

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Case No: QB-2022-001333

NCN [2023] EWHC 1954 (KB)
Courtroom No. E110

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday, 1st February 2023

Before:
MASTER DAGNALL

B E T W E E N:

FIT KITCHEN LIMITED & AMAR LODHIA

and

RELX GROUP UK PLC & RELX

The Claimant did not appear
MS F MCMAHON appeared on behalf of the Defendant

APPROVED JUDGMENT

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MASTER DAGNALL:

Introduction

1. There is before me an application notice of the defendants dated 28 July 2022 for an order:
“Under CPR 11.1 a declaration that the claim form was not served within its period of validity i.e. within four months of issue, (CPR 7.5). Therefore the Court has no jurisdiction to hear the claim and the claim form should be set aside.” [and also seeking costs]
2. Thus, the defendants assert that the service provisions of the Civil Procedure Rules have not been complied with and the Court should therefore (under CPR11) decline jurisdiction and refuse to hear this claim and in consequence strike it out. This judgment concerns, in particular, questions as to what are the rules regarding time-periods for service of CPR Part 8 Claim Forms and as to waiver of the fact of non-service within time by way of statutory or common-law submission to the Court’s jurisdiction.
3. The defendants are identified in the claim form as Relx Group UK Plc and RELX Group UK Limited. I am informed by Ms McMahon of counsel who appear for the defendants, and as expressed in the witness statement of Ms Kelly Savage in support of the application that the defendants have been incorrectly named and that their correct names are Relx Group Plc and Relx UK Limited, respectively. It seems to me that this is a simple situation of misnomer, where it was always perfectly clear objectively as to who was intended to be sued by the claimants, and that accordingly the two names of the defendants should be corrected. My eventual order consequential upon this judgment will so provide.
4. The claimants are a company, Fit Kitchen Limited, which has recently, on 19 December 2022, been made the subject matter of a compulsory winding up order, and an individual, Amar Lodhia. Neither of the claimants have appeared before me at this hearing, although shortly before the hearing there was provided to a Court and to the defendants a document entitled, “Claimants submissions in response to the application to strike out and request for a stay”. I will return to that document in due course, although it was provided to the Court and to the defendants only very shortly before the hearing, and contrary to directions which I had made for skeleton arguments to be filed and served in relation to this hearing not less than three days before it.
5. I have also been provided with an email from the Official Receiver who presently has the conduct of the liquidation, there having been no other liquidators, of the first claimant appointed. That email of 30 January 2023 and the surrounding email correspondence made clear that the Official Receiver did not intend to attend or take any part in this hearing.
6. The hearing has in fact taken place over two days. I heard argument from Ms McMahon on the first day in relation to numerous points. However in the light of a particular paragraph within the claimants’ submission documents and also a matter raised with the Court which potentially relates to the point advanced by the claimants, I provided to Ms McMahon a relevant authority, and referred to a recent substantial unreported oral judgment of mine in the area. It seemed to me to be only fair to give her an opportunity, of which she would wish to take advantage, to consider the defendants’ position and her submissions over what was effectively a short adjournment from yesterday to today. She in fact took advantage of that opportunity by preparing a written note and making extensive further oral submissions, and which have been of value to me in coming to my eventual decision.
7. The claim itself is a claim for defamation and libel. There had, prior to the issue of the claim form which is before me, been County Court proceedings which had been terminated

upon a discontinuance by the claimant. I note that the Civil Procedure Rules require claims in defamation to be brought in the High Court under Part 53, as is also required by section 15(2)(c) of the County Courts Act 1984, unless there is agreement between the parties that the County Court should have jurisdiction, which was not the case in relation to this matter.

8. The defamation claim is very heavily contested by the defendants who would in fact say that it has no real prospect of success. However those contentions and matters are not for me to deal with today. I do note, since it is just part of the overall context of the matter, that under section 4A of the Limitation Act 1980, any claim for defamation must be brought within one year of the accrual of the cause of action, normally the occurrence of the relevant publication or the first occurrence of the relevant publications, albeit that the Court has a discretion to extend that time, where it is equitable to do so, under section 32A of the Limitation Act.

The Procedural History

9. In any event, a claim form was issued in the High Court of Justice, but within the Business and Property Courts, and thus within the Chancery Division, on 3 February 2022. The claim form which was used was a claim form under and in accordance with Part 8 of the Civil Procedure Rules. I bear in mind that under Civil Procedure Rule 8.12, a claimant may and may only use the Part 8 procedure where the claimant seeks the Court's decision on a question which is unlikely to involve a substantial dispute of fact, or where certain rules or practice directions, none of which are not in point here, apply.
10. At first sight, the Part 8 procedure is not appropriate for defamation claims which are likely in various ways and means to involve substantial issues and questions of fact, and, indeed, paragraph 4 of Practice Direction 53B assumes that there will be particulars of claim and thus the use of the Part 7 procedure.
11. However, the Part 8 claim form was used, and the claim was issued on 3 February 2022. If, which is a matter to which I will return, Civil Procedure Rule 7.5 applied to the claim form, then under CPR 7.5(1) A relevant step for service had to be taken before 12.00 midnight "on the calendar day four months after the date of issue of the claim form", that being 3 June 2022. There is no evidence before me that any such step was taken within that time period.
12. As I have said, the claim form was issued within the Chancery Division in the Business and Property Courts. Defamation claims fall within Part 53 of the Civil Procedure Rules and CPR53.2(3) and 53.4 provide that such claims must be issued within the Media & Communications List within the King's Bench Division. However, following issue of the Claim in the Chancery Division, Chancery Master Pester, acting on his own initiative, made an order transferring the claim to the then Queen's Bench Division.
13. A number of different claims had been issued or transferred to this division by Mr Lodhia, and companies and entities associated with him. In view of the number of different claims and their potential for raising overlapping issues and matters, and with the support of the Senior Master, I came to the conclusion that in order to assist the transaction of business within this division, and in order to help achieve the overriding objective, it would be sensible for the Court to consider all the matters together on an initial case management basis. That would enable me to consider such matters as to whether it would be useful to link various matters together or to have various matters or applications within them determined at the same time, or in a particular order.
14. As a result of that consideration, I made an order of my own initiative of 13 June 2022, and by which I provided, by its paragraph one, that the claimant should serve all the claim forms with particulars of claim which had not been served and in relation to which the claimants

wished to proceed upon the relevant defendants by 4.30pm on 8 July 2022. Additionally I provided that the claimants should serve a copy of the order on each and all of the defendants by 15 July 2022, and with there then to be listed a case management conference for a date which was there stated to be 30 September 2022, but was ultimately to be 13 October 2022. I further provided that the parties might agree extensions of time for service of defences, but that, in the absence of agreement, any necessary applications for extension of time should be made by application notice giving reasons. I further included the usual provision for any party being able to apply to set aside or vary the order within seven days of service of it upon them. The order misidentified me as Senior Master but that does not seem to me to have affected its validity in any way.

15. No argument has been raised by the claimants that in some way or other paragraph one of my order of 13 June 2022, operated as an extension of time for taking a step for service under Civil Procedure Rule 7.5. If it had been then my provisional consideration is that such an argument would have failed since what the order was plainly seeking to do was to provide a cap and truncation of any period of time which might exist for a step to be taken, rather than in some way or other extending a period of time for such to occur. Further, if CPR 7.5 is applicable to this case, the time provided by it in this case would have already expired on 3 June 2022 i.e. before the order was made on 13 June 2022, and I do not see that the order could or should be read to extend any time-limit which had already expired.
16. The claimants were then instructing direct access counsel, Mr Joseph Chiffers. On 5 July 2022, his clerk or assistant Tracey McGuiver sent an email to Ms Savage of the defendants' solicitors which attached the claim form and a document called "particulars of claim", together with an annexe to the particulars of claim. The email read:

"Dear sirs, while we understand that the proceedings have previously been filed and served by our client, for completeness and in accordance with Master Dagnall's order", that being a reference to my order of 13 June 2022, "We enclose by way of service, the following: Claim form, particulars of claim, annex to the particulars of claim, order dated 13 June 2022. Please acknowledge receipt".
17. It appears that Ms McGuiver knew that the defendants' solicitors, Flint Bishop, acted for the defendants as a result of the previous County Court litigation and other dealings. In fact Ms Savage, had at the end of June, on or about 29 June, as a result of concerns that there might be further proceedings, carried out a search of the court file and learnt that the claim form had been issued. Additionally, in consequence of that, Flint Bishop had filed a notice of acting with the court at the end of June.
18. I note, though, firstly that as far as the email from Ms McGuiver serving particulars of claim was concerned, the claim form being a Part 8 claim form, and I will return to the rules in due course, what should have been served in support of the claim was witness evidence rather than particulars of claim which belong to the ordinary Part 7 procedure.
19. Secondly, as Ms Savage was to point out, in the absence of any statement within Civil Procedure Rule practice direction 6A to the effect that the defendants' solicitors were authorised to accept service of these proceedings, service by the taking of a step to serve by email to those solicitors was not a permitted step within the provisions of Civil Procedure Rule 7.5 insofar as such was applicable.
20. The email from Ms McGuiver was timed at 13.15pm. Ms Savage responded by email timed at 14.13pm to state, amongst other things, the following. In the first paragraph she stated, "We are instructed that no documents have previously been served on our client".
21. She then referred to the previous search that she had carried out of the Court's CE file, and

also suggested that my order implied that I had not thought that service had taken place. She then made an assertion which might or might not be right, and with which I am not concerned, that service would have to have taken place upon her firm. She then referred to the fact that no agreement had been made by her firm that rendered electronic service permissible, but went on to say, "I am willing to agree that your email constitutes effective service, with a date of service as 7 July 2022 (pursuant to CPR 6.14)".

