact that negotiations were proceeding was not a good reason.

11 Mr Purchas submits that the case law under Ord 6, r 8 still holds good, and that it is a necessary (but not sufficient) condition for the grant of an extension of time, where the application is made in accordance with CPR r 7.6(2), that there is a good reason for the claimant's failure to serve within one of the periods specified in CPR r 7.6(2) ("the specified period"), and therefore a good reason for an extension of time. The existence of a good reason is not a sufficient condition because the power to grant an extension of time is discretionary, and it must be exercised in accordance with the overriding objective identified in CPR r 1.1. Mr Purchas points out that, although the words "good reason" did not appear in the 1962 version of Ord 6, r 8, nevertheless they were implied into the rule. For the same reason, he submits, these words should be implied into CPR r 7.6(1)(2), and the old case law should be applied. There should be no difference, since the court would have had to have regard to the interests of justice in the pre-CPR era, just as it is now explicitly required to do by CPR r 1.1.

12 We cannot accept the full breadth of these submissions. The starting point is that the CPR are a "new procedural code": CPR r 1.1(1). They contain many detailed rules, and the court is required to give effect to the overriding objective when it interprets any rule: CPR r 1.2(b). In *Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926, 1934, Lord Woolf MR said:

> "The whole purpose of making the CPR a self-contained code was to send the message which now generally applies. Earlier authorities are no longer generally of any relevance once the CPR applies."

13 To similar effect, May LJ in *Godwin v Swindon Borough Council* [2002] 1 WLR 997, 1011, para 42 said: "it is not . . . generally helpful to seek to interpret the Civil Procedure Rules by reference to the rules which they replaced and to cases decided under former rules."

14 There have been instances where this court has derived assistance from cases decided under the former rules when interpreting the CPR. Thus in *Banks v Cox* (unreported) 17 July 2000; Court of Appeal (Civil Division) Transcript No 1476 of 2000, Morritt LJ said, at para 41, that the principles reflected in *Ladd v Marshall* [1954] 1 WLR 1489 remain relevant to any application for permission to rely on further evidence "not as rules but as matters which must necessarily be considered in an exercise of the discretion whether or not to permit an appellant to rely on evidence not before the court below". The court adopted and applied the statement by May LJ in *Hickey v Marks* (unreported) 6 July 2000; Court of Appeal (Civil Division) Transcript No 1469 of 2000, para 55:

> "The principle for the future will be that, since the Civil Procedure Rules are a new procedural code, the former body of authority will not apply, although of course the intrinsic persuasiveness of all relevant considerations, including, if they arise, those which were considered persuasive under the former procedure, will be capable of contributing to a just result."

15 Other examples are *Stewart v Engel* [2000] 1 WLR 2268, 2276, and *Garratt v Saxby* [2004] 1 WLR 2152, para 18, where I said:

> "Although it has been said on a number of occasions that decisions on pre-CPR procedural rules are not binding for the purpose of interpreting the CPR, there are circumstances in which they may be of considerable persuasive force."

16 But it should usually be possible to interpret the CPR without recourse to case law under the former rules. If the old case law were to be routinely invoked, the fundamental principle that the CPR is a self-contained procedural code would be undermined. In our judgment, it is unnecessary to construe CPR r 7.6(1)(2) as importing the case law that was developed for the interpretation of Ord 6, r 8, and it would be wrong to do so. It is true that the threshold condition of "good reason" was implied into what was apparently an untrammelled discretion given by Ord 6, r 8; and CPR r 7.6(1)(2) appear to give the court an equally untrammelled discretion. But that is not a sufficient reason for importing the old law and the panoply of the intricate cases decided under Ord 6, r 8. To do that would be to ignore the fact that the CPR is a new self-contained code. The CPR ushered in a new era in which, in significant respects, the previous approach to civil litigation and former practices (much of it enshrined in case law) were abandoned.

