Neutral Citation Number: [2020] EWHC 1708 (QB)

Case No: QB-2019-003622

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Date: 1 July 2020

Before :

THE HONOURABLE MR JUSTICE NICKLIN

- -

Between :

Dr Theodore Piepenbrock	**Claimant**
- and -	
(1) Associated Newspapers Limited (DMG Media) of Daily Mail General Trust plc (2) The London School of Economics and Political Science (3) Joanne Hay	**Defendants**

- -

The Claimant appeared in person
Alexandra Marzec (instructed by **ACK Media Law LLP**) for the **First Defendant**
Chris Buttler (instructed by **Pinsent Masons LLP**) for the **Second and Third Defendants**

Hearing date: 11 June 2020

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 of hand-down is deemed to be as shown above.

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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.

....

THE HONOURABLE MR JUSTICE NICKLIN

The Honourable Mr Justice Nicklin :

1. This is another case about the problems that can arise when a claimant leaves service of a Claim Form until the last moment. A litigant who does so "*courts disaster*" (Lord Sumption in ***Barton -v- Wright Hassall LLP* [2018] 1 WLR 1119** [23]).

2. The Claimant is a former professor who, until early 2013, was employed by the Second Defendant. He also held the role of Deputy Academic Dean in the Executive Global Master's in Management programme.

3. The Claimant brought a claim against the Second Defendant seeking damages for psychiatric injury arising from alleged harassment during the course of his employment. The claim was dismissed by Nicola Davies J on 5 October 2018 ([2018] EWHC 2572 (QB)). The Judge found that although the Second Defendant had been negligent towards the Claimant, the psychiatric damage caused to him was not reasonably foreseeable ([250]).

4. On 10 October 2018, the First Defendant published an article in the *Daily Mail,* under the headline, "*We must protect MEN in #MeToo era: Academic, 52, loses £4m claim against London School of Economics after an assistant, in her 20s, 'ruined his life' with false claims when he rejected her*", reporting, in terms that were broadly sympathetic to the Claimant, the outcome of his claim against the Second Defendant. It is not necessary for the purposes of this judgment, to set out the article in full. The headline gives a reasonable summary of its contents.

5. However, two days later, on 12 October 2018, the *Daily Mail* published a second article concerning the Claimant under the headline, "*'He's a master manipulator': Professor who put himself forward as a MeToo martyr after being accused of impropriety by spurned assistant is not what he seems, associate claims*". Again, the headline gives a reasonable summary of the article, which is still available on *Mail*Online. The article reported comments from an unnamed "associate" of the Claimant from the Second Defendant. A similar article was published in the print edition of the *Daily Mail* on 13 October 2018.

6. The Claimant's wife, Professor Sophie Marnette-Piepenbrock, sought unsuccessfully to persuade the publishers not to publish the second article. She had emailed both the editor, Geordie Greig (and deputy editor, Tobyn Andreae), and the journalist, Antonia Hoyle, early on 12 October 2018, threatening libel proceedings if the second article was published. The emails went apparently unanswered (and unacknowledged) and the second article was published later that day.

7. Nothing further was heard from the Claimant (or his wife) until the arrival of a letter, sent by email to Mr Greig just before 7pm, on 8 October 2019. The letter was written by the Claimant's wife. In it, she referred to the threat, made almost a year before, to sue for libel if the article was published. The 11-page letter set out the Claimant's contention that the second article had seriously defamed him, and was untrue, and sought the immediate removal of the article, a public apology to be published online, damages and the Claimant's legal costs. The letter concluded:

> "If we do not hear back from you by 6.00pm on Thursday 10 October 2019 regarding these terms, we will submit our lawsuit to the High Court on 11 October

2019, seeking damages for the *Daily Mail's* contributory role in Dr Piepenbrock's lost academic career…"

8. Letters in similar terms were emailed to the Second and Third Defendants, just before 5pm on 9 October 2019, requiring a response by the same deadline. The Claimant alleged that the Third Defendant was the unidentified "associate", quoted in the second article, and was therefore liable for its publication. The Second Defendant was alleged to be vicariously liable for her actions.

9. Solicitors instructed for the First Defendant, ACK Media Law, responded on 10 October 2019. The solicitors noted that no correspondence had been received from the Claimant since his wife's email on 12 October 2018. They continued:

> "Under the Defamation Pre-Action Protocol, a copy of which we attach, a Letter of Claim must be sent to a prospective Defendant providing the information set out (including remedies sought) and importantly setting out the defamatory meaning attributed to the words complained of. A reasonable length of time must be given to the prospective Defendant to allow them to respond, usually no less than 14 days, at which point the respective Claimant must then respond to the points raised.
>
> It appears that your letter attempts to function as a Letter of Claim, but it does not fulfil the requirements of the Pre-Action Protocol… Failure to comply with the Pre-Action Protocol, particularly in circumstances where you have clearly been aware of the publication of the article for nearly a year, may result in sanctions by the court in relation to costs.
>
> You will be aware that there is a 1 year limitation period in respect of libel actions. That is presumably why you have only given 3 days' notice to our client to respond to your letter, which is not sufficient, particularly in view of the new information that you now raise.
>
> In the circumstances, given that your husband is not legally represented, we suggest that the best way forward is that both parties agree to a standstill agreement which freezes the limitation period for a minimum of 28 days and a maximum of 4 months so that we can investigate the points you raise, and you can produce a Pre-Action Protocol Compliant Letter of Claim and the parties consider whether the matter can be resolved without recourse to litigation.
>
> We attach a draft agreement for your consideration which would need to be signed before close of business tomorrow if it is to be effective…"

10. On 11 October 2019, Pinsent Masons, instructed on behalf of the Second and Third Defendants, responded to the letter dated 9 October 2019. In the email, to which their letter of response was attached, Pinsent Masons said: "*We act for the LSE and Ms Hay. Please note our interest and refer further communications to us*". In their letter, the solicitors similarly complained that there had been no compliance with the Pre-Action Protocol. The letter denied that the Third Defendant had made the comments attributed to the "associate" in the article published on 12 October 2018 and, consequently, denied that the Second and Third Defendants were liable for the publication of the article. The letter concluded:

> "If you continue to bring a claim we are instructed to vigorously contest the same and recover against Dr Piepenbrock all legal costs incurred and interest…"

11. The Claimant did not respond to ACK Media Law's letter of 10 October 2019 or to Pinsent Masons' letter of 11 October 2019. Instead, on 11 October 2019, the Claimant and his wife attended the Royal Courts of Justice and issued the Claim Form in this claim against the three Defendants. The following was stated under "*Brief details of claim*":

> "The Claimant claims compensation for damages arising from defamation (slander and libel) in accordance with the Defamation Act 2013 and arising from malicious falsehoods in accordance with the Defamation Act 1952.
>
> These arise from defamatory articles about the Claimant published in the MailOnline on 12 October 2018, and the Daily Mail on 13 October 2018 and which contain defamatory statements and malicious falsehoods made by Associated Newspapers Ltd and Ms Joanne Hay, the Deputy Chief Operating Officer of the London School of Economics and Political Science (LSE), while acting in the course of her employment with the LSE."

12. On the reverse, the Claimant indicated that Particulars of Claim were "to follow". One option, open to the Claimant, was to elect to have the Claim Form served by the Court. However, the Claimant chose to serve the Claim Form himself. Having done so, he was advised that he had four months to serve the Claim Form.