22. The reference to this particular rule was due to the fact that it provides that where a step for service has taken place in accordance with CPR 7.5, service is deemed to have been effected on the second business day after the taking place of the service step. Therefore, on the assumption that a proper service step had taken place on 5 July 2022, the deemed date of service which triggers timings for other provisions of the rules would be 7 July 2022.
23. She then went on to say, "We will file an acknowledgment of service shortly which will extend the time for the defence to 4 August 2022". She then sought various other matters which are not material for these purposes.
24. Ms Savage then sought to submit an acknowledgment of service to the Court. It stated an intention to defend the claim, but did not have a tick next to the box on the standard acknowledgement of service form which states that there was some intention to contest jurisdiction. That acknowledgment of service document was rejected by the Court, and the court staff did not permit it to be filed on the basis of what was then and continuing confusion regarding whether the appropriate acknowledgement of service forms in this particular case were a Part 7 form or the Part 8 form.
25. Ms Savage send a chaser with regard to various matters on 8 July 2022. Having received no responses, Ms Savage then sent a further email to Ms McGuiver on 12 July 2022 timed at 15.16pm.
26. She stated in that to Ms McGuiver, firstly, "Further to my email below which was referenced to the previous emails, we do not appear to have received a response from you?" She then went on to ask for confirmation as to instructions and ability to accept service via mail, and then went on to say:

"In addition you have mentioned it is your understanding that your client has served proceedings previously. Please can you elaborate as to when proceedings were allegedly served and by what method, including evidence? You will no doubt be aware of the court rules regarding service of the claim form and the time allowed to do so.

We have seen no evidence from you to suggest that the claim form was validly served within the permitted timescale. For the avoidance of doubt, we do not believe the order of Master Dagnall intended to extend time for service of the claim form. I look forward to hearing from you as a matter of urgency".
27. Ms McGuiver responded at 21.41pm that day, 12 July 2022, stating that she was willing to accept service by email but would revert shortly regarding the remainder of the email.
28. In view of the Court having rejected the first attempt to file an acknowledgement of service, the defendants' solicitors on 14 July 2022 submitted further acknowledgements of service in both Part 7 and Part 8 forms. Although the acknowledgements of service were filed on that date, the Court only eventually accepted them on CE file on 27 July 2022. Both acknowledgements of service ticked the box of intention to defend the proceedings but did not tick the box of stating intention to context jurisdiction.
29. On 15 July 2022 at 17.43, Ms Savage sent a further email to Ms McGuiver which attached various material relating to other proceedings, being the County Court proceedings, but

which started with the sentence of, "Thank you for your confirmation. Please can I have a response on the remaining issues addressed within my emails". That, it seems to me, was clearly a reference which included a request for a response with regards to Ms Savage's earlier contentions about service and it not having taken place within time.

30. Again no response was received and on 19 July 2022, Ms Savage sent a further email timed at 11.12am. The first paragraph said, "Further to my previous emails I have not yet received a response. Please can you provide a response to my earlier requests?"

31. She then went on to refer to the question of the appropriate claim form in a paragraph which read as follows:

"In addition, the claim form was a Part 8 claim form. Please can you confirm that a Part 8 claim form was issued in error as the claim form has been supplemented by particulars of claim and not witness evidence as per the Part 8 procedure. Whilst it appears as if Part 7 proceedings were contemplated, it was argued that Part 8 proceedings not suitable for this claim in any event and that proceedings should follow the usual Part 7 procedure. Please confirm your understanding"

32. She then referred to a direction contained in my order of 13 June 2022 regarding the completion of a Master's appointment form.

33. No response being received, Ms Savage wrote a further email on 20 July 2022 timed at 14.06pm. It read:

"I still do not appear to have received any response from you. A response is now urgently required. You have failed to respond to key issues relating to procedural aspects to which we have deadlines to comply with. Accordingly if you do not respond to our queries raised in respect of the use of the Part 8 procedure, we will assume that your position is that the Part 8 claim form was not issued in error and make an application contesting the use of a Part 8 procedure accordingly. Alternatively, if you agree the claim should have been issued using the Part 7 procedure as clearly contemplated by the filing and service of particulars of claim, the parties can simply agree a consent order setting this out and negating the need for a formal application. Therefore I regard your urgent response within **30 minutes** otherwise I will have no other alternative than to draft and lodge an application contesting the use of a Part 8 procedure in addition to your client's failure to adhere to the Part 8 procedure and seek our client's costs of the application".

34. She then referred to various further difficulties in contacting the claimants.

35. The defendants, receiving no response that day, then created and filed with the Court an application notice dated 21 July 2022. That in its section three set out the order which was sought with reasons as follows:

"In order for the claim to proceed under Part 7 and/or further directions to the Court and/or for an extension of time for the defendant's evidence in response as the claim is unsuitable to progress under the standard Part 8 procedure in its current form".

36. Various information was set out in support of the order sought in part 10 of the application notice. That referred to the facts: that a Part 8 claim form had been issued but with

particulars of claim; and that paragraph 7.2 of the then Civil Procedure Rule Practice Direction to CPR Part 8 stated that evidence would normally be in the form of a witness statement or affidavit. It then made a number of contentions to the effect that the claim was not suitable for the Part 8 procedure including that: the claim was based on defamation which would involve a requirement to deal with a substantial dispute of facts between the parties; the rules did not refer in any way to Part 8 procedure being used for defamation claims; and Practice Direction 53B envisaged statements of case which is not the way by which Part 8 proceeds. It also stated that the claimants themselves had decided to serve particulars of claim.

37. The section then went on to say, "If the Court is not minded to agree that the claim is not suited for Part 8 proceedings, the defendants seek an extension to time to file evidence in response". The defendants also went on to seek an order for costs and said that the claimants had failed to provide any detail as to how they envisaged the matter being dealt with in the future.
38. There is no reference in the application notice to any intention to contest jurisdiction.
39. As well as providing that application notice to the Court, and it seems to me in view of the fact that the Court had not yet formally processed the acknowledgments of service which have been filed earlier in July, the defendant's solicitors sent at the same time further acknowledgments of service, again ticking the box stating an intention to defend, but not ticking the box stating any intention to contest jurisdiction to the court using the Court's electronic CE filing system.
40. Ms Savage then at 15.54pm on 21 July sent a further email to Ms McGuiver enclosing – attaching various acknowledgments of service and also the draft application notice together with a draft order and exhibit of the various emails and a statement of costs. The email stated:

"Please see the attached lodged at Court this afternoon. Sealed copy of the application notice will be served once received".
41. Ms McGuiver then responded stating that Mr Chiffers had sought to send an email which had bounced back, and enquiring whether or not the defendants "Would be agreeable to dealing with this on a consent basis with costs reserved?"
42. Ms Savage then responded by email timed at 22.10pm on 21 July 2022, thanking Ms McGuiver for her email and stating, "I am glad that your clients are amenable to a consent order to proceed under Part 7, however I am confused by the suggestion that costs should be reserved". She then went on to contend that there should be an order by consent or otherwise that the costs of the application should be paid by the claimants.
43. On 26 July 2022 at 8.50am, Ms Savage sent an email chasing for a response to the question of Master's appointment form.
44. On 27 July at 14.59pm, Ms McGuiver responded on the Master's appointment form aspect.
45. On 28 July 2022, the defendants filed the application notice which is presently before me. That application notice under its own terms, as I have already read, was an application under CPR Part 11 disputing the Court's jurisdiction to hear the claim. In section 10, it dealt in detail with why it was said that no relevant step for service of the claim form had taken place within time, and that therefore the Court should decline jurisdiction.
46. On 29 July 2022 at 16.12pm, at a point where the application notice had been filed but had not been sealed, Ms Savage sent to Ms McGuiver both a sealed copy of the application notice of 21 July 2022 and an unsealed copy of the application notice of 28 July 2022.
47. In due course the combined case management conference of this and other matters took place on 13 October 2022. At that hearing it was accepted by Mr Chiffers who appeared for

the claimants at it, that the claimants themselves had not taken any steps to serve the claim form prior to 5 July 2022, but he intimated at that point that the claimants' case was simply that Civil Procedure Rule 7.5 and its four month time limit for taking a step for service did not apply to a claim form which had been using the Part 8 procedure.

48. Notwithstanding that in the meantime the defendant had made other applications including to strike out or for a reverse summary judgment, it seemed to me to be appropriate to deal with the question of service and whether the Court does not have or should decline jurisdiction over the claim first, and I made directions providing for this hearing to take place limited to that issue. Those directions included provisions for the claimants to be able to serve any evidence in response to that of Ms Savage, which was effectively what was contained in the application notice of 28 July although reinforced by a separate witness statement containing the same information. I also provided for skeleton arguments to be filed and exchanged no later than three days before the hearing and for there to be an agreed authorities bundle no later than two days before the hearing.
49. The defendants complied with all those provisions. The claimants did not file or serve any evidence and have not sought to do so. Additionally, as I have already said, their document entitled "claimants' submissions" was filed and exchanged only a very short time before the hearing and not in accordance with my direction it should be filed and exchanged no later than three days before it.

