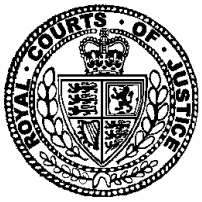

Neutral Citation Number: [2022] EWHC 1520 (Admin)

Case No: CO/4095/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2022

Before :

MICHAEL FORD QC SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

THE QUEEN
(on the application of WANJIRU KARANJA)

Claimant

- and -

UNIVERSITY OF THE WEST OF SCOTLAND **Defendant**

- -
- -

Ollie Persey (instructed by **Falcon Solicitors**) for the **Claimant**
Jennifer Thelen (instructed by **Clyde & Co**) for the **Defendant**

Hearing date: 25 May

- -

Approved Judgment

Michael Ford QC, sitting as a Deputy High Court Judge:

1. The Claimant brought judicial review proceedings in which she challenged the decision of the Defendant dated 28 September 2021, dismissing her appeal against the decision that she was to withdraw from the Defendant's Doctor of Business Administration ("DBA") Programme.

2. In an order dated 7 March the court (Jay J), acting of its own motion, listed the case for an oral hearing to decide two issues: (i) the question of the service of the claim form (and any consequential need for an extension of time); and (ii) jurisdiction (on the basis that the Scottish courts might have jurisdiction to hear any claim). It is those issues to which this judgment is directed.

3. There were three applications before me at the hearing.

   (1) An application dated 11 May 2022 in which the Claimant sought an extension of time for service of the claim form, pursuant to CPR 3.1(2)(a).

   (2) An application dated 18 May 2022, in which the Claimant sought permission to adduce a witness statement from herself in connection with the question of jurisdiction.

   (3) An application from the Defendant, sealed on 12 May 2022, in which it applied to set aside the claim form for late service and on the basis that the matter lay within the jurisdiction of the Scottish courts.

4. The Claimant was represented by Mr Persey and the Defendant by Ms Thelen. I am grateful to both counsel for their clear and focussed submissions.

5. There was an agreed, if somewhat disorganised, bundle of documents and an agreed bundle of authorities. The material facts were not in dispute. In the absence of any objection from Ms Thelen, I decided to permit the Claimant to rely on her witness statement dated 18 May 2022, relevant to both the service and jurisdiction questions.

Background Facts

6. The background to the judicial review application, and the alleged facts on which it relies, are set out in the statement of facts and grounds attached to the claim form. In short, the Claimant, who is a Kenyan national, enrolled on the Defendant's DBA programme and commenced study on it in March 2018. As a result of attending that programme, she obtained leave to remain in the UK as a "Tier 4" student.

7. The Defendant is a university and a registered Scottish charity with headquarters in Paisley, Scotland. It also has a campus in London, at 235 Southwark Bridge Road. The Claimant's unconditional offer of enrolment, set out in an e-mail dated 30 January 2018, gave London as her campus and she attended classes there. The relevant terms and conditions for her enrolment, which her offer e-mail said she was to ensure she

had read, stated that by enrolling she agreed to be bound by the terms. They went on to state:

> "By accepting our offer of admission you agree that the Scottish Courts will have exclusive jurisdiction to deal with any proceedings and that these Terms and any contract of which they form part will be governed by and interpreted in accordance with the law of Scotland."

8. Subsequent iterations of the terms and conditions were similar. Those for enrolment in 2019/20 and 2020/21 said, for example, that "These Terms will be governed by the laws of Scotland and any dispute between you and us [the Defendant] will be dealt with by the Scottish Courts".

9. In July 2021, the Defendant gave notice to withdraw the Claimant from the DBA course due to, it was said, inadequate progress. The Claimant appealed that decision to the Defendant's Senate Appeals Committee and the decision which is the subject of this challenge was made following a meeting which took place remotely on 27 September 2021. The members of that Committee are all based in Scotland. In a decision set out in an e-mail to the Claimant dated 28 September 2021, the Committee informed her that it had unanimously decided that her appeal should not be upheld. The Claimant subsequently received, according to her claim form, an e-mail dated 12 October 2021 from the Defendant saying she had been given a fail. A complaint to the Scottish Public Service Ombudsman could not be investigated because, according to the Ombudsman, the Claimant was already pursuing legal action.