13. After issue of the Claim Form, the Claimant did not serve it immediately. Instead, on 11 October 2019, the Claimant's wife sent emails:

    i) to Mr Greig and Mr Andreae (not to ACK Media Law):

    > "As we informed you last year on 12 October 2018, if you ran the defamatory story on Dr Piepenbrock containing malicious falsehoods as you had proposed, we would sue Associated Newspapers Ltd for libel. You have had one full year to investigate our serious concerns with your defamatory articles in both MailOnline on 12 October 2018… and the Daily Mail on 13 October 2018, and yet you have not engaged at all with our serious concerns.
    >
    > Although we wanted to give you the maximum time possible to address our urgent concerns, time has run out and we have now reached the end of the limitation period. As you have not responded to the suggestions outlined in our letter to you of 8 October 2019 to sensibly settle this dispute, we were left with no choice but to file a multi-million pound lawsuit today in the High Court as we promised we would…"

    ii) to the Second and Third Defendants (not their solicitors) in similar terms:

    > "As a follow up to my email and accompanying letter to you on [8/9] October 2019, I write to inform you that as you have not complied with our recommendations, we have today filed a multimillion pound lawsuit against you in the High Court as we promised we would…

> Dr Piepenbrock and I look forward to facing [you] once again in the High Court and under the spotlight of the international media…"

14. Further email correspondence was sent directly to employees of the First Defendant (making a subject access request under data protection legislation) and, on 25 November 2019, ACK Media Law sent a further letter to the Claimant:

> "We refer to our letter to you of 10 October 2019, copy attached, to which you have not responded. As we stated in that letter, this firm is instructed by Associated Newspapers Ltd in respect of his complaint. You have written to employees of our client by email dated 22 November 2019. Please correspond with this firm in future in that regard, and not directly with our client or employees of our client, who will not respond any further…"

15. Although ACK Media Law asked for an acknowledgement of that letter, none was received.

16. Meanwhile, on 15 November 2019, Pinsent Masons had also sent a further letter:

> "As you are already aware we act for the London School of Economics and Politics (sic) and its employee Ms Joanne Hay.
>
> Please note our interest in this matter. Please also refer any further communications, regarding the issues raised in this letter, to this firm at the address and reference noted above…
>
> We note that you assert that a purported claim has been issued on behalf of Dr Piepenbrock… We repeat the fact that we find this assertion hard to believe in the absence of any evidence from you or the courts that a claim is extant given you are now past limitation.
>
> In any event you have not complied with the Civil Procedure Rules and the requirement that a claimant wishing to bring a claim first complies with the relevant Pre-Action Protocol for Media and Communications Claims (previously the Pre-Action Protocol for Defamation Claims) before initiating any proceedings…
>
> If you continue to bring a claim we are instructed to vigorously contest the same and recover against Dr Piepenbrock all legal costs incurred and interest…"

17. Some further email correspondence on behalf of the Claimant in relation to other matters was sent to employees of the Second Defendant and the Third Defendant in late November 2019, but no response was sent to Pinsent Masons' letter.

18. No further communication in relation to the claim on behalf of the Claimant was sent to the Defendants (or their solicitors) until 10 February 2020. On that date, the Claimant's wife sent two emails, both timed at 14.24:

    i) to Mr Greig, Mr Andreae and Ms Hoyle and copied to ACK Media Law; and

    ii) to employees of the Second Defendant and to the Third Defendant and copied to Pinsent Masons.

19. The emails purported to serve the Claim Form (and Particulars of Claim) and the accompanying message was similar in the two emails:

> "I act for the Claimant in the above matter, as his McKenzie friend. Please find attached
>
> - Stamped [Claim Form]
> - Particulars of Claim
> - Acknowledgement of Service form N9
> - Relevant admission and defence forms: N9C, N9D
> - N1C – Notes for Defendant
>
> A certificate of service will be sent to the Court. All the above documents will also be sent by post…"

20. The Particulars of Claim ran to 300 pages (with appendices) and included claims outside the terms of the Claim Form (e.g. data protection, discrimination, harassment and personal injury) and also made claims against additional defendants not named in the Claim Form. As mentioned in each email, the attached documents were also sent in the post. They were sent to the postal address for ACK Media Law and Pinsent Masons. The evidence shows that they were posted on 11 February 2020.

21. I would observe, at this point, that the act of serving the Claim Form is a reserved activity under s.12(1) Legal Services Act 2007: conducting litigation. The Claimant's wife should not have done this, not having been authorised (or exempted). It may well be that the Claimant's wife was unaware of these restrictions on who can serve a Claim Form.

22. In response to the purported service of the Claim Form and Particulars of Claim, ACK Media Law wrote to the Claimant on 13 February 2020 contending that the Claim Form had not been validly served. For their part, by email on 13 February 2020, Pinsent Masons informed the Claimant and his wife that they had not sought confirmation that the firm was instructed to accept service of the Claim Form and that the purported service upon them was not valid.

23. The Claimant's immediate response to the Defendants' contention that service had been invalid was to re-send the Claim Form and Particulars of Claim by post to the Defendants, but it is common ground that, by this stage, the Claim Form was no longer valid.

24. On 24 February 2020, ACK Media Law and Pinsent Masons filed Acknowledgements of Service on behalf of the Defendants indicating an intention to contest the jurisdiction of the Court on the basis, explained in the accompanying correspondence, that the Claim Form had not been validly served during its period of validity.

25. On 25 February 2020, the Claimant's wife sent an email to the Third Defendant. Included within it was a request that the Third Defendant provide her residential address for service. On 27 February 2020, Pinsent Masons responded:

> "As we have already stated the Claim Form dated 11 October 2019 was improperly served by you three times because you simply refused to take any steps to establish the proper steps for service until it was too late. The Claim Form dated 11 October 2019 has now expired and so have any claims covered by that Claim Form. That Claim Form will be the subject of an application under CPR 11 as you are already aware. As an Acknowledgement of Service has been filed and we are now on the record any further communication regarding that Claim must now be through us. Ms Hay is not required to offer a further address for service in respect of that Claim. The matter is therefore closed and we will not enter into any further discussion with you regarding your default in serving the Claim Form."

26. On 6 and 9 March 2020, Application Notices were issued, respectively, by Pinsent Masons and ACK Media Law. They sought relief in similar terms: an order under CPR Part 11 that the Court has no jurisdiction to hear the Claimant's claim and declaration that service of the Claim Form had been ineffective. The Defendants' Application Notices were supported by witness statements from their respective solicitors.

27. On 10 March 2020, the Application Notices were referred to me for directions. The evidence suggested that the Claimant had indicated an intention to apply to the Court for orders validating the service of the Claim Form and for summary judgment. I made an order on 10 March 2020 requiring that the Claimant should file and serve any Application Notice seeking summary judgment, or orders concerning service of the Claim Form, by 4.30pm on 27 March 2020. I directed that any application issued by the Claimant regarding service of the Claim Form should be heard together with the Defendants' Applications at a 1-day hearing at which the Court would give further directions regarding any application for summary judgment. Subsequently, the hearing was fixed for 11 June 2020.