The Defendants' Procedural Case

50. The defendants' position is simply that under Civil Procedure Rule 7.5 a relevant step for service had to be taken within four months from the issue of the claim form, and that that did not occur. In those circumstances, they submit that under Civil Procedure Rule Part 11, the Court should decline jurisdiction.
51. The position of the claimants as set out in their submissions, is in summary to first state that the Court should simply stay the proceedings at this point for reasons to which I will come. Secondly, they submit that Civil Procedure Rule 7.5 has no application to a claim form issued using the Part 8 procedure. Thirdly, they submit that if it does, the Court should nonetheless validate service under one of two or possibly three alternative routes.
52. Fourthly, they state in paragraph 18 of the note, "The Court should also consider whether the defendants are debarred from challenging service of the claim form by their conduct". That contention was framed in very vague terms, but it seems to me to be effectively an attempt to raise, but without any detail whatsoever, an assertion that in some way or another the defendants have, either under statute or common law, waived any failure on the part of the claimants, so that they, the defendants, would not be able to contest the Court having and exercising jurisdiction.

Whether the Hearing should proceed

53. I have considered the claimants' submissions document fully. I have also considered Ms McMahon's initial skeleton argument, her oral submissions made to me on the first day of the hearing, and her subsequent note and subsequent oral submissions. Following the first morning, and when directing this second part of the hearing, I directed that the defendants' solicitors should inform Mr Chiffers (at least) that this second morning's hearing was taking place so as to give the claimants a further opportunity to attend. I am told by Ms McMahon that this occurred and that a response was received indicating that there was to be no attendance, and no attendance has occurred.
54. I am satisfied in all the circumstances that the claimants both knew perfectly well both about yesterday's hearing and today's hearing, and have decided not to attend. The reasons

which the claimants give for this, and which they advance in support of the application for a stay is as follows: Firstly, it is said in the document that the first claimant is currently subject to a winding up order, being a compulsory winding up order which was made on 19 December 2022, the existence of which is common ground and where I have seen the notice of advertisement of it.

55. What is stated in the claimants' submissions document is that the official receiver has given no instructions to Mr Chiffers with regard to this particular hearing, but that the winding up order itself is being appealed. It is stated that, in those circumstances, the first claimant is effectively being disadvantaged as far as this litigation is concerned should the litigation be continued to be progressed while an appeal is being brought. The appeal, if it succeeds, would result in the undoing of the winding up order and the cessation of the official receiver's appointment, and the first claimant would then, but only then, be able to take steps to contest the litigation.
56. Ms McMahon has drawn my attention to section 130(2) of the Insolvency Act 1986 which provides for effectively a stay of proceedings (subject to the discretion of the court to grant permission to continue) which are brought against a company which is the subject matter of a compulsory liquidation but makes no specific reference to the situation of any proceedings being brought by the company.
57. The claimants' submissions document also refers to the second claimant. It states that the second claimant is facing bankruptcy proceedings which arise from the same asserted debt which is in some way or the other the subject matter of the winding up order in relation to the first claimant. It then simply goes on to say that if the bankruptcy proceedings are successful, the second claimant would in all likelihood be forced to abandon these proceedings.
58. Although there might be an inference, but no more than an inference, that the second claimant's financial position is such that he is unable to instruct Mr Chiffers further, there is no explanation given as to why the second claimant has not attended this hearing in person except to say:

"To save costs, the second claimant has instructed his representatives to prepare these written submissions rather than attendance at the hearing in light of the circumstances detailed herein".
59. The submissions then go on to say that granting a stay would be a proportionate use of the Court's case management powers and correct in the context of the overriding objective as it would then allow the matter to proceed only at a time when the claimants were able to properly pursue the litigation; and, assuming that the claimants in some way or the other resolve their financial difficulties, where there be a situation that it would be worthwhile to the defendants to have a costs order against the claimants.
60. It seems to me that none of this written material is any justification for the Court to grant a stay in the particular circumstances of this case. I note, first, that there is no actual evidence before the Court, apart from the existence of the winding up order itself, which supports this application for a stay at all. The application is not made by an application notice which would be the ordinary requirement of the rules under CPR Part 23. There is no evidence in the form of any witness statement before the Court which would be the ordinary requirement of an application under Part 23, or even an informal application for an adjournment. There is no reason given as to why no such evidence has been prepared.
61. As far as the first claimant is concerned, while the winding up order exists, the affairs of the first claimant are conducted by the official receiver pending the appointment of any liquidator. The official receiver who is performing statutory duties has indicated that the

- official receiver is not going to attend and thus that the first claimant is not going to attend.
62. As far as the second claimant is concerned, he has given no reason as to why he cannot attend personally. Instead he has gone down the route of producing the distinctly limited material which has been produced in relation to this aspect, and has chosen not attend, not seek to flesh it out, and not provide further detail by any form of oral submission.
63. Reference is made in the submissions to the overriding objective and the Civil Procedure Rule 1.1, which I have borne fully in mind, and which reads as follows:
“1.1
(1) These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
- (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
- (a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate –
- (i) to the amount of money involved;
- (ii) to the importance of the case;
- (iii) to the complexity of the issues; and
- (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly;
- (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases; and
- (f) enforcing compliance with rules, practice directions and orders.”
64. The Rules requires the Court to manage the case so that it is dealt with justly and at proportionate cost. I do bear in mind various matters advanced by the claimants, and effectively incorporate in this judgment Ms McMahon’s submissions.
65. I consider first the part of the overriding objective set out in CPR 1.1 (2) (a), “Ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence”.
66. It is actually the case that the claimants can participate fully in the proceedings, should they choose to do so. This is a hearing which they could both attend but have decided not to attend.
67. I can see that there is some point to the effect that the first claimant is to some degree prejudiced by the existence of the winding up order. However, firstly, it is said that the official receiver effectively is not the proper person to deal with this matter on behalf of the first claimant.
68. That is only because it is said that the existing winding up order is being appealed. No

evidence has been produced that there is any such appeal in existence, and Ms McMahan tells me that her instructions are that a search has been made of the Business and Property Courts CE file which reveals that no appeal notice has currently been filed. This is in circumstances where there would only be a 21-day period for filing such an appeal notice from 19 December 2022, and which period would have expired slightly over a month ago. It seems to me that in those circumstances, I can give no weight to the assertion that there is any appeal against the winding up order.

69. However, secondly, it seems to me to be quite clear that the first claimant is a corporate entity which effectively belongs, as least as far as shareholding is concerned to Mr Lodhia, Indeed Mr Lodhia is also the key director, albeit that the director's powers are effectively presently at least suspended due to the existence of the winding up order. If points are to be advanced on behalf of the first claimant, then Mr Lodhia himself, being the second claimant, is perfectly able to advance them.
70. It seems to me that this is an ordinary situation, in fact, of the litigant in person who has decided not to attend; and where is no difficulty in the litigant in person participating fully in the proceedings should they wish to do so.
71. Sub-rule 1.1(b) provides that part of the overriding objective is saving expense, and adjourning this matter, it seems to me, would involve the increase of expense rather than saving it.
72. Sub-rule 1.1(c) provides that part of the overriding objective is dealing with the matter in ways which are proportionate; and there is nothing in this matter which indicates to me that granting adjournments or staying the matter would be proportionate. Additionally, this is a defamation claim relating to an alleged misleading publication; and it seems to me that it is the sort of matter which ought to be progressed on and resolved, and that the interests of justice do not favour adjournments and stays.
73. Sub-rule 1.1(d) provides that part of the overriding objective is ensuring the matter is dealt with expeditiously and fairly. As far as expedition is concerned, it seems to me that that is quite contrary to any stay or adjournment. As far as dealing with the matter fairly is concerned, it seems to me that the claimants have had an opportunity which they have taken to put in written material, it is entirely their own fault if they choose not to come to court to seek to flesh it out. I have in the particular circumstances of this case, effectively of my own initiative, sought to ensure that the position is fully tested and that relevant authorities have been put before the Court. I also bear in mind that Ms McMahan has sought, as far as I can see, to fully comply with her duty as counsel to draw relevant authorities to the Court's attention.
74. Sub-rule 1.1(e) provides that part of the overriding objective is the allotting of an appropriate share of the Court's resources to the matter whilst taking into account the need to allot resources to other cases. It seems to me in the context of this case that it would be entirely contrary to seeking to achieve that element of the objective to adjourn and stay the matter.
75. Sub-rule 1.1(f) is enforcing compliance with rules, practice directions and orders. I did earlier make an order at the case management conference that this hearing should take place, and in circumstances where it seems to me that the claimants would be very likely to be aware of their then financial difficulties. I also bear in mind that the claimants have decided not to take advantage of the opportunity to put in evidence and I have sought to put in their written submissions albeit late and contrary to the provisions of my order. If this application had been made earlier, then it is possible that the Court might have been able to see it at least in more detail and possibly differently. However the difficulties, and any loss of weight or force of the claimants' application as a result of delay, seem to me to be

- entirely their own fault.
76. The overriding objective also involves dealing with the case at proportionate cost which would not – which it seems to me would also be infringed if I were to grant a stay or adjournment.
77. I have fully considered the overriding objective and in the light of the above matters, it simply seems to me that I should refuse the application to adjourn, and I will do that

The Issues

78. I then come onto the defendants' application. It seems to me that the convenient way to consider this is to consider: first, whether a relevant step for service of the claim form only took place out of time, and if that is the case; secondly as to whether or not, the situation should be corrected in the claimants' favour, and; thirdly, if there not to be a correction, to come to the question as to whether the defendants have in some way or other put themselves in a position that they are barred from taking this particular point, either as a result of a statutory waiver or a common law waiver.
79. Strictly speaking it would be logical to take that final point first, but it seems to me that I can better conduct the analysis by taking it last. I have, though, considered all matters holistically, that is to say borne in mind the position and relevant material on each point when considering each other point.