17 Moreover, there are reasons internal to CPR r 7.6 itself which show that it was not intended to impose any threshold condition on the right to apply for an extension of time under CPR r 7.6(2). The contrast between rule 7.6(2) and rule 7.6(3) is striking. Rule 7.6(3) empowers the court to grant an extension of time to a claimant who applies after the end of the specified period only if the conditions stated in paragraphs (a) or (b) and (c) are satisfied. The reference to conditions in rule 7.6(3), and the absence

A of any such reference in rule 7.6(2) must have been deliberate. Against the background of the case law on Ord 6, r 8, and in view of the introduction of new and stringent conditions in rule 7.6(3), it cannot have been intended that rule 7.6(2) should be construed as being subject to a condition that a "good reason" must be shown for failure to serve within the specified period, or indeed subject to any implied condition.

B **18** In the absence of any such condition, therefore, the power must be exercised in accordance with the overriding objective: see CPR r 1.2(b). What does that mean in practice? We have no doubt that it will always be *relevant* for the court to determine and evaluate the reason why the claimant did not serve the claim form within the specified period. This has nothing to do with the fact that under the former procedural code, the threshold requirement was that the plaintiff should show good reason. It is because the C overriding objective is that of enabling the court to deal with cases "justly", and it is not possible to deal with an application for an extension of time under CPR r 7.6(2) justly without knowing why the claimant has failed to serve the claim form within the specified period. As a matter of common sense, the court will always want to know why the claim form was not served within the specified period. As Mr Zuckerman says in *Civil* D *Procedure*, p 180, para 4.121:

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

F **19** Whereas, under the previous law, a plaintiff who was unable to show a good reason for not serving in time failed at the threshold, under the CPR a more calibrated approach is to be adopted. If there is a very good reason for the failure to serve the claim form within the specified period, then an extension of time will usually be granted. Thus, where the court has been unable to serve the claim form or the claimant has taken all reasonable G steps to serve the claim form, but has been unable to do so (the CPR r 7.6(3) conditions), the court will have no difficulty in deciding that there is a very good reason for the failure to serve. The weaker the reason, the more likely the court will be to refuse to grant the extension.

20 If the reason why the claimant has not served the claim form within the specified period is that he (or his legal representative) simply overlooked the matter, that will be a strong reason for the court refusing to grant an H extension of time for service. One of the important aims of the Woolf reforms was to introduce more discipline into the conduct of civil litigation. One of the ways of achieving this is to insist that time limits be adhered to unless there is good reason for a departure. In the *Biguzzi* case [1999] 1 WLR 1926 Lord Woolf MR said, at p 1933: "If the court were to ignore

delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant."

21 It is easy enough to take the view that justice requires a short extension of time to be granted even where the reason for the failure to serve is the incompetence of the claimant's solicitor, especially if the claim is substantial. But it should not be overlooked that there is a three year limitation period for personal injury claims, and a claimant has four months in which to serve his or her claim form. Moreover, the claim form does not have to contain full details of the claim. All that is required is a concise statement of the nature of the claim: see CPR r 16.2(1)(a). These are generous time-limits. As May LJ said in *Vinos v Marks & Spencer plc* [2001] 3 All ER 784, 790, para 20:

> "If you then look up from the wording of the rules and at a broader horizon, one of the main aims of the CPR and their overriding objective is that civil litigation should be undertaken and pursued with proper expedition. Criticism of Mr Vinos's solicitors in this case may be muted and limited to one error capable of being represented as small; but there are statutory limitation periods for bringing proceedings. It is unsatisfactory with a personal injury claim to allow almost three years to elapse and to start proceedings at the very last moment. If you do, it is in my judgment generally in accordance with the overriding objective that you should be required to progress the proceedings speedily and within time limits. Four months is in most cases more than adequate for serving a claim form. There is nothing unjust in a system which says that, if you leave issuing proceedings to the last moment and then do not comply with this particular time requirement and do not satisfy the conditions in rule 7.6(3), your claim is lost and a new claim will be statute-barred. You have had three years and four months to get things in order."