28. On 20 March 2020, the Claimant issued an Application Notice seeking (1) relief from sanction under CPR 3.9; (2) correction of an error of procedure under CPR 3.10; (3) an order extending time for service of the Claim Form under CPR 7.6; (4) an order for service by an alternative means/at an alternative place under CPR 6.15; (5) an order dispensing with service of the Claim Form under CPR 6.16; and (6) summary judgment pursuant to CPR 24. The Claimant has filed a witness statement in support of his Applications, and they have been followed by further, shorter, witness statements from the solicitors of the Defendants.

The Hearing

29. Due to the current Coronavirus pandemic, the hearing was held remotely using a video platform, Skype for Business. With the cooperation of the parties the hearing bundles were available in good time prior to the hearing. I had directed, in my order of 10 March 2020, that the Defendants should provide their skeleton argument to the Claimant a week prior to the hearing so that he had an extended period within which to prepare his argument in response. In addition, the Claimant's wife had submitted to the Court a letter from the Claimant's doctor, Dr Andrew Iles, which gave details of the Claimant's disabilities. The doctor noted that the Claimant presented with symptoms of depression and met the diagnostic criteria for Asperger's syndrome, but Dr Iles said it was "*without intellectual or language impairment*". Dr Iles also suggested several steps the Court could take to make reasonable adjustments to take account of the Claimant's disability,

including taking adequate breaks during hearings. In light of that, in consultation with the parties, I fixed a clear timetable for the parties' submissions during the hearing which included regular breaks. I did not detect during the hearing that the Claimant was struggling at any point and, with the assistance of his wife and his son, he presented his arguments clearly and effectively.

Service of the Claim Form: The Legal Framework

Time for service

30. Where a Claim Form is to be served within the jurisdiction, a claimant must complete the relevant step required in the table set out in CPR 7.5 before 12.00 midnight on the calendar day four months after the date of issue of the Claim Form. For postal service, the step required to be taken before midnight is to post the Claim Form or, for service by electronic method, to send the email or other electronic transmission.

31. It is common ground in this case that the required step needed to be completed by the Claimant by midnight at the end of 11 February 2020.

On whom must the Claim Form be served

32. If the relevant defendant has not given an address at which he will accept service, and the claimant does not opt to serve the Claim Form on the defendant personally, CPR 6.9(2) provides a table (subject to certain exceptions) where a relevant defendant must be served. For present purposes, an individual, such as the Third Defendant, has to be served at her usual or last known residence; and a company, registered in England & Wales, can be served at its principal office or any place of business of the company, within the jurisdiction, which has a real connection with the claim.

33. Service of a Claim Form upon a defendant's solicitor is governed by CPR 6.7(1). A Claim Form may be served on a defendant's solicitor within the UK where either:

    i) the defendant has given in writing the business address within the jurisdiction or a solicitor as an address at which the defendant may be served with the Claim Form; or

    ii) a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the Claim Form on behalf of the defendant at a business address within the jurisdiction.

The notes in the *White Book* make clear that, when it applies, CPR 6.7(1) is in mandatory terms, unless (unusually) there is a requirement of personal service on the defendant.

> "In the (rare) circumstances where personal service of the claim form on the defendant is mandatory, r.6.7 yields. In the (usual) circumstances where personal service of the claim form on the defendant is but one of the methods of service that may be used, then r.6.7 has its full effect. In those circumstances, service on the defendant instead of on the solicitor… is not valid service (***Nanglegan -v- Royal Free Hospital NHS Trust*** **[2002] 1 WLR 1043**)."

Service by email

34. A Claim Form can be validly served by email – CPR 6.3(1)(d), but only if certain conditions are met. Practice Direction 6A (to which express reference is made in CPR 6.3(1)(d)) provides (so far as material):

> "4.1 … 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 or 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; …
>
> 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)…"

35. §4.1 is particularly important. Before service by email can be used, the party to be served (or his solicitor) "*must previously have indicated in writing to the party serving that he is willing to accept service [by email]*".

36. §§4.1-4.2 of the Practice Direction do not provide an independent basis on which a Claim Form can be served by email upon a solicitor for a defendant. Whether service on the solicitor for a defendant is authorised is to be determined applying CPR 6.7: ***Brown -v- Innovatorone* [2009] EWHC 1376 (Comm)** [24], [31] *per* Andrew Smith J. Therefore, before a Claim Form can be validly served on a solicitor for a defendant by email, two hurdles must be surmounted:

    i) first, CPR 6.7(1) must be satisfied to permit service of the Claim Form upon the solicitor (see [33] above); and

    ii) second the requirements of §4.1 (and §4.2) of Practice Direction 6A must be met to permit service by email.

Has the Claim Form in this case been validly served on the Defendants?

37. The answer is no.

i) Service upon the solicitors was not permitted and was ineffective for two reasons:

a) First, the requirements of CPR 6.7 were not met. None of the Defendants had provided the solicitor's address as an address at which the Claim Form could be served, and the solicitors had not stated that they were instructed by the relevant defendant to accept service of the Claim Form.

b) Second, and in any event, the solicitors themselves had not previously indicated in writing that they were willing to accept service by email, as required by Practice Direction 6A §4.1.

ii) Service on the defendants, by email, was not permitted and was ineffective because none of the defendants had previously indicated in writing a willingness to accept service by email, as required by Practice Direction 6A §4.1.

38. In his submissions, the Claimant placed emphasis on the fact that he had been told by both firms of solicitors that he should correspond with them, rather than their clients. That may be so, but it does not alter the requirements for valid service of a Claim Form that I have set out, and which the Claimant did not observe. The Claimant told me, at the hearing, that he and his wife had obtained and read the provisions of the CPR relating to service of the Claim Form. Although I do have sympathy for those who have to navigate the Civil Procedure Rules without any legal training, I consider that the relevant part of Practice Direction 6A, which governs service by email, and to which express reference is made in CPR 6.3, is perfectly clear. It may be that, in the haste to serve the Claim Form at the end of its period of validity, the Claimant and his wife missed (or failed to appreciate the effect of) this important provision.

39. Having made that determination, I shall turn to consider whether the Claimant can be relieved of the consequences of failing to serve the Claim Form in time on any of the bases upon which he advances.

CPR 7.6: Extension of time for service of the Claim Form

40. CPR 7.6 provides (so far as material):

> "(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
>
> (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…"

41. In most cases where the application for an extension of time is made under CPR 7.6 after the Claim Form has expired, the critical factor is the efforts the claimant has taken to serve the Claim Form within its period of validity. This aspect is also emphasised in Paragraph 8.2 of Practice Direction 7A which provides that the evidence in support of the application should state all the circumstances relied upon and should include "*a full explanation as to why the claim has not been served*".