Whether CPR7.5 applies to Part 8 Claim Forms

80. The first question is whether or not Civil Procedure Rule 7.5 “Where a claim form is served within the jurisdiction the claimant must take the step required... before 12 midnight on the calendar day four months after the date of issue of the claimant form” applies to a claim form which is issued under the Part 8 procedure. This is a point which does not seem to me to be absolutely directly addressed in any particular authority although Ms McMahon has produced a number of authorities which come very close to doing so.
81. In analysing this question I start first with the relevant provisions of Civil Procedure Rules Part 7. CPR 7.1 provides that there are restrictions on where proceedings may be started and which restrictions are set out in Practice Direction 7A. That practice direction also sets out, in both certain general terms and certain specific terms, such matters as to whether particular types or values of claim should be started in the County Court or the High Court.
82. I note that paragraph 2.9(1) provides that a claim for damages or other remedy for libel or slander, which is what is sought in this claim, may not be stated in the County Court unless the parties have agreed otherwise in writing.
83. Paragraph 3.1 of PD 7A provides:
“A claimant must use practice form N1 or practice form N208 (the Part 8 claim form) to start a claim (but see paragraphs 3.2 and 3.4 below)”.
84. Paragraph 3.3 provides:
“If the claimant wishes the claim to proceed under Part 8 or if the claim is required to proceed under Part 8, the claim form should so state. Otherwise the claim will proceed under Part 7. However note that in respect of claims and specialist proceedings (solicited in CPR Part 49), and claims brought under the RSC”, that is a reference to the old Rules of Supreme Court, “Or CCR”, that is a reference to the old County Court Rules, “Set out in the schedule to the CPR (See CPR Part 50), the CPR will apply only to the extent that they are not

inconsistent with the Rules and Practice Direction as expressly applied to those claims”.

85. Paragraph 3.4 provides, “Other practice directions may require special practice forms to be used to commence particular types of proceedings or particular proceedings, in particular Courts”.
86. Those provisions thus seem at first sight to apply to claims which are brought under both the Part 7 procedure and the Part 8 procedure CPR Practice Direction 7A refers to the two alternative claim forms which may generally be used, the Part 7 claim form and which was used in this claim form, the Part 8 claim form; and also, additionally, to the possibility that certain particular types of claims may in fact be governed by other rules and practice directions.
87. CPR 7.2(1) reads “Proceedings are started when the court issues a claim form at the request of the claimant.” At first sight it seems to make it clear that proceedings are started when a claim form is issued, and it is entirely general in its terms and does not suggest that it is only applying to a particular type of claim form e.g. one issued under the ordinary Part 7 procedure and not one issued using the Part 8 procedure.
88. The same applies with regards to CPR 7.3 “ A claimant may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings.” CPR 7.4 provides for particulars of claim to accompany the claim form.
89. I have set out the material elements of CPR 7.5 above. CPR 7.6 deals with the Court’s power and the limits upon it to extend the time period in CPR 7.5 as follows:
“Extension of time for serving a claim form
7.6

(1) The claimant may apply for an order extending the period for compliance with rule 7.5.

(2) The general rule is that an application to extend the time for compliance with rule 7.5 must be made –

(a) within the period specified by rule 7.5; or

(b) where an order has been made under this rule, within the period for service specified by that order.

(3) If the claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if –

(a) the court has failed to serve the claim form; or

(b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and

(c) in either case, the claimant has acted promptly in making the application.

(4) An application for an order extending the time for compliance with rule 7.5 –

(a) must be supported by evidence; and

(b) may be made without notice.”

90. CPR 7.8 refers to the filing of a defence to particulars of claim.

91. The structure of CPR Part 7, as can be seen from CPR 7.4 and CPR 7.8, is that the procedure involves not only the service and the claim form, but also service of particulars of claim and where there also has to be served what is called “the response pack” being relevant forms not merely for providing acknowledgment of service, but also for providing one or both of a defence and admission.

92. I turn on to CPR Part 8.

93. CPR8.1 reads:

“8.1

(1) The Part 8 procedure is the procedure set out in this Part.

(2) A claimant may, unless any enactment, rule or practice direction states otherwise, use the Part 8 procedure where they seek the court’s decision on a question which is unlikely to involve a substantial dispute of fact.

(3) In the County Court, a claim under the Part 8 procedure may be made at any County Court hearing centre unless an enactment, rule or practice direction states otherwise.

(4) The court may at any stage order the claim to continue as if the claimant had not used the Part 8 procedure and, if it does so, the court may give any directions it considers appropriate.

(5) Where the claimant uses the Part 8 procedure, they may not obtain default judgment under Part 12.

(6) A rule or practice direction may, in relation to a specified type of proceedings, disapply or modify any of the rules set out in this Part as they apply to those proceedings.

(Rule 8.9 provides for other modifications to the general rules where the Part 8 procedure is being used.)”

94. The Rule thus sets out in general what is called the Part 8 procedure and provides in sub-rule 8.1(4) that the Court can at any stage order the Court to continue as if the claimant had not used the Part 8 procedure and provide appropriate direction. By sub-rule 8.1(5), the Part 12 default judgment procedure cannot be used for Part 8. By sub-rule 8.1(6) there is a general power for Rules or Practice Directions to disapply or modify any of the rules set out within Part 8.

95. CPR 8.2 makes provision in relation to the contents of a Part 8 claim form. The Rule finishes with what are termed “signposts”. They read as follows:

“(Part 22 provides for a claim form to be verified by a statement of truth) (Rule 7.5 provides for service of the claim form).”

96. It is a somewhat difficult question as to what status, if any, these particular signposts have. They form part of the Civil Procedure Rules as such, they being included within the relevant statutory instruments which make or amend the Civil Procedure Rules. On the other hand, they are not Rules themselves, and I have been provided with no particular case law by Ms McMahon to state that they have a higher status than some form of limited guidance.
97. CPR 8.3, requires a defendant to file at the court, not more than 14 days after service of the claim form, an acknowledgment of service. There is a different acknowledgement of service form N210 which is prescribed where the Part 8 procedure is used, than that for the Part 7 procedure. However both sets of acknowledgements of service provide for the defendant to tick one or more of a number of boxes. One of those boxes being as to whether the defendant admits the claim, another box being as to whether the defendant intends to defend a claim, and another box being as to whether or not the defendant intends to contest jurisdiction.
98. However, while the Rule provides in CPR 8.3 (2)(a) that the acknowledgement of service must state whether defendant contests the claim, the Rule does not require the defendant to state whether or not they intend to contest jurisdiction. That is simply a box element, included within the acknowledgement of service form. Additionally, acknowledgement of service is to be provided by filing it. That is to say to the Court, not more than 14 days after service of the claim form.
99. CPR 8.4 contains a section which provides that if acknowledgment of service is not filed within time, the defendant can attend the hearing of a claim but can only take part in it if the Court grants permission.
100. Under CPR 8.5 it was and is provided that the claimant must file any written evidence on which the claimant intends to rely when filing the claim form. That did not occur here where the claim form instead included ordinary Part 7 particulars of claim. I note that in CPR 8.6 it is provided that no written evidence can be relied on at the hearing of the claim unless it has been served in accordance with Rule 8.5 or the Court gives permission.
101. CPR 8.7 provides that Part 20 regarding counterclaims applies with modifications where the Part 8 procedure is used.
102. CPR 8.8 enables the defendant to contend that the Part 8 procedure is not appropriate simply by filing a statement of reasons when filing the acknowledgment of service. I note both that should occur when the acknowledgement of service is filed, but also that it does not require an application notice as such, and indeed section D of form N210 enables the defendants to advance the relevant contentions and reasons.
103. CPR 8.9 provides as follows:

“Modifications to the general rules
8.9 Where the Part 8 procedure is followed –

 - (a) provision is made in this Part for the matters which must be stated in the claim form and the defendant is not required to file a defence and therefore –
 - (i) Part 16 (statements of case) does not apply;
 - (ii) Part 15 (defence and reply) does not apply;
 - (iii) any time limit in these Rules which prevents the parties from taking a step before a defence is filed does not apply;
 - (iv) the requirement under rule 7.8 to serve on the defendant a form for defending the claim

does not apply;

(b) the claimant may not obtain judgment by request on an admission and therefore –

(i) rules 14.4 to 14.7 do not apply; and

(ii) the requirement under rule 7.8 to serve on the defendant a form for admitting the claim does not apply; and

(c) the claim shall be treated as allocated to the multi-track and therefore Part 26 does not apply.”