10. The factual background relevant to service of the claim form is not in dispute. The communications between the Claimant's and Defendant's solicitors took place exclusively in writing.

11. On 29 October Mr Sampson, the Claimant's solicitor and who is also a member of the church which she attends, e-mailed the Defendant at the address legal@uws.ac.uk, copied to the e-mail address of Ms Emma Cuckow, the Defendant's Head of Legal, to inform them that the Claimant had instructed him to lodge an application for judicial review.

12. On 11 November Mr Sampson sent a further e-mail to the same two e-mail addresses, chasing up a response and saying that unless a reply was received by 12 November, a claim for judicial review would be lodged. In her reply on the same day, Ms Cuckow said that she had passed the matter to the Defendant's insurance team and would forward the latest e-mail to them.

13. On 15 November Mr Sampson sent a further chasing e-mail to Ms Cuckow, saying he still had not received a response. In her reply of the same day, Ms Cuckow said that the matter had been passed to "our insurance colleagues to progress. The best contact point for you going forward would be my colleague Jacqueline Thomson", whose e-mail address she supplied. (It seems that, in response to an e-mail from Mr Sampson of 16 November, in an e-mail of 18 November Ms Thomson informed Mr Sampson that

due process had been followed and the case had been reviewed by the Senate Appeals Committee, implying there were no grounds for challenge.)

14. On 30 November the Claimant's solicitor lodged the application for judicial review - the claim form and accompanying documents - in person at the Administrative Court. He left it in the Court's drop box because the office was closed. An unsealed claim form and the supporting documents were sent to the Defendant at 235 Southwark Bridge Road, the Defendant's London campus, by special delivery that day.

15. On 30 November, as explained in his e-mail to the Administrative Court of 12 December, Mr Sampson travelled to Dubai, returning to the office on 10 December.

16. The sealed judicial review application was issued by the Court on 1 December. A letter of that date from the Court Manager informed the Claimant's solicitors that the claim had been issued that day and had to be served on the Defendant "within 7 days of the date of this letter and a Certificate of Service lodged with the Court. Failure to comply with this requirement may result in the file in these proceedings being closed".

17. According to Mr Sampson's e-mail to the Court office of 12 December, the letter of 1 December from the Court was not received at his office until 6 December 2021. The e-mail also explained that on his return from Dubai on 10 December, he spoke to someone in the Administrative Court who told him that service of the unsealed claim form was not in compliance with the rules and he should immediately serve the court's letter of 1 December on the Defendant by e-mail.

18. At 13:36 on 10 December Mr Sampson sent an e-mail to legal@uws.ac.uk alone - and not to the e-mail address of Jacqueline Thomson as Ms Cuckow had suggested or to the insurers - attaching a copy of the sealed claim form, the accompanying documents, and the letter from the Administrative Court of 1 December. Ms Cuckow responded at 17:29 that evening, saying:

> "this matter has been passed to our insurers to deal with and Jacqueline Thomson is the internal contact. I will send your recent correspondence on to her but can you please update your records with the correct e-mail address as set out in my e-mail of the 10th so Ms Thomson can ensure things are dealt with promptly."

19. On 12 December Mr Sampson sent an e-mail to the Court office, to which I have already referred, in which he explained why the claim form had not been lodged earlier, enclosing a certificate of service (Form N215) giving the date and time of service as 10 December at 13:28, apologising for the delay in returning the form, explaining he had been away and asking that the delayed filing was accepted by the court. He also contended the claim should be heard in the English courts.

20. On 7 January the Defendant's solicitors wrote to the court, copied to Mr Sampson, contending that the service on 10 December was late and that e-mail service was ineffective because it was not in accordance with the rules. The Claimant's solicitors

responded on 28 January 2022, stating it was not just to strike out the claim owing to what was described as a "technical breach". The Defendant's solicitors subsequently provided fuller details of why they contended service was invalid and the English courts lacked jurisdiction in a letter of 3 February.

Service

21. CPR 54.7 requires that a claim form must be served on the defendant within seven days after the date of issue. It is common ground that this rule requires service of the sealed claim form: see ***Ideal Shopping Direct Ltd v Mastercard Incorporated*** [2022] EWCA Civ 14 per Sir Julian Flaux at §§137-8. Service of an unsealed claim form is not a mere procedural irregularity in the proceedings because, until the claim form is served, there are no extant proceedings: see ***R(Good Law Project) v Secretary of State for Health and Social Care*** [2021] EWHC 1782 (TCC) at §§44-45. In the subsequent appeal, the Court of Appeal emphasised the importance of valid service of the claim form because of its special function in subjecting a defendant to the jurisdiction of the court: see ***R(Good Law Project) v Secretary of State for Health and Social Care*** [2022] 1 WLR 2339 per Carr LJ at §41.