42. The authorities establish the following principles when considering an application under CPR 7.6:

i) In determining whether a claimant has taken all reasonable steps to serve the Claim Form, the Court is limited to taking into account the steps taken during the four-month period of validity. Steps taken after the Claim Form has expired are irrelevant: ***Carnegie -v- Drury* [2007] EMLR 24** [36] *per* Smith LJ. The Court should consider what steps were taken to serve the Claim Form during the whole period of its validity: ***Hallam Estates Ltd -v- Baker* [2012] EWHC 1046 (QB)** [18] *per* Tugendhat J.

ii) The correct approach is to consider what steps were taken in the four-month period and then to ask whether, in the circumstances, those steps were all that it was reasonable for the claimant to have done. The test is objective; not whether the claimant believed that what he had done was reasonable, but whether what he did was objectively reasonable, given the circumstances that prevailed: ***Carnegie*** [37].

iii) 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. The weaker the reason the more likely the court will be to refuse to grant the extension: ***Hashtroodi -v- Hancock* [2004] 1 WLR 3206** [19] *per* Dyson LJ; ***Cecil -v- Bayat* [2011] 1 WLR 3086** [90] *per* Rix LJ.

iv) Provided s/he has done nothing to put obstacles in the claimant's way, a potential defendant is under no obligation to give any positive assistance to the claimant to serve the Claim Form. If the potential defendant simply sits back and awaits developments (if any), that is an entirely neutral factor in the exercise of the discretion: ***Sodastream Ltd -v- Coates* [2009] EWHC 1936 (Ch)** [50(9)].

v) Some of the authorities consider whether the reason provided by the claimant is a good, bad or neutral reason for failing to serve the Claim Form. In ***Sodastream***, Blackburne J noted that delaying service of the Claim Form until the Particulars of Claim were ready is not likely to provide a good reason for the failure to serve: [50(7)]. A claimant always has an option of serving the Claim Form with Particulars of Claim being served 14 days later (see CPR 7.4(1)(b)) (providing they are served within the validity of the Claim Form). The period of time for

serving the Particulars of Claim can be extended, either by agreement of the parties – CPR 2.11 – or by the Court.

vi) Whether the limitation period has expired is also of considerable importance. If an extension is sought beyond the expiry of the limitation period, the claimant is effectively asking the court to disturb the defendant who is by that time entitled to assume that his rights can no longer be disputed: ***Hashtroodi*** [18]. In the law of limitation "*a miss is as good as a mile*". The stronger the claim, the more important is the defendant's limitation defence which should not be circumvented by an extension of time for serving a Claim Form save in exceptional circumstances: ***Cecil*** [54]-[55] *per* Stanley Burnton LJ. It is therefore for the claimant to show that his "good reason" directly impacts on the limitation aspect of the problem, as for instance where he can show that he has been delayed in service for reasons for which he does not bear responsibility, or that he could not have known about the claim until close to the end of the limitation period. If he cannot do that, he is unlikely to show a good or sufficiently good reason in a limitation case ***Cecil*** [108] *per* Rix LJ.

Submissions

43. On the evidence, the Claimant has to accept that he made no attempt to serve the Claim Form before it was sent by email on 10 February 2020. He provided three reasons for not making any efforts to serve the Claim Form before that:

i) There was no need to do so. The Defendants knew that the Claim Form had been issued, therefore they knew by 10 February 2020 that they would be receiving it. In his witness statement, the Claimant explained this as follows:

> "It is important to note that with each passing day that the claim documents were not received by the Defendant, the uncertainty as to when they should respond to the Court regarding receipt of the claim documents dissolved. On 10 February 2020, it was 100% certain to the Defendants that as they had not yet received the Claimant's claim documents, that they would receive them by 11 February 2020, within the time limits and that they would have until two weeks later on 25 February 2020 to acknowledge service to the Court. Therefore the Defendants knew with 100% certainty that by 11 February 2020 they should have instructed and alerted their solicitors to the fact that service of the claim documents would arrive on 11 February 2020."

ii) The Claimant had been engaged on other litigation. He had a hearing in November 2019 at the Employment Tribunal in a claim against the Second Defendant and he had been preparing for a further 2-day hearing on 3-4 March 2020 and "*he had very little time to prepare the claim documents*".

iii) It took a considerable period of time for the Claimant to become familiar with the law relating to defamation and his other claims and to prepare the Particulars of Claim.

44. In his skeleton argument, dealing with the latter two points, the Claimant submitted:

> "There are perfectly **good reasons** why the Claimant served the claim documents when he did. Between the dates of filing (11 October 2019) and the date of service (10 February 2020), the disabled litigant in person Claimant, who suffers from autism and deep chronic depression, was busy with two other legal claims: the Final Appeal of his High Court judgment against [the Second Defendant], which was only finally determined on 16 December 2019, and the attempts on the part of [the Second Defendant] to lift the stay of his Employment Tribunal Claim and then to strike it out – which failed. The Claimant has had to attend two separate hearings as a litigant in person for the ET Claim, on 20 November 2019 and on 3 March 2020, where [the Second Defendant's] attempt to strike out the Claim was firmly rejected by [the Employment Judge]. The disabled Claimant litigant in person therefore had very little time to try to learn multiple complex facets of law (including defamation law, harassment law, personal injury law, etc.,) and to prepare the claim documents, which were properly submitted on time, in spite of his chronic disability, within the four-month window on 10 and 11 February 2020."

45. The Defendants submit that the Claimant has not provided a good reason for his decision to delay efforts to serve the Claim Form until the day before its period of validity expired. He has not demonstrated that he took all reasonable steps to serve the Claim Form in the four-months he had to do so. On the contrary, he did nothing until his failed efforts to serve it on 10 February 2020. Objectively judged, he has no good reason for that failure.

Decision

46. I accept the Defendants' submissions and I refuse the Claimant's application under CPR 7.6(3) for a retrospective extension of time to serve the Claim Form. The Claimant has failed to demonstrate that he took all reasonable steps to serve the Claim form in the period of its validity. There were no earlier attempts to serve the Claim Form before the attempt to serve it by email on 10 February 2020. The argument that the Defendants could be assured that the Claim Form was going to be served on 10 February 2020 is unrealistic. A defendant cannot sensibly be expected to work on the basis that a claimant who has issued a Claim Form is bound ultimately to serve it. Sometimes, and for a variety of reasons, claimants do not progress their claims beyond issuing a Claim Form. As recognised in ***Sodastream***, a defendant is entitled to sit back and wait to see whether the Claim Form is actually served.[1] The fact that a defendant has been given notice of a claim, and may even be expecting service of the Claim Form, does not lessen the obligation on a claimant to serve it in accordance with the rules.

47. To the extent that it is necessary to consider whether the Claimant has a "good reason" for not having attempted service before 10 February 2020, judged objectively, the reasons advanced by the Claimant do not amount to a "good reason", either individually or collectively. Whilst I accept that the Claimant has also had to deal with a claim in the Employment Tribunal, including preparing for two hearings, that cannot amount to a good reason for not serving the Claim Form in this case. I do not accept that the burdens of preparing for the Employment Tribunal were so great that they prevented service of the Claim Form. The Claimant could have served the Claim Form at any time after it was issued. If he was not ready to serve Particulars of Claim, and if the 14 days provided under CPR 7.4(1)(b) was insufficient, he could have sought to agree an

[1] A defendant who wishes to take a more active approach always has the option under the CPR of serving a notice upon the claimant that s/he either serve the Claim Form or discontinue the claim: CPR Part 7.7.

extension of time with the Defendants or made an application to the Court for further time to serve the Particulars of Claim (see [42(v)] above). The Claimant's Claim Form indicated that the Particulars of Claim were "*to follow*" indicating that, at least when the Claim Form was issued, that was his intention. CPR 16.4(1) requires Particulars of Claim to contain a "*concise statement of the facts upon which the claimant relies*". Particulars of Claim in defamation claims rarely need to be long documents and precedents are available (including in the leading textbook, *Gatley*). Whatever can be said of the 300-page document served by the Claimant, it is not concise. To the extent that the Claimant used up the four-month period preparing it, objectively judged, it was not time spent wisely, but more importantly, it does not provide a good reason for not serving the Claim Form.