22 In view of the importance of this appeal, we have considered whether we should try to give some guidance as to how the discretion should be exercised beyond merely saying that it should be exercised in accordance with the overriding objective, and that the reason for the failure to serve within the specified period is a highly material factor. We do not, however, think that it would be right to go further than this, any more than did the House of Lords in the *Kleinwort Benson* case [1987] AC 597. The Civil Procedure Rule Committee could have produced a check-list of relevant factors (as it has done, for example, in CPR r 3.9(1) in relation to applications for relief from sanctions). But it did not do so. In *Robert v Momentum Services Ltd* [2003] 1 WLR 1577, this court had to consider a case where the claimant applied for an extension of time for service of particulars of claim before the time for service had expired. The application was made under CPR r 3.1(2)(a), which simply provides that, except where the Rules provide otherwise, the court may extend the time for compliance with any rule, practice direction or court order. The discretion is not otherwise circumscribed. I said, at para 33:

> "By not spelling out a checklist in rule 3.1(2)(a), it seems to me that the draftsman was intending that the discretion should be exercised by simply having regard to the overriding objective of enabling the court to deal

A with cases justly including, so far as practicable, the matters set out in rule 1.1(2)."

23 For the same reasons, we consider that the draftsman also intended that the discretion to grant an extension of time under CPR r 7.6(2) should be exercised having regard to the overriding objective.

24 Having dealt with the question of principle raised by the first B decision, we turn to the present case.

The facts

25 The claimant was injured in a road traffic accident on 21 January 2000. His motor cycle collided with the defendant's taxi. The claimant, who was 46 years of age at the time of the accident, suffered severe damage C to the cervical spine which resulted in tetraplegia. At that time, he was in paid employment. As a result of the accident, he requires care 24 hours a day and he will never be able to work again. He instructed solicitors, Lock & Marlborough ("L & M"), who wrote a letter before action to the defendant on 14 June 2000 and sent a copy to his insurers. The letter to the defendant was sent to his correct address. There is in force between the D insurers and a third party claims handling company, then called Tradex Claims Management Co Ltd, and now called Technical Claims Management Ltd ("TCM") an agreement whereby TCM handle third party claims in respect of which the insurers might have a liability. On 5 July TCM replied to L & M notifying them of their interest, saying that there was substantial evidence to show that it was the claimant who was responsible for the accident.

E **26** On 22 August 2000 TCM wrote to L & M setting out their reasons for asserting that "very substantial levels of contributory negligence must be assumed by your client". Further correspondence ensued between July and November 2000, culminating in a letter dated 28 November from L & M and TCM. Thereafter, L & M did not communicate with the defendant or TCM until they wrote on 25 April 2003 to TCM notifying them that a claim F had been issued and that the relevant papers would be ready for service shortly. They asked whether TCM wished to nominate solicitors to accept service on behalf of the defendant, or whether papers should be sent to him direct, adding: "we should be grateful to hear from you within the next seven days failing which papers will be served on Mr Hancock direct." The claim form had in fact been issued on 13 January 2001, eight days before the G expiry of the limitation period.

27 The letter of 25 April was sent to the registered office of TCM, and not its place of business. It was received by the company's auditors, who forwarded it to TCM's place of business where it was received on 1 May. The letter did not bear the TCM reference which had appeared on the earlier correspondence written by TCM. Moreover, although it purported to do so, the letter did not enclose a copy of a letter dated 22 November 2000 which H had been written by TCM to L & M and which did bear the TCM reference. The letter was, therefore, sent back to L & M who received it on 6 May. On 8 May Mr Pike (the locum solicitor contracted to L & M who handled this litigation on behalf of the claimant from May 2001 until 22 May 2003 when he left the firm) claims to have made four telephone calls to TCM (only one is

admitted), but failed to receive any written confirmation that solicitors would be nominated.

28 On 9 May (one clear working day before the expiry of the validity of the claim form) the claimant made an application without notice for a three weeks' extension of time for the service of the claim form until 3 June. The application was supported by a statement by Mr Pike. He had made no attempt to effect service on the defendant personally.