22. It follows that service of the unsealed claim form to the Southwark campus on 30 November was not valid service, as is not in dispute. There are, therefore, two issues: first, whether there was valid service of the sealed claim form by e-mail on 10 December; and, second, whether there should be an extension of time to that date under CPR 3.1(2)(a).

23. It is important to note that there was no application under, and at the hearing it was accepted that the Claimant did not seek to place any reliance on, CPR 6.15, by which the court may order that steps taken to bring the claim form to the attention of a defendant by an alternative method not permitted by the rules amounts to good service. Accordingly, it was not submitted that the steps taken to bring the claim form to the attention of the Defendant, for example by the e-mail on 10 December, should be deemed good service under that rule.

24. Service by e-mail of 10 December? As to first issue, Mr Persey relied exclusively on the e-mail sent by Mr Sampson at 13:36 on 10 December as valid service. He confirmed the Claimant did not rely on any other method or time of service of the sealed claim form.

25. CPR 6.3(1)(d) permits service of the claim form by fax or "other means of electronic communication in accordance with Practice Direction 6A". The difficulty Mr Persey faced is Practice Direction ("PD") 6A itself, paragraphs 4.1 and 4.2 of which provide as follows:

> **"4.1** Subject to the provisions of rule 6.23(5) and (6), where a document is to be served by fax or other electronic means –
> (1) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving –

> (a) that the party to be served or the solicitor is willing to accept service by fax or other electronic means; and
> (b) the fax number, e-mail address or other electronic identification to which it must be sent; and
> (2) the following are to be taken as sufficient written indications for the purposes of paragraph 4.1(1) –
> (a) a fax number set out on the writing paper of the solicitor acting for the party to be served;
> (b) an e-mail address set out on the writing paper of the solicitor acting for the party to be served but only where it is stated that the e-mail address may be used for service; or
> (c) a fax number, e-mail address or electronic identification set out on a statement of case or a response to a claim filed with the court.
> **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).
> **4.3** Where a document is served by electronic means, the party serving the document need not in addition send or deliver a hard copy."

26. The problems for the Claimant are threefold. First, according to PD6A paragraph 4.1(1)(a), before service there must have been a prior indication that the party to be served (or their solicitor) "is willing to accept service by fax or other electronic means". Mr Persey submits that the Defendant provided the necessary consent because, in her e-mail of 15 November, Emma Cuckow said that "The best contact point for you going forward would be my colleague Jacqueline Thomson", whose e-mail address was provided.

27. In my judgment, however, that e-mail fell short of a written indication that *service* could be effected at Ms Thomson's e-mail for the purpose of paragraph 4.1(1)(a) of PD6A. That provision requires a written indication of willingness to *accept service* by electronic means; it requires words which state or at least provide a clear indication that *service* itself can be effected by means of an e-mail address. Reinforcing this view in the context of e-mail service is paragraph 4.1(2)(b), which provides that a solicitor's e-mail address may only be used for service if it is stated explicitly that the e-mail address may be used for that purpose (so that the provision of an e-mail address alone is not sufficient). It is also supported by paragraph 4.2 which requires a prior request to see whether there are any limitations on the "agreement" to accept service by electronic means. These provisions seem to contemplate a specific indication or agreement that an e-mail address can be used for service, and not simply an indication of where future communications should be directed.[1] The general statement in the e-mail of 15 November that future communications should be sent to Ms Thomson was

[1] In this regard, it is notable that in ***Good Law Project*** it appears to have been accepted that service by e-mail sent to Mr Olsen, the individual in the Government Legal Department to whom correspondence was to be sent, was not sufficient service (although in that case the GLD gave another specific address for service).

not, in my view, a sufficient indication that the Defendant was willing to accept service by means of Ms Thomson's e-mail address.