48. The First Defendant's solicitors have come under sustained criticism from the Claimant, most of which has been unwarranted. The Claimant did not even respond to the offer of a standstill agreement in ACK Media Law's letter of 10 October 2019. The Claimant told me at the hearing that he did not know what a standstill agreement was. He said he had taken advice from what he described as the "claimant community", the effect of which was that he should not trust solicitors who acted for defendants. He also said that there had been no similar offer of a standstill agreement from Pinsent Masons.

49. That explanation is difficult to understand. The Claimant and his wife are highly educated. The standstill agreement was written in plain terms. It offered to suspend the operation of the limitation period for a maximum of four months, terminable on 28 days' notice. It was a sensible and pragmatic – even generous – response to presentation of a defamation claim right at the end of the limitation period. ACK Media Law did everything that was required of them on behalf of the First Defendant following receipt of the detailed letter of claim from the Claimant. The offer of a standstill agreement was not some trick or device, and it was perhaps unwise of the Claimant to follow advice to treat it as such. The fact that Pinsent Masons had not put forward a similar agreement might have had some force if the Claimant had actually inquired whether they were prepared to offer one. But he did not. In fact, the Claimant simply ignored the correspondence he received from the Defendants' solicitors and adopted an approach of non-engagement. With hindsight, that was very unwise. A more constructive approach might have avoided the position in which the Claimant now finds himself.

50. In the light of my conclusion that the Claimant has not satisfied CPR 7.6(3)(b), it is not necessary to consider whether the Claimant acted promptly in making the application under CPR 7.6(3)(c). The Claimant's application for an extension of time to serve the Claim Form is refused.

CPR 6.15: Service of the Claim Form by an alternative method or alternative place

51. In the alternative, the Claimant seeks an order under CPR 6.15, which provides (so far as material):

> "(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 to the defendant by an alternative method or at an alternative place is good service…"

52. As is clear from the terms of the rule, an application can be made retrospectively to validate steps a claimant has taken to serve the Claim Form.

53. The authorities establish the following principles:

i) The issue for the court to decide is whether the claimant has demonstrated a good reason to justify the making of the order. This is essentially a question of fact and it should not be necessary for the Court to spend undue time analysing previous cases which depend on their own facts ***Abela -v- Baadarani* [2013] 1 WLR 2043** [33]-[35] *per* Lord Clarke.

ii) Generally, 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 his solicitor was aware of the contents of the Claim Form at the time when it expired; and (c) 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 itself. The weight to be attached to them will vary with all the circumstances: ***Barton*** [10].

iii) It is not necessary for a claimant to show that he "*left no stone unturned*" in his/her efforts to serve the Claim Form: ***Barton*** [21].

iv) The mere fact that the defendant learned of the existence and content of the Claim Form cannot, without more, constitute a good reason to make an order under 6.15(2). However, the wording of the rule shows that this is a critical factor: ***Abela*** [36]. "*It has never been enough that the defendant should be aware of the contents of the 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*" ***Barton*** [16].

v) The question is whether there is good reason for the Court to validate the mode of service used, not whether the claimant had good reason to choose that mode: ***Barton*** [9(3)].

vi) The difficulties faced by litigants in person may be a basis for the Court making allowances in respect of case management decisions, but they will not usually justify applying to litigants in person a lower standard of compliance with rules of Court. It is reasonable to expect a litigant in person to familiarise him/herself with the rules that apply to any step s/he is about to take: ***Barton*** [18].

vii) Claimants who issue a Claim Form at the end of the limitation period, opt not to have it served by the Court, and then make no attempt to serve it themselves until the very end of its period of validity "*can have only a very limited claim on the court's indulgence*" in any subsequent application under CPR 6.15(2): ***Barton*** [23].

viii) The CPR clearly stipulate the acceptable methods for serving the Claim Form. Absent some difficulty in using these methods, CPR 6.15(2) does not enable litigants to devise their own methods to effect service. It is necessary in the interests of certainty that the Court permits a litigant to depart from the prescribed methods of service only where a compelling case is made out to do so: ***Brown -v- Innovatorone*** [44] *per* Andrew Smith J.

Submissions

54. In his oral submissions, the Claimant stated that the following paragraph in his skeleton argument summed up his position:

> "It appears that the main issue for the Court to decide is whether the Defendants' solicitors, after having been notified that a Claim was filed, and having repeatedly and unequivocally stated that they were acting for and instructed by the Defendants in this litigation and having demanded that the autistic litigant in person send 'any further communication' to them [Pinsent Masons' letter of 11 November 2019 – see [16] above), that when the Claimant therefore sent the only piece of legal communication remaining – the Claim documentation – such explicit comprehensive demands indicated instruction to accept service. If the Defendants' solicitors are arguing that they were not in fact instructed by the Defendants to accept service of the Claim form, this is entirely irrelevant, as the only thing that matters is what they unequivocally told the Claimant and how the Claimant as an autistic litigant in person, understood it."

55. The Claimant argued that he clearly understood, from the "*unequivocal correspondence*" from the two solicitors' firms (ACK Media Law's letter of 25 November 2019 ([14] above) and Pinsent Masons' letters of 11 October and 15 November 2019 ([10] and [16] above), that they were solicitors of record for the respective Defendants and that he had been given notice that any and all legal correspondence was to be sent to them. He was therefore misled by the solicitors that the Claim Form should be sent to the solicitors.

56. The Claimant submits that he took reasonable steps to effect service in accordance with the CPR, by both emailing the Defendants and their solicitors, in time, and by sending the Claim documents via registered post to the Defendants' solicitors, again in time, after repeatedly receiving authorisation to do so by the Defendants' solicitors. In consequence, the Defendants (and their solicitors) were aware of the contents of the Claim Form at the time when it expired. They had been put on notice of the nature and content of the claim back in October 2019 and, on 10 February 2020, they received the Claim Form and Particulars of Claim by email. The Defendants would suffer no prejudice if the application were granted.

57. The Claimant denied that service was effected at the last minute. There was, he argued, enough time left for the Defendants (or their solicitors) to inform the Claimant whether, in their view, there was any alleged error in service and time for the Claimant to rectify it. The Clamant contended that the Defendants had a duty, imposed by the overriding objective, to signal any alleged error to the Claimant when they had contributed to that error. This duty, he argued, arose from the solicitors' correspondence requiring the Claimant to communicate with the solicitors rather than the Defendants.

58. The Claimant also pointed to evidence that, after the ineffective service by email, the Third Defendant refused to provide her residential address (see [25] above) as further evidence of playing "technical games" and obstructing the efforts of the Claimant to serve the Claim Form.

59. Ms Marzec for the First Defendant submits the following:

i) The Claimant and his wife are both highly educated. They could be expected to appreciate the importance of compliance with the relevant rules and should have had no difficulty in understanding what they required.

ii) There was no basis on which the Claimant could reasonably have concluded (a) that service by email was permitted or (b) that service on the solicitors was permitted. He made no other attempt to serve the Claim Form in accordance with the rules. In summary, he employed a method of service that he could and should have appreciated was not permitted.

iii) Neither the First Defendant nor its solicitors had engaged in "*technical games*". They had not misled the Claimant as to service or done anything to obstruct service. They had simply objected to the invalid method of service that the Claimant used. The fact that the Claimant was unable to remedy the position thereafter was due to the lateness of his first attempt to effect service.