I note in relation to that that it specifically disapplies certain parts of the Civil Procedure Rules; and also that it was also regarded as appropriate by the Rules Committee to include specific provisions that CPR 7.8's requirements to serve the forms for defending the claim a for admitting the claim do not apply when the Part 8 procedure is used.

104. Part 8 was supplemented by Practice Direction 8A which since the relevant events has been deleted. However, at the relevant time, it contained a paragraph 4.1(1) which stated in terms that Part 7 contained applicable rules albeit that they should only be applied, “Where appropriate”. It also contained numerous other provisions which applied to particular points of proceedings, those provisions having been made under the power contained in CPR 8.1 (6).
105. Ms McMahon drew my attention to the fact that that PD 8A contained a paragraph 25 dealing with particular types of legislation and proceedings which are transferred from the Magistrates Court to the High Court; and in those paragraphs CPR Rules 7.5, 7.6 and 7.7 are specifically disapplied. Ms McMahon submitted that those paragraphs indicate that as far as the Rules Committee is concerned, CPR 7.5 would ordinarily apply to Part 8 claims. Where her submission is a perfectly proper one, I think that it should be given little weight by me in circumstances where the paragraph 25 procedure is a distinctly unusual one relating to transfer existing proceedings from the Magistrates Court and the particular dis-applications may be being included out of an abundance of caution rather than amounting to some particular recognition that CPR 7.5 applies in general to Part 8 claims.
106. Ms McMahon however does very much rely on the general provisions of Part 7. She submits that those rules are only disapplied or modified by Part 8 where Part 8 says so. She relies on the signpost to CPR 8.2 (which specifically refers to CPR7.5), and to what was paragraph 4.1 of the Practice Direction 8A which appears to have stated at the relevant time that Part 7 rules are applicable to Part 8 claims albeit only “Where appropriate”.
107. The claimants' position is as set out in their written submissions document; being that, notwithstanding the various rules and elements of the Practice Direction to which I have referred, there is nothing specific in CPR Part 8 apart from the signpost to say that CPR 7.5 applies when the Part 8 procedure is used, and that the Court should therefore not import such a requirement
108. Ms McMahon took me to various case law which is relevant to the question as to whether or not the Part 8 procedure has within it the requirement of CPR 7.5 for a step for service of the claim form to take place within four months.
109. Ms McMahon took me first to the decision of Nicklin J, in *Canterbury City Council -v- Persons Unknown* [2020] EWHC 3153 (QB). She drew my attention to the fact that that judgment considered numerous claims in which injunctions had been granted, but where, as stated in paragraph three of the judgment, at least most of the injunctions would have been

- granted in Part 8 – in claims commenced using Part 8 claim forms.
110. The judgment was concerned very much with the circumstances of what happened where claim forms had been issued against persons unknown and with injunctions being granted against them, but the claim forms were not served.
111. In paragraphs four onwards, Nicklin J referred to his earlier decision in *London Borough of Enfield -v- Persons Unknown* [2020] EWHC 2717, another case where there had been no service of the relevant claim form, and indeed where an application for retrospective validation of service was refused.
112. In paragraph 5 of the Canterbury judgment Nicklin J said:
“5. The failure to serve the Claim Form has serious repercussions. In *LB Enfield* , I explained in [24]:
24. The consequence of the failure of the application under CPR 6.15(2) is pretty stark. The failure to serve the Defendants in this case means that the Interim and Final orders were made in this case without jurisdiction over any Defendant. The period of validity of the original Claim Form has long since expired: CPR 7.5. For the last three years, therefore, an injunction has been posted at up to 130 sites, directed at Persons Unknown, prohibiting certain conduct, on pain of committal for breach, when jurisdiction had not been established over any individual Defendant because of the failure validly to serve the Claim Form.”
113. At first sight, that paragraph simply states that the period for service of a part 8 claim form, and for a step to be taken, is that laid down in paragraph 7.5.
114. In paragraph 29 Nicklin J said:
“29. The 4-month period to serve the Claim Form under CPR 7.5 expired at midnight on 10 August 2019. No application had been made under CPR 7.6 to extend the period within which the Claim Form had to be served. Any application now made would be required to be made under CPR 7.6(3) and CPR 7.6(3)(b) might be regarded as something of an obstacle to such an application. Nevertheless, no such application has been made.”
115. Again at first sight he appears to be saying that the four-month period was applicable to the Part 8 claim forms in the case before him, albeit that there does not appear from the judgment to have been any actual argument about that point of the nature of which has been considered by me in this hearing.
116. Nicklin J repeated his assumption that there was a relevant four-month period, and that it had expired in paragraphs 34, 39.6 and paragraph 46 of his judgment. It seems to me that although it appears there was no argument as such before him as to whether or not CPR 7.5 applied to Part 8 claim forms, that as far as he was concerned, it clearly did, and that if he had any thought to the contrary, then he would have mentioned it within that judgment.
117. Ms McMahon next took me to the decision of *Grant -v- Dawn Meats (UK)* [2018] EWCA Civ 2212, an earlier decision of the Court of Appeal. As appears from paragraph four of that judgment, the case was concerned with a situation of a Part 8 claim form; this being under the procedure laid down in and following the pre-action protocol for low value personal injury, employers liability and public liability claims.
118. The question of the applicability and consequences of non-compliance with CPR 7.5, was considered by the Court of Appeal initially in paragraphs 12 onwards. Again though, there was no specific consideration of the question as to whether CPR Part 7.5 applied to service of Part 8 claim forms, but there was, it seems to me, a clear assumption that that was the case. The Court of Appeal concluded that the relevant claim was not to be struck out because of the operation of a particular stay. Their conclusion was contained in paragraph 30 of Coulson LJ’s judgment with which the other two Lord Justices agreed:
“30. For all those reasons, therefore, I would allow the appeal against the decision of Judge Gore QC. Subject to submissions on the form of the order, I would reinstate the decision of

- Deputy District Judge Davy dismissing the respondent's application dated 17 March 2017 for the claim to be struck out for non-service of the claim form; and declare the claim form to have been served in time. The claim form was served within 4 months of its issue, once proper allowance is made for the full period of the stay imposed by the court.”
119. That conclusion was that the effect of the stay was effectively to suspend the running of the four-month period so that the eventual service was within four months of issue. It seems to me to be clear that it was being assumed by Coulson LJ that the four-month period applied in the context of what was a Part 8 claim form. If Coulson LJ had been in any way of the view that the four-month did not apply in the first place, then there would have been no need for the judgment to proceed to analyse the question as to whether the four-month period had been suspended, because there would have been no time period which would have required there to be any suspension.
120. However, again as I said, this specific question as to whether or not the rules import such a four-month time period was not considered as such. It seems to me to have been merely assumed.
121. The next judgment to which Ms McMahon took me to was the decision of Costs Judge Rowley in the case of *Kelly v Ralli* being an approved judgment delivered on 7 February 2022 but which does not appear to have a neutral citation number.
122. Paragraph one of the judgment makes clear again that these were Part 8 proceedings. The Costs Judge considered the relevant rules relating to service where this claim form had not been served within the period of four months, in paragraphs 10-13 of the judgment:
“10. In this case, the defendant had no notice of the proceedings prior to them being commenced. As such, although they are a firm of solicitors, they do not come within rule 6.7 regarding service on the solicitors of the defendant: (see *Thorne v Lass Salt Garvin* [2009] EWHC 100 (QB).) Nor did the defendant give an address for service at which it might be served and consequently the relevant rule is the general rule at 6.9 which provides for the relevant place of service, depending on the nature of the defendant to be served. For a company registered in England and Wales the place of service is
“the principal office of the company; or any place of business of the company within the jurisdiction which has a real connection with the claim.”
11. Rule 6.9 deals with service of a paper copy of the Claim Form. Where the claimant wishes to serve it electronically, regard is to be had to paragraph 4 of PD6A. Prior to this method of service being allowed, the putative recipient needs to confirm that it is willing to accept service in this way.
12. Where proceedings have not been served within four months of the claim form being issued, a party may seek an extension of time for serving the claim form under rule 7.6. The general rule is that an application to extend the time needs to be made prior to the expiry of the original period. If an application is made after the end of that period, the court may only make an order extending time if either the court has failed to serve the claim form, or the claimant has taken all reasonable steps to comply with the requirements for service. In either event, a prompt application is required.”
123. It seems to me that in paragraph 12 of that judgement, the Costs Judge plainly again both assumed and considered that the CPR 7.5 four-month period applied or taking a relevant step for service applied to the Part 8 claim form. Against the remainder of the judgment would seem to indicate that again the specific question as to whether or not CPR 7.5 applies to the Part 8 procedure was not specifically argued out before the Costs Judge.
124. Ms McMahon next took me to the decision of *Good Law Project Limited -v- Secretary of*

State for Health and Social Care [2022] EWCA Civ 355. That was a decision in relation to a judicial review commenced by Part 8 claim form under the judicial review procedure in Part 54 of the Civil Procedure Rules. There was specific limited time period, under Civil Procedure Rule 54.7 in relation to this particular type of judicial review which required service of the claim form within seven days after the date of issue. For various reasons, that did not occur, and the decision was mainly concerned with the question of what if any jurisdiction the Court had to extend time for service of the claim form and how such jurisdiction should be exercised.