28. The second difficulty is that the e-mail of 10 December, upon which Mr Persey relies, was not in fact sent to Ms Thomson's e-mail address at all; instead, it was sent to legal@uws.ac.uk. Mr Persey seeks to overcome this difficulty by arguing that service was perfected by Ms Cuckow, who informed Mr Sampson in her reply to his e-mail of 10 December that she would - "I will" - send his "most recent correspondence on to [Ms Thomson]". The result, on this submission, was that service was not done by Mr Sampson but was effected or completed by Ms Cuckow.

29. It is not difficult to see how this analysis could cause problems with the time limits in the CPR because whether Ms Cuckow in fact forwarded the e-mail to Ms Thomson, and the time and date on which this took place, was not known Mr Sampson. Nor was I shown evidence confirming that Ms Cuckow did in fact forward the e-mail and the sealed claim form to Ms Thomson on 10 December or subsequently, so that the fact and time of actual service remains unknown, though neither party addressed me on this point. In ***Good Law Project***, Carr LJ stated at §24 that it was for "the claimant, and not the court, to effect service of the claim form", referring to PD54A, and in that case sending a copy of the sealed claim form to the e-mail addresses of three individuals within the Government Legal Department was invalid service because the sealed form was not sent to the specific e-mail address given for service: see Carr LJ at §12(i)(iii) and (x) and §61. I doubt the result would have been different if one of those individuals had happened to forward the e-mail on to the correct address. For all these reasons, I consider that even if Ms Thomson's e-mail address was a valid address for service, there was a failure to serve the sealed claim form by the Claimant at that address for the purpose of PD6A paragraph 4. Service on another e-mail address was not sufficient, despite the subsequent indication that the correspondence would be forwarded.

30. The third problem for the Claimant is paragraph 4.2 of PD6A, and the requirement of a prior request to ascertain whether are any limitations on the other party's agreement to accept service by electronic means. Here, Mr Persey argues by confirming safe receipt of the claim form in her e-mail of 10 December, Ms Cuckow "implicitly" confirmed there were no limitations on the subsequent service which she, it is presumed, subsequently effected on Ms Thomson. I do not accept that argument. Paragraph 4.2 requires an express prior question about any limitations on the acceptance of service, such as the format of documents. All Ms Cuckow did was to say she would pass the e-mail onto Ms Thomson. She was not asked anything in advance about limitations on what would be accepted as e-mail service.

31. It follows, in my judgement, that the sealed claim form was not validly served on 10 December (or on whatever date Mr Sampson's e-mail of 10 December was forwarded on by Ms Cuckow to Ms Thomson). Nor, it follows from the case before me, was it ever validly served: Mr Persey accepted that if the e-mail of 10 December was not valid service, there was no valid service.

32. This is sufficient to decide the case but because I heard argument on the other matters I address them below.

33. Extension of Time? Assuming I am wrong, however, and there was valid service on 10 December - two days later than required under CPR 54.7 - should time be extended to that date under CPR 3.1(2)(a)?

34. The Court of Appeal in ***Good Law Project*** decided that the requirements in CPR 7.6 for a retrospective extension of time to serve a Part 7 or Part 8 claim form apply equally to extensions of time for service of a judicial review claim form: see Carr LJ at §§53, 80.[2] I do not accept Mr Persey's submission that the strict approach taken in ***Good Law Project*** is restricted to public procurement challenges, judicial review claims where proceedings are lodged near to the end of the three-month time limit, or claims where a claimant is not directly affected by a decision. The first issue in the appeal in ***Good Law Project*** was whether principles in 7.6 applied to extensions of time for service of judicial review claim forms and not only those involving public procurement: see §6. The clear and unequivocal answer of Carr LJ at §80, with which Phillips LJ and Underhill LJ agreed, is that the principles in CPR 7.6 govern the discretion to extend time for service of *all* judicial review claim forms because of the universal requirement of promptness in such challenges. Even if this applies with greater force in a procurement challenge, with its tighter deadlines, the judgment is not restricted to such challenges. Carr LJ underlined the same point in §85 of her judgment:

> "As for extensions of time for service of a judicial review claim form, whilst CPR 7.6 does not directly apply, its principles are to be followed on an application to extend under CPR 3.1(2)(a). Thus, unless a claimant has taken all reasonable steps to comply with CPR 54.7 but has been unable to do so, time for service should not be extended".

That is a clear statement of general application to judicial review claims.