60. Mr Buttler, for the Second and Third Defendants, adopted Ms Marzec's submissions. In respect of the refusal to provide the Third Defendant's address for service, he submitted that this was after the period of validity of the Claim Form had expired and the circumstances were then different. There was no obligation upon the Third Defendant to provide an address for service when an Acknowledgement of Service had been filed by solicitors acting on her behalf.

Decision

61. I reject the submission that, properly construed, the correspondence sent by ACK Media Law and Pinsent Masons misled the Claimant. Neither firm, in its correspondence in October/November 2019, represented or suggested that the Claim Form in any proceedings should be served on them. To read an instruction by solicitors to correspond with them (and not their clients) or to refer further communications to them as an instruction to serve the Claim Form on the solicitors rather than the Defendants is unreasonable. I do not accept that the Claimant's autism has significantly contributed to this. First, he told me that both he and his wife considered the terms of the CPR regarding service of the Claim Form. Second, whatever impact the Claimant's autism had on his own understanding of the correspondence from the Defendants' solicitors, it was not something that would have affected his wife's understanding. The terms of CPR 6.7 leave no room for doubt that service of the Claim Form is in a special category beyond normal correspondence. Perhaps of greater importance, the evidence demonstrates that the Claimant did not regard himself as obliged to correspond with the solicitors. The Claim Form and Particulars of Claim were sent to the Defendants (or Mr Greig and Mr Andreae as proxies for the First Defendant) by email which was *copied to* the solicitors.

62. The Claimant's principal error was that he thought that service by email was an acceptable form of service when it was not. Neither the Defendants nor their solicitors played any part in the Claimant making that error. It arose because he failed properly to consider CPR 6.3 and Practice Direction 6A. I acknowledge the Claimant's disabilities, but as I have said, I do not consider that that had any bearing on the mistake he made. It is clear that both he and his wife had considered the relevant provisions of the CPR. Service on the solicitors, without ascertaining that they had been instructed to accept service of the Claim Form was a further error (which a careful reading of CPR 6.7 would have avoided), but this was secondary to the mistake about the availability of email to effect valid service.

63. There were, in this case, no obstacles in the way of valid service of the Claim Form on the First and Second Defendants. The Claim Form could have been posted to the relevant address. The Claimant did not, it appears, have the residential address of the Third Defendant. But this point could have been addressed by the Claimant at any stage after 11 October 2019, had a constructive approach been adopted. The simplest would have been to have asked Pinsent Masons for it. If they had prevaricated, or refused to provide her residential address – and if the inquiry did not lead to Pinsent Masons being instructed to accept service on her behalf – then that would have been cogent grounds upon which to make an application under CPR 6.15 to authorise service on the Third Defendant by an alternative means, for example service on her professional address at the LSE. If the Claimant had only belatedly addressed the point, failed to get an order under CPR 6.15 before the Claim Form expired, and chosen to serve the Claim Form by a different method (rather than apply for an extension of time to do so), the Claimant could have relied upon the refusal to provide the residential address as a "good reason" to justify service by the alternative means. But the Claimant did none of this. On the evidence, the only conclusion that can be drawn is that the issue of service of the Claim Form was addressed by the Claimant practically at the last minute and the method he chose was invalid. The damage has been entirely self-inflicted.

64. The Claimant has argued that the Defendants should have done more when they received the Claim Form by email to alert the Claimant to his failure to effect service in accordance with the rules. Insofar as that criticism is directed at the Defendants' solicitors it is misplaced – see Lord Sumption's observations in ***Barton*** [22]; levelled against the Defendants personally it is unrealistic. Providing s/he has done nothing to mislead or obstruct, a defendant could hardly be criticised if s/he decided to follow Napoleon's advice not to interrupt an enemy when s/he is making a mistake. If an unrepresented claimant elects to serve the Claim Form, then it is his/her responsibility alone to ensure that it is validly served in accordance with the rules. The Court of Appeal has expressly rejected an argument that there is any duty on a defendant (whether under CPR 1.3 or otherwise) to warn a claimant that he had not validly served the Claim Form: ***Woodward -v- Phoenix Healthcare Distribution Ltd*** **[2019] EWCA Civ 985** [44]-[47] *per* Asplin LJ (a case that is very similar to the current facts).

65. Has the Claimant demonstrated a "good reason"? In my judgment he has not. It is illuminating to consider whether the Court would have granted the Claimant an order under CPR 6.15(1) had he applied, say in early February 2020, for permission to serve the Claim Form on the Defendants by sending it: (a) to them by email; and/or (b) to their solicitors by email and/or post. It seems to me to be tolerably clear that such an application would have failed. There would be no reason – still less a good one – for

the Court to validate a mode of service not prescribed by the rules. The Master's first question on any such application would likely have been whether the Claimant had asked the Defendants whether they would accept service by email under §4(1) of Practice Direction 6A. The circumstances in which a Court would permit service of a Claim Form upon solicitors under CPR 6.15(1), where a defendant had refused to nominate them for that purpose, would have to be compelling and would probably require evidence that it was practically impossible to serve the defendant by any other method. I cannot see how, if a claimant would not have been able to demonstrate a "good reason" under CPR 6.15(1), s/he should be should be in any materially better position if his/her efforts validly to serve the Claim Form fail and he is forced to apply under CPR 6.15(2) to validate his invalid service. I reach the same conclusion as Lord Sumption in ***Barton***. There was no problem in this case about service of the Claim Form. The Claimant had not found out that he had a claim at the end of the limitation period, and the reason he delayed efforts at service of the Claim Form was his own choice. Ultimately, the problem was that the Claimant had made no attempt to serve in accordance with the rules. All that he did was to employ a mode of service which he should have appreciated was not in accordance with the rules. That is not a "good reason" for making an order under CPR 6.15(2). If it were, then every claimant who failed to serve a Claim Form validly would seek refuge in CPR 6.15(2), and the whole regime for service of the Claim Form would be undermined.

66. I accept the Claimant's submission that the Defendants did, in fact, receive notification of the Claimant's claim against them during the validity of the Claim Form as a result of the combination of the previous correspondence that had been sent and the sending of the Claim Form and Particulars of Claim by email. But that fact, alone, is not sufficient to justify an order under CPR 6.15(2). The prejudice to the Defendants by making an order under CPR 6.15(2) would be significant. They would be deprived of a limitation defence. The principles that apply to applications under CPR 7.6 on this point (see [42(vi)] above) are equally applicable to applications under CPR 6.15(2).

67. Although I sympathise with the Claimant that the consequences for him of the error of not validly serving the Claim Form will be serious, there is nothing that really separates his case from many others who have made similar mistakes when attempting to serve a Claim Form. His circumstances are very close to Mr Barton's. Often when something goes wrong, there is a tendency nowadays to look around for someone else to blame. I am afraid, in this case, the responsibility for the failure validly to serve the Claim Form rests solely with the Claimant's side. I refuse the Claimant's application for an order under CPR 6.15(2).