29 Master Tennant allowed the application and extended time until 3 June. On 12 May, L & M wrote to TCM by fax, giving the correct reference, and enclosing their letter of 25 April again. They said that they hoped to serve on the next day, and therefore requested an urgent response. On 14 May, TCM replied nominating Blake-Turner & Co as solicitors authorised to accept service of all proceedings. On 19 May, L & M informed Blake-Turner (for the first time) that they had obtained an order extending time for service of the claim form. On 20 May, the order of Master Tennant was drawn up and sealed. On 23 May, L & M purported to serve the claim form and response pack on Blake-Turner by DX. In his witness statement, Mr Lock explained that he arranged for the documents to be served by DX in the usual way, and that they were delivered to the Document Exchange before 5.30 p m on 23 May. Deputy Master Eastman found that "ordinary office procedure and practice prevailed and the letter and claim form got to the DX and that the probabilities are that they got lost there". On 28 May L & M sent by fax to TCM and by DX to Blake-Turner the particulars of claim and schedule.

30 On 2 June, the defendant issued an application for an order that the order of Master Tennant be set aside pursuant to CPR r 23.10 on the grounds that the claimant had no good grounds pursuant to CPR r 7.6 for extending the time for service of the claim form. On 9 June, the defendant issued an application for an order that the court strike out the claim pursuant to CPR r 3.4 on the ground that neither the claim form nor the response pack had been served by 3 June in accordance with the order of Master Tennant.

31 In support of the application for an extension of time, Mr Pike had made a statement. He explained the reasons for the application in these terms:

> "17. Such an extension will enable me to chase the insurers for a few more days in the hope that they will nominate solicitors. In the event that the insurers still do not nominate solicitors, arrangements will be made to have the defendant served personally, or at his last known address.
>
> "18. In making this application, I bear in mind that the CPR does set down a timetable that should ordinarily be complied with. However, I respectfully suggest that the circumstances of this case justify the short extension of time that I seek. Such an extension is, in my respectful submission, consistent with the overriding objective. Moreover, were the defendant to ever say that he was prejudiced by the fact that a short extension of time was granted, I would point out that he and his insurers were notified of this claim as long ago as July 2000, and that the principal reason why this extension is now sought is the fact that the defendant's insurers have not yet confirmed that they are nominating solicitors to accept service."

A **32** On 13 June, the deputy master dismissed both of the defendant's applications. I have already referred to the reasons he gave for dismissing the application to strike out for non-service: see para 29 above. As regards the application to set aside the extension of time for service of the claim form, he said:

> "I obviously have a discretion in this matter and in exercising my
> B discretion both in relation to that and in relation to the other summons I have to bear in mind the requirement following the overriding principle of effectively doing justice to the parties. I observe that if I accede to the first application the defendant gets what is commonly known as a windfall limitation defence and escapes a potentially expensive claim. The claimant would lose his action against the primary tortfeasor and must look to a claim against his solicitors. I observe that
> C the result of a claim against his solicitors would be by no means certain. They may have been dilatory and they may have run this case up to the wire so far as limitation is concerned, but I observe that Mr Pike sought to act within time to try and look after his client's interests, and I am of the view that it is not absolutely certain that a negligence claim against the solicitors would succeed. So if I accede to the defendant's
> D application there is a chance that Mr Hashtroodi would end up with nothing. Back to the substance of this appeal. It is observed to me that there is no guidance as to whether or not this is a review or a rehearing. I have to say I am not sure it particularly matters. I note that effectively there is nothing substantially new before me than was before the master on 9 May, save that I now know a little of the toing and froing of the
> E 25 April letter. But the master saw it and I am satisfied that the fact that the claimant's solicitors were using what I will describe as the less good address originally and indeed put no reference number on the letter would not have influenced Master Tennant's decision. He had and could have and may have for all I know read the letter with its reference to personal service on Mr Hancock in it, but he chose to make an order. I am satisfied that there was a sufficient reason for him to make an
> F order, namely so that with a little extra time what I will call 'safe' service could be achieved rather than the vagaries of other methods. Mr Pike had made efforts to achieve this in time, albeit late in the date. In all the circumstances I see no reason to differ from Master Tennant's exercise of his discretion and his views on the matter, and that application will be dismissed."