125. In paragraph 29, Carr LJ (as she then was) referred to the CPR 7.5 four months' time limit and that CPR 54.7 provided for a very much shorter time period. She then went on to consider as to whether CPR 7.6 applied with its own provisions with regards to the question of whether the Court had a jurisdiction to extend time for service and if so, as to what principles the Court should apply that in considering such, whether to grant a discretionary extension.
126. The actual conclusion to which she and the remainder of the Court of Appeal came to was that CPR 7.6 did not apply in the particular circumstances, being where CPR 54.7 laid down a different time period from CPR 7.5 in relation to the judicial review procedure. Instead she came to the conclusion that the Court's general case management power contained in CPR Rule 3.1 (2) (a) to extend time applied so as to confer jurisdiction. However she held that the relevant discretion afforded by that jurisdiction should be operated in accordance with effectively analogous principles to those laid down in CPR 7.6 where the CPR 7.5 limit applied. This had the eventual result that the claim form was set aside.
127. Ms McMahon took me though to paragraph 41 of the judgment:
"41 As for the importance of valid service, service of a claim form can be distinguished from other procedural steps. It performs a special function: it is the act by which the defendant is subjected to the court's jurisdiction. This quality is reflected in the terms of CPR r 7.6, with its very strict requirements for any retrospective extension of time. Equally, reliance on non-compliant service is not one of the instances of opportunism deprecated by the courts (see for example *Woodward v Phoenix Healthcare Distribution Ltd* [2019] EWCA Civ 985 ("*Woodward*") at [48]). The need for particular care in effecting valid service, particularly when there are tight time limits and/or a claimant is operating towards the end of any relevant limitation period, is self-evident."

It does seem to me emphasises very much the importance of a time period for serving a claim form and that service should take place within such a period.

128. She also took me to paragraphs 42-53 of the judgment:
" 42 The SSHSC submits that, ideally, the outcome of the appeal should not be determined by the procedural route chosen. There is force in that proposition. In many respects the issues for consideration under the various provisions overlap, such as the reasons for the error (or delay) and prejudice. Further, in *Barton* [2018] 1 WLR 1119, para 21, Lord Sumption JSC commented, albeit in passing, as follows:
"I note . . . that if Mr Barton had made no attempt whatever to serve the claim form, but simply allowed it to expire, an application to extend its life under CPR r 7.6(3) would have failed because it could not have been said that he had taken all reasonable steps to comply with rule 7.5 but has been unable to do so. It is not easy to see why the result [under CPR r 6.15] should be any different when he

made no attempt to serve it by any method permitted by the rules.”

43 However, specifically in relation to CPR rr 6.15 and 3.1(2)(a), the tests to be applied are nevertheless conceptually separate and distinct. There is a principled basis for that distinction: under CPR r 3.1(2)(a) it is not a question of perfecting defective service; rather it is a question of extending time in which to serve. Thus, the outcome of an application under CPR r 6.15 may legitimately as a matter of principle be different to the outcome of an application under CPR r 3.1(2)(a).

44 As for the interplay between CPR rr 7.6 and 3.1(2)(a), it was common ground before the Judge and before us that, where CPR r 7.6 (extension of time to serve a claim form) is engaged, CPR r 3.1(2)(a) is not. The specific overrides the general (see *Vinos v Marks & Spencer plc* [2001] 3 All ER 784, para 27).

45 There is also no dispute that CPR r 7.6 applies to Part 7 and Part 8 claims. What is not common ground, however, is the relevance, if any, of CPR r 7.6 to an application to extend time for service of a claim for judicial review under CPR Pt 54. The Judge found, incontrovertibly, that if CPR r 7.6 did apply to the application to extend time for service, the threshold conditions for granting an extension would not be met on the facts.

46 Good Law argues that CPR r 7.6 is of no relevance, in line with the Judge's conclusion to this effect. The SSHSC by contrast argues (by way of respondent's notice) that it is of direct application to an application to extend time for service of a judicial review claim, alternatively falls to be applied by analogy on an application under CPR r 3.1(2)(a), alternatively informs the application of the principles identified in *Denton v White* on an application under CPR r 3.1(2)(a).

47 In order to understand the argument, it is necessary to follow a close procedural trail.

48 CPR r 7.5 deals with service of a claim form and sets out the service steps that must be taken by a claimant within four months of issue. CPR r 54.7 provides for a different period (of seven days from issue) for service of judicial review claims. CPR r 7.6 provides that a claimant can apply for an order extending the period for compliance with CPR r 7.5 but makes no reference to CPR r 54.7.

49 However, CPR r 54.1(2)(e) provides that the judicial review procedure is the Part 8 procedure as modified by CPR Pt 54. CPR r 8.9 sets out modifications to the general rules in CPR Pt 7 where the Part 8 procedure is followed, but makes no modification or reference to CPR r 7.6. CPR PD 8A, para 4.1(1) provides that CPR Pt 7 and CPR PD 7A should be applied where appropriate to all claims, including those to which Part 8 applies.

50 Thus CPR r 7.6 is not disapplied in respect of Part 8 (including judicial review) proceedings (unlike, for example, CPR r 20.3(2) where it is expressly disapplied for Part 20 claims). Further, CPR r 8.2, which deals with the contents of a Part 8 claim form, makes express reference to CPR r 7.5, and there is no express equivalent provision to CPR r 7.6 in CPR Pt 54.

51 The submission for the SSHSC then is that the general provisions of CPR r 3.1(2)(a) are displaced by the specific provisions of CPR r 7.6 not only in relation to Part 7 and 8 claims, but also judicial review claims under CPR Pt 54.

52 The insuperable hurdle for this primary position is the wording of CPR r 7.6 which, as set out above, refers expressly and repeatedly only to CPR r 7.5. Whilst this may be a lacuna in the CPR, which makes no express provision otherwise for extending time for service of a judicial review claim, it is not possible to read in to CPR r 7.6 what would be the necessary references to CPR r 54.7.

53 However, this does not dispose of the SSHSC’s alternative submissions that the principles behind CPR r 7.6 are still relevant to Good Law’s application under CPR r 3.1(2)(a), to which I turn in due course below.”

129. I note that in paragraph 45 she set out that there was no dispute that CPR 7.6 applied to Part 7 and Part 8 claims. That in paragraphs 47 onwards, she stated that it was necessary in order to consider the argument before her, the Court of Appeal there, it was necessary to follow a close procedural trail. She then first considered CPR 7.5, and then in paragraph in 49 made reference to the fact that CPR Rule 8.9 did not, when modifying the general rules in CPR Part 7, make any modification or reference to CPR 7.6.
130. Additionally she then went on in paragraph 50 to say that there was no disapplication in Part 8 expressly of Rule CPR 7.6, and then expressly referred to the signpost to CPR Rule 8.2 in the second sentence of paragraph 50 and to its making express reference to CPR 7.5.
131. In paragraph 52 she made clear that CPR Rule 7.6 itself only actually referred to Rule 7.5, something which was to underpin the eventual decision, at the relevant CPR Rule for the purposes of the Court of Appeal in that case was actually Rule 3.1 rather than Rule 7.6.
132. It seems to me again that there is absolutely no suggestion at all from Carr LJ that Rule 7.5 did not apply to Part 8 claims; but, again, that there was no specific argument directed towards her or the remainder of the Court of Appeal to the effect of the argument adduced by the claimants in this case that Rule 7.5 does not have application where a Part 8 claim form is issued which is not governed by some other rule.
133. Ms McMahon relied on these various cases as demonstrating that Judges at all levels, namely Costs Judge which is equivalent to Master, a High Court Judge and the Court of Appeal had all regarded it as effectively going without saying that CPR 7.5 applied to an ordinary Part 8 claim; even though, as set out in *The Good Law Project*, CPR7.5 and 7.6 would have no application to a Part 8 claim which was governed by a specific procedure which itself dealt with service as was the case in *The Good Law Project*.
134. Ms McMahon did however draw my attention to another authority, doing so in accordance with her ethical duties as counsel to draw the Court’s attention to any authority which might be regarded as being inconsistent with a proposition which she was advancing. She took me in the *White Book* in volume one of the 2022 edition, to page 450 and the part of the *White Book* notes at paragraph 7.5.1. That reads as follows:

“In *Corus UK Limited -v- Erewash Borough Council* [2006] EWCA Civ 1175, the claimant issued Part 8 proceedings to challenge the defendant’s local plan for which an application had to be made by 20 September 2005 in accordance with section 287 of the Town and Country Planning Act 1990. The claim was issued on 20 September but not served until 23 September. The claimant applied to extend time to serve the claim form. The first instance Judge in the Court of Appeal decided that CPR Rules 7.5 and 7.6 were not engaged because this was a Part 8 claim and the Part 8 PD provides only...”

[I interject to say that was the then wording of the Practice Direction which no longer exists]

“... that a claim form must be served not less than 21 days before the hearing. It was open to the Court to exercise the discretion in CPR Rule 3.1 (2) (a) to extend time for service as making an application in accordance with section 287 meant issuing the claim”.