35. In support of his submission, Mr Persey also relied on the decision of the Supreme Court in ***Public Prosecutors Office of the Athens Court of Appeal v O'Connor*** [2022] UKSC 4 where it was held that the fault of a legal representative in failing to give notice of leave to appeal against an extradition order in time was not a failure to be attributed to the individual facing extradition. He argued the same should apply here because the decision of the Defendant also had a significant interference with the Claimant's rights. But the statutory provision there, section 26(5) of the Extradition Act 2003 (cited by Lord Stephens at §2), operated in a very different context, and fell to be interpreted in accordance with its particular wording, purpose and legislative history. That statutory context led the Supreme Court to depart from the surrogacy principle, by which the fault of a legal representative is attributed to the client: Lord Stephens at §§48-52. I do not consider it assists on the correct approach to CPR 7.6 or

[2] Carr LJ referred to the requirements of CPR 7.6(2), concerned with prospective extensions of time, but she presumably meant CPR 7.6(3).

CPR 3.1(2)(a). In *Good Law Project*, Carr LJ rejected an argument that Good Law Project was not fixed with the acts and omissions of its solicitors, albeit in the context of addressing the submission based on CPR 6.15: see §61. That assumption, I consider, equally informed her conclusion that Good Law Project had not taken all reasonable steps to comply with CPR 54.7 for the purpose of an extension of time under CPR 3.1(2)(a): see Carr LJ at §80. I was not taken to any authority which suggested that the surrogacy principle does not apply to CPR 7.6.

36. It follows that the principles in CPR 7.6 apply here by analogy. They require that the claimant (i) has taken all reasonable steps to comply with service within the relevant time period but has been unable to do so (7.6(3)(b)) and (ii) has acted promptly in making the application (7.6(3)(c)).

37. For the Claimant, Mr Persey relies on three factors to show that the Claimant took all reasonable efforts to effect service on time but was unable to do so: difficulties of solicitors operating during the pandemic; Mr Sampson was out of the country in Dubai; and the letter from the court did not arrive until 6 December, close to the expiry of the time for service.

38. The principles in relation to extensions of time under CPR 7.6, which apply by analogy to judicial review claims, are summarised by Nicklin J in ***Piepenbrock v Associated Newspapers Limited and others*** [2020] EWHC 1708 (QB) at §§41-42, to which Ms Thelen referred me. They require a court to consider what steps were taken to serve the claim form during the period of its validity and require a full explanation as to why the claim form was not served in time.

39. I consider the matters raised by Mr Persey are insufficient to demonstrate that Mr Sampson took "all reasonable steps" to serve the sealed claim form within the seven-day period in CPR 54.7. The reference to difficulties in operating during the pandemic does not show what steps were taken to serve the claim form and there is no full explanation why they prevented timely service. While Mr Sampson was away in Dubai between 30 November and 10 December, the failure to put in place arrangements for dealing with urgent correspondence meant that no steps were taken to serve the form in that time. Even accepting that the letter from the court did not arrive until 6 December, had such arrangements been in place that still left time to ask the Defendant if it would accept service electronically or to serve the sealed claim form personally. There is, in fact, no real explanation of any steps taken to serve the claim form during its period of validity, between 1 December and the date for service (8 December). As Ms Thelen pointed out by reference to Mr Sampson's e-mail of 12 December, it seems he simply assumed that he had complied with the rules for service before he left for Dubai.

40. This means there can be no assessment of whether the steps taken by Mr Sampson were objectively reasonable because no such steps were taken. But, so far as relevant, I consider it cannot have been objectively reasonable to assume the rules on service had been met, not to be familiar with the rules on service and not to have arrangements in place to deal with urgent correspondence while Mr Sampson was in Dubai. The Claimant has therefore failed to show that all reasonable steps were taken to serve the

claim form in the period of its validity.

41. In addition, I consider that the Claimant's solicitors did not act "promptly" in making the application to extend time for the purpose of the applicable requirement in CPR 7.6(3)(c). The Defendant's solicitors drew attention to the unauthorised and/or late service of the claim form in their letter of 7 January 2022. They explained the problems in greater detail in a letter to the court and Mr Sampson dated 3 February, referring to ***Good Law Project*** and CPR 7.6(3) and pointing out that the Claimant had failed to make any application to extend time for service of the claim form. Yet no application to extend time was made until an application notice dated 11 May 2022 was presented to the court, and there is no explanation for the delay in making that application.