CPR 6.16: an order dispensing with service of a Claim Form

68. In light of the conclusions I have already reached, I can deal with this shortly.

69. The power to dispense with service retrospectively under CPR 6.16 is limited to "*truly exceptional cases*": ***Olafsson -v- Gissurarson (No.2)*** **[2008] 1 WLR 2016** [21] *per* Sir Anthony Clarke MR. If the facts of this case do not reveal a "*good reason*" to make the order regarding service of the Claim Form sought under CPR 6.15 they cannot disclose "*exceptional circumstances*" sufficient to justify dispensing with service altogether: ***Bethell Construction Ltd -v- Deloitte & Touche*** **[2011] EWCA Civ 1321** [28] *per* Sir Andrew Morritt C.

70. I have found that the Claimant did not have a "*good reason*" justifying an order under CPR 6.15. There is nothing exceptional in the circumstances of this case. On the contrary, it is a sadly just another example of a claimant failing to effect valid service of a Claim Form during its period of validity as a result of leaving it to the last minute to do so. There is no justification for an order under CPR 6.16. I refuse the application.

CPR 3.9: relief from sanction

71. An application under CPR 3.9 for relief from sanction does not assist in the circumstances in which the Claimant finds himself: see explanation of Lord Sumption in ***Barton*** [8] and Asplin LJ in ***Woodward*** [48]. The disciplinary element of a decision whether to relieve a party of a sanction imposed for non-compliance with a rule or order is less important when the Court is considering the rules governing service of a Claim Form. Those rules do not impose duties upon a claimant; they simply represent the conditions with which the claimant must comply in order to invoke the Court's jurisdiction.

72. In light of my conclusions above, having refused the applications made under CPR 7.6, 6.15 and 6.16, there is not a residual self-standing power available under CPR 3.9 to relieve the claimant of the "sanction" that, as a result of his failure to validly to serve the Claim Form during its period of validity, it has now lapsed. The term "sanction" is inapt because it would, in theory, be possible for the Claimant to issue and validly serve a fresh Claim Form. The obstacle standing in the way of a claim is not any sanction imposed by the Court but the fact that the limitation period for defamation and malicious falsehood has expired.

73. I refuse the Claimant's application under CPR 3.9.

CPR 3.10: Rectification of error of procedure

74. Finally, the Claimant seeks an order under CPR 3.10 remedying his error in not validly serving the Claim Form. The Defendants submit that CPR 3.10 cannot rescue the Claimant. This general provision does not enable the Court to do what CPR 7.6(3) forbids: ***Vinos -v- Marks & Spencer plc*** **[2001] 3 All ER 784**; **[2001] CP Rep 12** [20].

75. Ms Marzec argues that CPR 3.10 provides a mechanism whereby the Court, when seized of a claim, can cure defects in procedure, including defects in serving process; it does not permit service to be dispensed with altogether. This, she submits, can be done only under CPR 6.16.

76. I was originally attracted by this submission, but there are several authorities which might cast doubt on it and, in fairness to the Claimant, I should consider them.

77. In ***Integral Petroleum SA -v- SCU Finanz AG*** **[2014] EWHC 702 (Comm)** Popplewell J (relying upon *obiter* remarks of Lord Brown in ***Phillips -v- Symes (No.3)*** **[2008] 1 WLR 180**) held that service of Particulars of Claim by email was an error of procedure that could be corrected by CPR 3.10. He noted that in ***Phillips -v- Symes*** ([31]) the relevant step which was treated as valid was the very service of the proceedings out of the jurisdiction, not some subsequent step: [26]. Further, Lord Brown had approved two aspects of the decision of the Court of Appeal in ***The Goldean Mariner*** **[1990] 2 Lloyd's Rep 215** (a) that the rule was a beneficial provision which

should be given wide effect; and (b) that the rule was engaged even where all that had been served was an acknowledgement of service and there had been no service of the writ. Popplewell J considered this suggested CPR 3.10 was of very wide ambit and was capable of curing a defect which consisted of non-service of the very document by which originating process was initiated: [28].

78. Popplewell J considered the case of ***Olafsson -v- Gissurarson*** **[2007] 1 Lloyd's Rep 182**, in which service of proceedings was effected personally on the defendant in Iceland, but not in accordance with the procedure permitted in that country. No steps were taken by the defendant and judgment was entered in default of acknowledgement of service. When the defendant applied to set aside the judgment, the claimant applied for relief under CPR 3.10 and/or 6.9. Mackay J held that CPR 3.10 could not be used retrospectively to validate the service of the Claim Form. He considered that there had been a failure to serve it because the purported service was by a method not permitted in Iceland. The Judge held that, in the words of Neuberger LJ in the Court of Appeal in ***Phillips -v- Symes (No.3)***, it was a "*no service at all*" case. However, Popplewell J considered that Mackay J's decision had been heavily influenced by the judgments of the Court of Appeal in ***Phillips -v- Symes (No.3)***, which had been subsequently overtaken by the decision in the House of Lords which allowed the appeal. Popplewell J considered that the effect of the subsequent decision of the House of Lords was to cast serious doubt on the reasoning adopted in ***Olafsson***.

79. Popplewell J concluded:

> [34] Returning to the facts of the instant case, in my view the error of procedure in serving the Particulars of Claim by e-mail was a failure to comply with a rule or practice direction which falls within CPR 3.10. Accordingly under CPR 3.10(a) such service is a step which is to be treated as valid, so as to commence time running for the service of the defence, and disentitle [the defendant] in this case to bring itself within CPR 13.2. In reaching that conclusion I have taken into account the following considerations.
>
> [35] [***Phillips -v- Symes (No.3)***] establishes that CPR 3.10 is to be construed as of wide effect so as to be available to be used beneficially wherever the defect has had no prejudicial effect on the other party. The instant case is a good example where such beneficial use is called for. Service by e-mail on Maitre Cohen was sufficient to bring the Particulars of Claim to his attention. He was [the defendant's] chosen lawyer appointed for the purpose of receiving the document. The document reached the appropriate destination in just the same way as if it had been sent by post to the Paris address given in the acknowledgement of service which would have constituted good service. He ought reasonably to have known, as a European accepting the burden of acting for a client in English High Court proceedings, that particulars of claim required to be answered by a defence, and that in default judgment might be entered. What was effected was purported service, not merely transmission for information only (c.f. ***Asia Pacific (HK) Ltd -v- Hanjin Shipping Co Ltd*** **[2005] EWHC 2443 (Comm)**).
>
> [36] Service by e-mail is a permitted method of service under CPR 6.20, albeit that what is permitted is service in accordance with the requirements of Practice Direction 6A. The error is therefore more readily characterised as a failure to comply with a practice direction than a rule. But however

characterised, the substantive defect is in using a method which English procedural law regards as a permissible method in circumstances where the formalities necessary to make it a permitted method had not been concluded. Maitre Cohen had been identified as the chosen legal representative for the Defendant and he had corresponded with the Claimant's solicitors about when the Particulars of Claim should be served from the very e-mail address to which they were then sent. I can envisage circumstances in which purported "service" by a method which is not permitted by the rules at all is sufficiently distant from what is required by the rules as arguably to fall outside CPR 3.10. Moreover I should not be thought to be endorsing any proposition that CPR 3.10 can be used as a matter of course to circumvent service out of the jurisdiction of originating process by effecting service on a firm of solicitors or other lawyers as a matter of practical convenience without seeking an order for service by an alternative method. But I would not accept Mr Collins QC's submission that any defect in the method of service is outside CPR 3.10. The method of service applied in this case, namely service by e-mail, is one which in the 21st century is a common and effective way of transmitting a document and one which the Rules envisage may be used, albeit with certain conditions which are set out in the practice directions.