135. Ms McMahon drew my attention to this wording because on one construction it could be said to be a reference by the author of this section of the *White Book* to a principle that the

CPR Rule 7.5 time limit does not apply to a Part 8 claim form. Ms McMahon submitted to me though that this was a misreading of the true situation of the *Corus* judgment which she cited to me.

136. She drew my attention to the fact that the Town and Country Planning Act 1990 laid down a specific period in which a relevant claim had to be commenced, and that the rules provided for a specific procedure in relation to such claims. A relevant rule was the old rule in the Rules of the Supreme Court Order 94, Rule 2(1), which had been maintained in effect by the transitional provision, CPR rule 50.1(2). It provided that the claim form not only had to be issued but also had to be served within the time limited by the 1990 Act.
137. She drew my attention to paragraphs five and six of that judgment, which noted that the Judge below had applied Rule 3.1 to an application by the claimant for extension of time for service whereas the respondent Local Authority wished to contend that the more severe Rule 7.5 and Rule 7.6 applied.
138. In paragraphs 13-14 it was said:
“13. Thus the question for decision may be framed in this way: is CPR r.7.6 a rule applicable to all claims, including Pt 8 claims, so that it is “appropriate” to apply it where application is made to extend the time for service in a Pt 8 claim constituted by an application under s.287 of the 1990 Act?

14. For my part, I cannot see that it is. As a matter of construction, the provisions of CPR r.7.6 are only engaged in a case in which “the period for serving the claim form specified by rule 7.5 ” applies. This is because the claimant may apply for an extension of time for service while the period specified by r.7.5 is still running (see 7.6(2)(a)); or if he already has obtained such an order under 7.6(2)(a) he may apply while the extra time given by that order is still running; 7.6(2)(b). If he applies at a time later than that contemplated by 7.6(2)(a) or (b), he is fixed with the stringent conditions of 7.6(3). “The period for serving the claim form specified by rule 7.5 ” can in my judgment only be the period of four months specified in 7.5(2) or the period of six months specified in 7.5(3). Simply put, r.7.5 does not specify any other period. I see no justification for rewriting r.7.5 so as to interpret the period specified by r.7.5 set out in 7.6 as referring to the time for service given in this case by RSC Ord.94, r.1(2).”
139. In note that in paragraph 14 the Judge held that Rule 7.6 only applied where Rule 7.5 applied, and that Rule 7.5 had no application in the circumstances of that case where the time for service was actually given by the Rules of the Supreme Court, Order 94, Rule 1(2).
140. The result in *Corus* was thus somewhat similar to that in *Good Law*, namely that it was held that Rule 7.5 did not apply where there was another rule – either a Rule of the Supreme Court or a Civil Procedure Rule - which provided for a different service procedure and service time limits from the ordinary Rule of CPR 7.5.
141. Additionally which was relevant more to those cases than to this one, the consequence was that an application to extend the relevant time was not made under Rule 7.6 which itself is parasitic upon Rule 7.5, but rather under Rule 3.1, albeit that it was then held in *Good Law*, possibly taking a different view from that in *Corus*, that the Rule 7.6 principles were applied by a means of analogy rather than directly.
142. I have considered these various matters together with Ms McMahon’s submissions. All that I have from the claimants’ side is the very bold written assertion to the effect that CPR 7.5 does not apply to an ordinary Part 8 claim form, as this one is.
143. It seems to me that Ms McMahon is clearly right and that the CPR 7.5 provision and time limit applies to this particular claim form. I take into account all her submissions and all that I have said above, but it seems to me that she is right in particular for the following

reasons.

144. Firstly, that conclusion flows from the actual wording of the Rules in a number of different ways.
145. It is the general structure of the Rules. The procedure with regard to claim forms, as to their issue, content and service with associated provisions, is laid down in general in CPR Part 7. Other Rules will modify that procedure in relation to certain types of claim, but only insofar as they effect modifications. Insofar as they do not effect modifications expressly or by implication, the ordinary provisions of Part 7 apply. It seems to me that that is quite clear from its general wording and is also quite clear from such matters as to provisions within it with regards to, for example, the ability to combine a number of claimants or claims within a single claim, which are not referred to in other Rules but where it seems to me quite clearly that Part 7 is laying down a general rule.
146. The structure of the CPR is that the general rules in Part 7 are modified by Part 8, and, as provided for in Part 8 (as it stood at the relevant time) were further soft modified in relation to particular categories of Part 8 claims. However all of this is merely a modification of a general rule, which unless modified otherwise applies.
147. As far as Part 8 is concerned, and its modifications, there is the signpost at the bottom of CPR 8.2 and which I accept is merely a signpost and therefore at most guidance, but nonetheless is at least an indication that there was no intention on the part of the Rules Committee to modify the general rule in relation to service of an ordinary Part 8 claim form. The same point it seems to me was, at the relevant time, expressly set out in paragraph 4.1 of Practice Direction 8A.
148. It seems to me also that the same point can be seen in terms of general structure from the provisions of CPR 8.9 and their specific disapplication of CPR 7.8 in relation to forms of defence and forms of admission. Although there is always a certain danger when applying the maxim that where something is sought to be expressly excluded there is an implication that other matters which are not expressly mentioned are not to be excluded; and even applying that approach with caution; this is a matter which clearly points in favour of the proposition that the intent of the rule maker is only disapplying the general rules to the extent that the rule maker actually says so, rather than that there is some general disapplication.
149. I bear in mind that paragraph 4.1 of Practice Direction 8A stated that Part 7 should only apply to Part 8 Claims, "Where appropriate". However, it seems to me that it is and was clearly appropriate, even if that paragraph did not exist, to apply the time limit provisions in CPR 7.5 generally where there is not some other Rule laying down the procedure.
150. This is, in particular, for the following reasons: firstly, there is a strong policy which requires claim forms to be served within a set period of time. It seems to me that that is generally the case simply because it must be wholly unsatisfactory for it to be possible for someone to issue a claim and simply leave it lying around.
151. However, secondly, there is a specific importance which arises from the law of limitation. The law of limitation and the Limitation Act 1980 in particular, lays down a number of specific periods following the accrual of a cause of action during which a relevant claimant must bring their claim.
152. The provision in CPR 7.5 in fact extends that time period by a further four months. As set out in various cases, including *Barton -v- Wright Hassall LLP* [2018] UKSC 12, that extension is a matter which is prejudicial to defendants, and indeed also to the statutory protection and rights afforded to them by the Limitation Acts, and should be kept within tight limits. The CPR seek to do that in general by CPR 7.5, albeit that other and generally shorter time periods are imposed by specific Rules. It seems to me to be quite contrary to

- that general policy to seek to construe the CPR so as to give rise to a general open-ended time for a Part 8 claim form to be served.
153. It further seems to me that if the claimants were right, there would be a massive and unexpected distinction between Part 7 claim forms and claim forms issued under the Part 8 procedure. Where the one would have a strict time limit during which they must be served, and where if they are not served then the Court will decline jurisdiction, the other would not have any time limit for service at all. It seems to me that for such a distinction to be the case is something which would require express wording within the Rules, and which simply does not exist here.
 154. Secondly, it seems to me that all the case law proceeds on the basis of the CPR 7.5 time limit applying to an ordinary Part 8 claim form, unless there is some other rule which provides for a different service procedure and time limit. It seems to me that that is abundantly clear from each of the cases which I have cited.
 155. With regards to the comments of the *White Book* author, which I have cited, I agree with Ms McMahon that those comments are somewhat incomplete and therefore possibly misleading on a first reading. However, any difficulty is dispelled after consideration of the actual wording of the judgment in *Corus*. It seems to me that all that *Corus* was saying was that CPR 7.5 does not apply where some other rule lays down a specific service procedure and time limit. I also think that that is probably to what the author is actually referring, even though, for reasons, I assume, of brevity, a rather shorter form of words has been used to describe that than might be used had consideration been given to the point which has been sought to be advanced by the claimants in these proceedings.
 156. I should say that Ms McMahon did make some points with regards to construction of Part 7 and Part 8 based on the old provision in the old Practice Direction 8B that any evidence should be served not less than 21 days before the hearing of a Part 8 claim. It does not seem to me that that aspect adds any real weight to the matter since: firstly, those were merely words in a Practice Direction where one should be caution in using a Practice Direction to construe a Rule; and, secondly, it seems to me that the flexibility of the Part 8 procedure would enable some application to be made to, or order to be made by, the Court should those provisions have caused difficulty in any particular case.
 157. Nevertheless for all the reasons which I have given, it seems to me to be clear that the general situation of the CPR 7.5 time limit for taking a relevant step for service applies to a Part 8 claim form.

Whether service took place out of time

158. It also seems to me to be clear on the evidence before me, and as was conceded by the claimants at the last hearing, that no such relevant step for service was taken in time.
159. As far as that evidence is concerned, the only evidence I have before me is that of the defendants to say that they only received the claim form attached to Ms McGuiver's email of 5 July 2022, and have not received it in any other way. They therefore invite me to infer that it had not been provided in any other way, and in consequence that no relevant service step had been taken in time under CPR7.5, and further support that inference by reference to the fact that they had continually asked in July 2022 for details of any other method of service, and had received no response.
160. There was then the concession at the hearing of 13 October 2022. I had also provided for the claimants to be able to file and serve evidence with regards to this matter in my order of 13 October 2022, but no evidence whatsoever has been provided by the claimants. Indeed, in their written submissions document there was no suggestion of any step for service having been taken apart from the email of 5 July.