42. It follows that the application to extend time under CPR 3.1(2)(a) also fails.

43. I appreciate this result will no doubt appear harsh to the Claimant in circumstance where the late service of the claim form was no fault of hers. As Mr Persey pointed out, a claim in negligence against her solicitors is of no use to her. But I consider the result follows from the Court of Appeal deciding in ***Good Law Project*** that the appropriate rules to be applied to extensions of time for serving judicial review claim forms are those in CPR 7.6 and not, as O'Farrell J had decided at first instance, the more generous guidelines set out in ***Denton v TH White*** [2014] 1 WLR 3926 (which, following ***R (Hysaj) v Secretary of State for the Home Department*** [2015] 1 WLR 2472, ordinarily govern applications for extension of time under CPR 3.1(2)(a)). The apparent harshness of this approach is justified by the need for strict adherence to the rules on service and limitation; it may be mitigated, in other cases, by means of an application under CPR 6.15.

Jurisdiction: English or Scottish Courts?

44. This is the second issue for me to decide. In light of my conclusions on the service of the claim form, it is no longer strictly relevant because there are no extant proceedings in England. But the matter was argued before me, although briefly, and so I set out my conclusions on it.

45. At the outset, there are two preliminary matters to clear up:

    (1) Neither party submitted that the question was to be decided by reference to the Civil Jurisdiction and Justice Act 1992. This is presumably on the basis, as set out in Mr Persey's skeleton, that the dispute was in the sphere of administrative law and so fell outside that Act: see ***R (Girgis) v Joint Committee on Intercollegiate Examinations*** [2021] EWHC 2256 (Admin) at §§37-45.

    (2) Mr Persey lightly raised an argument that the Defendant could not challenge territorial jurisdiction because, where a defendant wishes to challenge the court's jurisdiction, under CPR 11 it "must first file an acknowledgement of service in accordance with Part 10". I consider he was right not to press the point. It is clear from the express wording of the order of Jay J that this issue

> was raised by the court of its own motion. The requirements of CPR 11 do not apply in circumstances where the court is acting of its own initiative under its general powers of case management, according to the Court of Appeal in ***Cook v Virgin Media*** [2015] EWCA Civ 1287at §§34-40. There is also an argument that unless and until an extension of time for service is granted, there were no extant proceedings in response to which an acknowledgement of service could be filed.

46. As it transpired, there were two legal issues to determine. The first was whether the exclusive jurisdiction clause in the terms and conditions which governed the Claimant's enrolment with the Defendant had the effect that proceedings in England should be stayed. The second was whether the English courts were the inappropriate forum (usually referred to as *forum non conveniens*).

47. As to the first issue, on the exclusive jurisdiction clause, the terms to which the Claimant agreed when she enrolled were those for the academic year 2017/18. The relevant clause is set out in §7 above. It gave the Scottish courts "exclusive jurisdiction to deal with any proceedings". Although no doubt the clause was principally intended to govern contractual disputes, the wording appears wide enough to apply to judicial review proceedings and no point was taken by the Claimant that such proceedings fell outside the scope of the clause.

48. Ms Thelen submitted that the court should give effect to the exclusive jurisdiction clause following the judgment of the House of Lords in the leading authority, ***Donohue v Armco Inc and others*** [2001] UKHL 64. The principle was expressed in this way by Lord Bingham at §24:

> ".. If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word "ordinarily" to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case. In the course of his judgment in *The Eleftheria [1970] P 94*, 99–100, Brandon J helpfully listed some of the matters which might properly be regarded by the court when exercising its discretion, and his judgment has been repeatedly cited and applied. Brandon J did

> not intend his list to be comprehensive, but mentioned a number of matters, including the law governing the contract, which may in some cases be material. (I am mindful that the principles governing the grant of injunctions and stays are not the same: see *Aérospatiale* at p 896. Considerations of comity arise in the one case but not in the other. These differences need not, however, be explored in this case)."