[37] This case is not concerned with service of originating process but service of particulars of claim. To my mind this is a significant distinction. A narrower approach to CPR 3.10 is justified when it is sought to be applied to the service of originating process, because such service is what establishes *in personam* jurisdiction over the defendant. [***Phillips -v- Symes (No.3)***] indicates that even for service of originating process the rule is to be given a wide effect, and that is so where the application of the rule affects the establishment of *in personam* jurisdiction in one of two competing jurisdictions. But the effect to be given to CPR 3.10 is even wider when concerned with documents which are other than those by which the proceedings are commenced. What the rules are concerned with in relation to the service of such subsequent documents is simply bringing them to the attention of the other party in circumstances in which that other party knows or should realise that a step has been taken which may have procedural consequences. This contrasts with the service of originating process which fulfils other functions: it establishes *in personam* jurisdiction, and it is what engages a wide range of powers in the Court, such as those under s.37 of the Senior Courts Act 1981 and under an inherent jurisdiction. CPR 3.10 is particularly apposite for treating as valid a step whose whole function is to bring a document to the attention of the opposing party where such function has been fulfilled. It prevents a triumph of form over substance."

80. ***Integral Petroleum SA*** and the limits of CPR 3.10 were subsequently considered by Sara Cockerill QC (as she then was) sitting as a Deputy Judge in ***Bank of Baroda, GCC Operations -v- Nawany Marine Shipping FZE*** **[2016] EWHC 3089 (Comm)**. The Judge held:

[18] Is this therefore a case where CPR 3.10 can operate? There is no suggestion that the defect in service has had a prejudicial effect. The Defendants were effectively informed by the defective attempt at service that proceedings had been commenced against them. Nor was it argued that there was any

limitation issue. If I were to accede to the Defendants' application, even though the validity of the Claim Form has now expired there would be nothing preventing the Claimants from issuing another Claim Form and serving it properly. This would, therefore, be a triumph of form over substance.

[19] Further, while the error relates to originating process (which Popplewell J at [37] indicated should attract a more cautious approach) this is a case where a procedural step was taken defectively rather than omitted or performed directly contrary to a rule. So although on one analysis one might say that service on some of the Defendants was omitted in the absence of sufficient Claim Forms, the covering letter makes clear that service was being attempted to be effected against all the Defendants. Effectively some of the procedural boxes were ticked, but others were not. This therefore seems to me to be a case where the power under CPR 3.10 can and should be exercised. Given the fact that no limitation point arises, and the effect of the order will be to validate the steps taken before the Claim Form expired, I do not consider that the expiry of the Claim Form stands in the way of this order being made.

[20] I also note that this result is consistent with the law as it existed before the CPR: in ***The Goldean Mariner*** (cited in passing by Popplewell J and also discussed by Lord Brown) four defendants received the wrong writs, while the fifth received no writ, only an acknowledgment of service form. These errors were all treated as capable of cure under RSC rule 2(1). It would be odd if the CPR, with its greater emphasis on substance, should produce a less favourable result to an erring claimant than would have been obtained under the RSC."

81. These two cases were decided before the Supreme Court decision in ***Barton***. The comments as to whether CPR 3.10 can validate an error in serving a Claim Form are strictly *obiter* and there is a consistent line of authority that suggests that CPR 3.10 cannot be used to rescue a claimant who, having failed to serve the Claim Form by a permitted method, cannot bring him/herself within CPR 7.6, 6.15 or 6.16: see ***Vinos***; ***Kaur -v- CTP Coil Ltd*** **[2001] CP Rep 34** [19]; ***Nanglegan -v- Royal Free Hampstead NHS Trust*** **[2002] 1 WLR 1043**; [14]-[15]; ***Elmes -v- Hygrade Food Products plc*** **[2001] CP Rep 71** [13]-[14]; ***Godwin -v- Swindon Borough Council*** **[2002] 1 WLR 997** [50]; ***Steele -v- Mooney*** **[2005] 1 WLR 2819** [22]-[23]; and ***Capital Alternatives Sales and Marketing Limited -v- Nabas*** **[2018] EWHC 3345 (Comm)** [91].

82. My conclusion is that CPR 3.10 cannot assist the Claimant in this case:

i) I consider that ***Barton*** is a clear statement of the underlying principles as to the importance of serving the Claim Form in accordance with the CPR.

ii) CPR 3.10 was not referred to in ***Barton*** yet, if the argument as to the width of the rule were correct, it would appear to have been an obvious solution to Mr Barton's predicament. In my view, the analysis of Lord Sumption as to why CPR 3.9 is inapt would apply equally to CPR 3.10.

iii) If CPR 3.10 is given an interpretation that permits the Court, retrospectively, to validate service not in accordance with the CPR on the basis that there has been

a "*failure to comply with a rule*", then that would make CPR 6.15(2) redundant. That would be a surprising result as the terms of CPR 6.15(2) are of specific operation whereas CPR 3.10 is of general application. Further, as noted in ***Godwin*** the effect would be "*tantamount to giving the court a discretionary power to dispense with statutory limitation periods*". This would be contrary to the clear policy statement in ***Barton***.

iv) ***Steele -v- Mooney*** [18]-[19] appears to contain the clearest pre-***Barton*** statement that CPR 3.10 cannot be used in this way

a) CPR 3.10 gives the court a discretion. This must be exercised in accordance with the overriding objective of dealing with cases justly. If remedying one party's error will cause injustice to the other party, then the court is unlikely to grant relief under the rule. This gives the court the necessary control to ensure that the apparently wide scope of rule 3.10 does not cause unfairness.

b) The general language of rule 3.10 cannot be used to achieve something that is prohibited under another rule. This is the principle established by ***Vinos***.

v) ***Integral Petroleum SA*** was not a case involving service of originating process (as Popplewell J made clear in [37]). ***Bank of Baroda*** was a case where there was no prejudice to the defendant by validating the defective service (see [18]) and the Deputy Judge acknowledged that CPR 3.10 might not apply where what was sought to be corrected was service directly contrary to a rule ([19]). Here, in contrast, (1) the expiry of the limitation period means that there is significant prejudice to the Defendants if CPR 3.10 validates the "error of procedure"; and (2) the Claimant's service of the Claim Form on the Defendants' solicitors was directly contrary to (or at least not permitted by) CPR 6.7 and service by email (whether on the Defendants or their solicitors) was, without compliance with the relevant paragraphs of Practice Direction 6A, directly contrary to (or at least not permitted by) CPR 6.3. Finally, as I have noted, both cases were decided before the Supreme Court decision in ***Barton***.

83. I therefore refuse the Claimant's application under CPR 3.10.

84. In light of my findings, the Defendants are entitled to the declaration they seek. The Claim Form was not served during its period of validity. In consequence, the Court has no jurisdiction over the Claimant's claim. It follows that I should also formally dismiss the Claimant's application for summary judgment.