G **33** It is common ground that in the events which have occurred here, the appeal to this court is a rehearing, rather than a review of the decision of Deputy Master Eastman. This is because, as Keith J pointed out, an application under CPR r 23.10(1) to set aside an order obtained without notice should involve a rehearing of the issue, and not a review of the decision that it is sought to set aside; but, in the present case, the deputy
H master conducted the application as if it were a review of the decision of Master Tennant.

34 Our review of the facts discloses that the only reason for the failure to serve the claim form within the four months' period was the incompetence of L & M. The deputy master observed that Mr Pike sought to look after his client's interests, and it was not "absolutely certain" that a

negligence claim against the solicitors would succeed. On the material that has been presented to this court, we can see no answer to an allegation of negligence against the solicitors. It has often been said that a solicitor who leaves the issue of a claim form almost until the expiry of the limitation period, and then leaves service of the claim form until the expiry of the period for service is imminent courts disaster. That is precisely what occurred here. But Mr Pike was in the fortunate position of knowing the defendant's address. All he had to do was to serve the claim form on the defendant by first class post, or by effecting personal service: CPR r 6.2(a) or (b). In his letter of 25 April 2003, he said in terms that, unless solicitors were nominated within seven days (i e by 2 May), he would serve the defendant personally. There is no explanation for his failure to do just that. The "explanation" put forward by Mr Pike in his witness statement does not stand up to scrutiny. The fact that TCM had not yet confirmed that they were nominating solicitors to accept service may have been the reason why Mr Pike decided to apply for an extension of time. But the failure of TCM to nominate solicitors was no reason at all for Mr Pike's failure to serve the claim form within the specified period on the defendant personally. In any event, if L & M had not mishandled the sending of the letter of 25 April, there is no reason to suppose that TCM would not have nominated Blake-Turner in time for service to have been effected on that firm within the specified period.

35 It follows that this is a case where there is no reason for the failure to serve other than the incompetence of the claimant's legal representatives. Although this is not an absolute bar, it is a powerful reason for refusing to grant an extension of time. Despite this, Mr Gore submits that an extension should be granted. In relation to the application of the overriding objective, he relies on the following factors. First, the claim is very substantial. Secondly, the issues in the case were identified early on, so that a short extension of time would not undermine the case management process. Thirdly, the extension of time would not put the parties on a more or less equal footing than they would have been if the extension were not granted. Fourthly, the extension would not increase the cost of the litigation. Fifthly, it would be disproportionate to refuse the extension. Finally, the defendant has not suffered any prejudice as a result of the extension, since at the date of the claimant's application, the defendant had not yet acquired an accrued limitation defence.

36 We are in no doubt that the time for serving the claim form should not be extended in this case. The absence of any explanation for the failure to serve is, on the facts of this case, decisive. Sadly, the errors on the part of Mr Pike were particularly egregious. The other factors identified by Mr Gore are not sufficient to outweigh the complete absence of any reason which might go some way to excusing the failure to serve in time. If we were to grant an extension of time in the present case, it seems to us that the rule stated in CPR r 7.5 would cease to be the general rule. Moreover, there would be a real risk that statements made by this court about the importance of the need to observe time limits would not be taken seriously. That would be most unfortunate.

37 It follows that we allow the defendant's appeal against the deputy master's first decision.

A *The second decision*

38 The issue raised by the second decision turns on the meaning of Practice Direction—Service supplementing CPR Pt 6, para 2.2, which (until it was amended) provided:

> "Service by DX is effected, *unless the contrary is proved,* by leaving the document addressed to the numbered box: (1) at the DX of the party who is to be served, or (2) at a DX which sends documents to that party's DX every business day."

B

The issue concerns the meaning and effect of the words which we have italicised. But since (a) the practice direction has been amended so as to remove these words, and (b) in view of our conclusion on the first decision this issue is moot in any event, we do not propose to deal with it.

C

Conclusion

39 For the reasons given in relation to the first decision, the defendant's appeal is allowed, and the order of Master Tennant dated 20 May 2003 will be set aside.

D *Appeal allowed with costs.*

Solicitors: Blake-Turner & Co; Bindman & Partners.

G F

E

This page will be reissued in the next part

F

Note

End of starred cases in this issue of The Weekly Law Reports. Cases following are those intended for publication in the Law Reports.

G

H