49. Mr Persey submitted that the clause was irrelevant because it was akin to an impermissible ouster clause in a contract, which cannot remove the judicial review jurisdiction of the court: see ***Mauritius v CT Power Ltd*** [2019] UKPC 27 at §44. I am not sure that this judgment is the appropriate place to resolve such a question, on which I only heard brief submissions and which involves navigating some uncharted, deep and murky legal waters. In my view, however, there is a difference between a clause which purports to oust judicial review altogether, as did the clause in ***Mauritius***, and one which seeks to allocate jurisdiction to particular courts, at least where there is no suggestion that the clause is a device to frustrate a legal remedy or proper legal scrutiny. The public interest concerns which underpin the judgments on ouster clauses are then less prominent. Moreover, to the extent a clause is used as a deliberate device to avoid judicial review or similar rules of procedural or substantive fairness, the courts can exercise the discretion in ***Donohue*** to depart from the ordinary rule. For these reasons, it is my view that the principle in ***Donohue*** is applicable here and is not barred by analogy with the cases on ouster clauses.

50. However, that is not the end of the issue. For even though I agree with the Defendant that the principle in ***Donohue*** is engaged, still it needs to be considered if the Claimant can show strong reasons sufficient to displace the apparent effect of the clause in giving jurisdiction to the Scottish courts, which depends on all the facts and circumstances of the case: see Lord Bingham at §24. I return to this issue below, because it involves a consideration of the factual circumstances of the claim, which are also relevant to the *forum non conveniens* argument.

51. As to the second issue, on *forum non conveniens*, the parties were in agreement that the principles which apply are those set out in ***Spiliada Maritime Corporation v Canulex*** [1987] 1 AC 460 per Lord Goff at 476–8. I can take the convenient summary of the principles in ***Girgis*** at §71 (internal citation marks in original):

> "First, in general the legal burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay, although the evidential burden will rest on a party who seeks to establish the existence of matters which will assist him in persuading the court to exercise its discretion in his favour." "Secondly, if the court is satisfied by the defendant that there is another available forum which is clearly a more appropriate forum for the trial of the action, the burden will shift to the claimant to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in England."

> ”Thirdly, the burden on the defendant is not just to show that England is not the natural or appropriate forum, but to establish that there is another forum which is clearly or distinctly more appropriate than the English forum; accordingly, where (as in some commercial disputes) there is no particular forum which can be described as the natural forum, there will be no reason to grant a stay.” “Fourthly, the court will look to see what factors there are which point in the direction of another forum as being the ‘’natural forum’’, i.e. that with which the action has the most real and substantial connection. These will include factors affecting convenience or expense (such as availability of witnesses) and such other factors as the law governing the transaction and the places where the parties reside or carry on business, and also whether the claim is part of a larger overall dispute which would be damaged by being fragmented.”
>
> ”Fifthly, if the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, the court will ordinarily refuse a stay.”
>
> ”Sixthly, if, however, the court concludes that there is some other available forum which prima facie is clearly more appropriate, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should not be granted. In that enquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions.”
>
> ”Seventhly, a stay will not be refused simply because the claimant will thereby be deprived of ‘’a legitimate personal or juridical advantage’’, provided that the court is satisfied that substantial justice will be done in the available appropriate forum.”

52. In applying those principles, Ms Thelen drew attention to the facts that the Defendant is a charity registered in Scotland, the offer to the Claimant was made from Scotland, she signed an exclusive jurisdiction clause, the decision she challenged was taken by members of the Senate Appeals Committee based in Scotland and the Claimant had and has a potential complaint to the Scottish Public Service Ombudsman, only put on hold because of legal proceedings. Mr Persey submitted that the Court of Session is not clearly the most appropriate forum. He pointed out that the Claimant was based in England and studied at the England campus; it may now be too late to issue proceedings in Scotland; and the Claimant can only access the court by using the pro bono assistance of her solicitor, who is not qualified in Scotland.

53. I have found ***Girgis*** to be of assistance in resolving this question, which involved a not dissimilar factual background. There, in applying the ***Spiliada*** factors, HHJ Simon held that the English courts had jurisdiction to hear a claim challenging a decision of the Joint Committee on Intercollegiate Examinations, a body based in Scotland. While the marking of exams and the appeal took place in Scotland, he placed weight on the

effect on the claimant, who lived and worked in England. He also noted that the defendant there operated outside Scotland and would have refused a stay because it was far from certain the Court of Session would allow a claim to be brought out of time.

54. Conclusion (1): *Forum non conveniens*. I consider an application of the ***Spiliada*** factors produces, or would produce, the same result here as in ***Girgis***. I accept, of course, that the Defendant is a registered Scottish charity and its main campus is in Paisley. But it also has a campus in London, at 235 Southwark Bridge Road, and that campus was given as the principal place of study on "Confirmation of Acceptance for Studies Details" form completed on behalf of the Claimant. In fact the Claimant resided (and still resides) in England and all her classes and tutorials took place, I understand, at the English campus, where her tutors were also based.

55. It is not suggested that there will be any difficulties in the Defendant's witness statements being prepared from Scotland and their attendance is rarely required in a judicial review in any event. While the exclusive jurisdiction clause is a relevant factor to consider in the ***Spiliada*** exercise, I do not consider it has sufficient weight for the Defendant to meet the burden of showing that the Scottish courts are the natural forum in accordance with the ***Spiliada*** principles, particularly in a judicial review claim which does not turn on the interpretation of a contract.

56. If necessary, and even if I am wrong in my assessment that the Scottish courts were not the appropriate forum, I would have refused a stay for the reasons of practical justice to which Lord Goff referred at 483G-484A in ***Spiliada***, on the basis that the Claimant acted reasonably in commencing proceedings in England, did not act unreasonably in failing to commence proceedings in Scotland and would now (it seems) be outside the primary limitation period for bringing proceedings in Scotland (see ***Girgis*** at §79).

57. Conclusion (2): the exclusive jurisdiction clause. However, the Defendant has an alternative argument based on the exclusive jurisdiction clause and the application of the principle in ***Donohue***, which I have already said I consider is engaged. There was no such clause in ***Girgis***. Here, in a reversal of the position under the ***Spiliada*** principles governing forum non conveniens, the burden is on the Claimant to show "strong reasons" why there should be a departure from suing in the Scottish courts in accordance with the exclusive jurisdiction clause. This depends on all the facts and circumstances: see Lord Bingham in ***Donohue*** at §24, referring to the judgment of Brandon J in ***The Eleftheria*** [1970] P 94 at 100.

58. Similar factors are relevant as apply to the ***Spiliada*** exercise. I have taken account of the following. First, there is little difficulty in providing evidence of fact in either the Scottish or English courts, given that this is a judicial review challenge. Second, the Claimant is most closely connected with England, whereas the Defendant is most closely connected with Scotland. Third, there is no suggestion of any distinction between the courts in terms of fairness, meaning that I do not consider the clause was some sort of device to exclude proper scrutiny of the fairness of the Defendant's

actions in the courts. These factors are, I consider, neutral in their effect.

59. But there are at least two factors counting in favour of a hearing in England. First, the English courts will no doubt be more convenient to the Claimant because, as she explains in her witness statement, she does not know any Scottish lawyers and will have to travel to Scotland. While there was a suggestion that these may be the only courts in which she can bring a claim because she has a solicitor, Mr Sampson, acting pro bono, she does not say that in her witness statement and, in relation to this hearing, Mr Sampson has submitted costs. I therefore consider this factor is based on the inconvenience of litigating in Scotland rather than the inability to litigate there. Second, if the Claimant now brings a claim in Scotland she will, it seems, face a potential time bar (though as a result of my decision she also faces an insurmountable one in England). But that arose from her decision to bring proceedings in England alone in the first place despite the exclusive jurisdiction clause, so that I do not consider it should bear much weight. On balance, and with hesitation, I do not consider the Claimant has met the burden of showing sufficiently strong reasons to displace giving effect to the exclusive jurisdiction clause and respecting the agreement made between the parties.

Conclusion

60. For the reasons set out above my conclusions are:

    (1) There was no effective service of the sealed judicial review claim form on 10 December (or subsequently) for the purpose of CPR 54.7 and/or CPR 6.3.

    (2) In any event, the application to extend time for service of the claim form to 10 December under CPR 3.1(2)(a) is refused.

    (3) The Scottish courts, and not the English courts, have jurisdiction to hear the claim by virtue of the exclusive jurisdiction clause contained in the terms and conditions of the Claimant's enrolment with the Defendant.

61. As a result of my conclusions on (1) and (2) above, it follows that the claim for judicial review is dismissed. I anticipate there is no need of any stay of any English proceedings.