161. In all those circumstances, I conclude that the claimants failed to comply with CPR 7.5 and did not take a step for service within the prescribed four months time.

Whether late service should be validated

162. The next question, logically, is whether or not I should make some sort of order validating service which the claimants seem in their written submissions document to invite me to do. They refer to my extending time under CPR 7.6, dispensing with service under CPR 6.16, permitting service by an alternative method under CPR6.15, and taking a step to waive the defect under CPR3.1(2)(m).
163. They have however provided no evidence in the form of any witness statement or similar giving any factual material on which to base such an exercise of discretion and order. All they have done is simply provided a bald request in a set of written submissions themselves served late.
164. I have not sought detailed submissions from Ms McMahon in relation to this but I have borne in mind very much the *Good Law* decision and its reasoning, where it is set out when applying CPR 7.6 by analogy that its requirements were strict, and also the decision in *Ideal Shopping Direct Limited -v- Mastercard Inc* [2022] 1WLR 1541, and my consideration of those decisions in my judgments in *Joe Macari Servicing Limited -v- Chequered Flat International Inc.* [2021] EWHC 3175 (QB), and also in the case of *Tara Yoga Centre & Another -v- Dr Omar Dinsmore-Tuli* Claim No. QB-2021-003007 (an oral judgment which I delivered on 1 December 2022), and all of which considered a number of points similar to certain of those raised in this case.
165. CPR 7.6 makes clear that if an application is made for an order to extend time for compliance after the end of the Rule 7.5 period, which is the case here, the Court may make such an order only if (a) the Court has failed to serve the claim form, which is not the situation here; alternatively (b) the claimant has taken all reasonable steps to comply with Rule 7.5 but been unable to do so and, additionally (c) in either case the claimant has acted promptly in making the application.
166. I have no evidence whatsoever before me that the claimant has taken all reasonable or indeed any reasonable steps to comply with Rule 7.5 but been unable to do so. It also seems to me where this point was raised at the end of July, but the request under CPR 7.6 was only made a very few days ago, that the claimant has not acted promptly in making the application.
167. For each of those reasons it seems to me that the necessary jurisdictional conditions of CPR 7.6 are not made out. Even if they were made out, in the circumstances of this case where I have absolutely no evidence to explain from the claimants' side the apparent blatant failure to comply with the Rule, or as to why nothing was done about it following the point being raised at an early stage by the defendants, it seems to me both generally, but also bearing in mind what is said in *Ideal* and *Good Law* about the Court requiring a very proper situation from which to exercise any discretion that may exist, that I should refuse to exercise any such discretion.
168. Insofar as an extension of time or waiver of the failure is sought under any other Rule, in particular 3.1 (2), whether it is (a) or (m), or CPR 3.10, I bear in mind the decision in *Ideal* directly to the effect, and which is also said at least to an extent in *Good Law*, that CPR 7.6 takes precedence over those other Rules, but, even if that is in any way incorrect, sets out a set of principles which ought to be applied in any consideration of exercising a discretion under those other Rules. Applying that approach as set out in the case law, in my judgment: firstly, the discretion under those Rules simply does not arise to start with because the matter is controlled by CPR 7.6; but, secondly, and if that is wrong, there is nothing to

justify or meet what is in any event a stringent test which would justify the exercise of such a discretion.

169. The claimants further request that the Court should make an order for alternative service, effectively validating what has already occurred under CPR 6.15:

“6.15

- (1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.
- (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.
- (3) An application for an order under this rule –
 - (a) must be supported by evidence; and
 - (b) may be made without notice.
- (4) An order under this rule must specify –
 - (a) the method or place of service;
 - (b) the date on which the claim form is deemed served; and
 - (c) the period for –
 - (i) filing an acknowledgment of service;
 - (ii) filing an admission; or
 - (iii) filing a defence.”

170. Ms McMahon responds to submit that CPR 6.15 only applies where a good reason is shown to authorise service by an alternative method and that there is absolutely no evidence adduced which would found such a good reason, and, further, there is no explanation at all as to what such a good reason could be.

171. I bear in mind also that in *Barton -v- Wright Hassall*, the Supreme Court took a restrictive approach with regards to CPR 6.15, and which can very much be seen as requiring, or at least generally requiring, a good explanation for service of the claim form not to have occurred by use of an ordinary CPR 7.5 method.

172. It seems to me that I should accede to Ms McMahon’s contention that I should not make any order under CPR 6.15. Firstly, there is nothing before me to even suggest, let alone amount to, a good reason. Secondly, even if there was a contention made in the written document which could amount to a good reason, it seems to me that it would have to be supported by evidence and there is no evidence before me, but merely written contention. Thirdly, there is nothing before me which could possibly explain as to why service was not effected and could not have been easily effected within the CPR 7.5 four-month period. In all those circumstances I simply reject that application.

173. The claimants’ next application is under CPR 6.16:

“6.16

- (1) The court may dispense with service of a claim form in exceptional circumstances.
- (2) An application for an order to dispense with service may be made at any time and –
 - (a) must be supported by evidence; and
 - (b) may be made without notice.”

174. It is made clear in that Rule and also in such cases as *Bethell Construction Ltd & Another -v- Deloitte and Touche* [2011] EWCA Civ 1321, that Rule is only to be applied in, “Exceptional circumstances”.

175. Again, it seems to me as Ms McMahon submits, that I have absolutely no suggestion of anything which could possibly be an exceptional circumstance before me. Even if there was such a suggestion, I have no evidence to support it. It seems to me in those circumstances that the jurisdictional requirement is simply again not satisfied, and I should refuse that element of the application.

Challenges to Jurisdiction and Types of Waiver

176. In those circumstances, that leaves me with the claimants' contention, again made very baldly, that the defendants have in some way or other debarred themselves from taking these particular points and making the relevant application.
177. The case law, and in particular the decision in *Hoddinott -v- Persimmon Homes (Wessex) Limited* [2008] 1WLR 806, requires the defendant's application to be made under CPR Part 11 which reads as follows:

“11

(1) A defendant who wishes to –

- (a) dispute the court's jurisdiction to try the claim; or
- (b) argue that the court should not exercise its jurisdiction

may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.

(2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.

(3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.

(4) An application under this rule must –

- (a) be made within 14 days after filing an acknowledgment of service; and
- (b) be supported by evidence.

(5) If the defendant –

(a) files an acknowledgment of service; and

(b) does not make such an application within the period specified in paragraph (4), he is to be treated as having accepted that the court has jurisdiction to try the claim.

(6) An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including –

(a) setting aside the claim form;

(b) setting aside service of the claim form;

(c) discharging any order made before the claim was commenced or before the claim form was served; and

(d) staying^(GL) the proceedings.

(7) If on an application under this rule the court does not make a declaration –

(a) the acknowledgment of service shall cease to have effect;

(b) the defendant may file a further acknowledgment of service within 14 days or such other period as the court may direct; and

(c) the court shall give directions as to the filing and service of the defence in a claim under Part 7 or the filing of evidence in a claim under Part 8 in the event that a further acknowledgment of service is filed.

(8) If the defendant files a further acknowledgment of service in accordance with paragraph (7)(b) he shall be treated as having accepted that the court has jurisdiction to try the claim.

(9) If a defendant makes an application under this rule, he must file and serve his written evidence in support with the application notice, but he need not before the hearing of the application file –

(a) in a Part 7 claim, a defence; or

(b) in a Part 8 claim, any other written evidence.”

178. I note that CPR11 applies, as stated in CPR11(1), where a defendant either wishes to dispute the Court's jurisdiction the claim, or to argue that the Court should not exercise its jurisdiction. As far as that is concerned, the *Hoddinott* decision left open whether the application the defendants are actually making in this case falls within sub-rule 11(1)(a) or sub-rule 11(1)(b). In the *Tara* decision, I came to the conclusion that it probably fell within sub-rule (b), although I note that the claimants' application expressly refers to disputing the Court's jurisdiction and sub-rule (a). However, it does seem to me, reading the application notice and evidence in support as a whole, that it makes absolutely clear that the application is made under Part 11 and on a general and holistic basis relying generally on CPR 11 (1) and not merely CPR 11 (1) (a), and so that it does not matter whether or not it was correct to identify sub-rule (a).

179. CPR11(2) together with CPR11(4) lay down the procedure that a defendant must follow;

namely the defendant must first file an acknowledgment of service, and then must make the application within 14 days after filing the acknowledgment of service, supported by evidence, as was done here.

180. There is then the provision in CPR11(5) that if acknowledgement of service is filed, but an application is not made within time, then the defendant is to be treated as having accepted the Court has jurisdiction to try the claim. That, as was made clear in the *Hoddinott* decision and indeed other decisions following it, is what is terms to be a statutory waiver. Namely that the defendant is taken to have waived their right to contest the claim on the basis of non-service by asking the Court not to exercise any jurisdiction, and, rather, to have submitted to the jurisdiction and accepted that it should be exercised. That is a different concept from what is known as common law waiver or common law submission to the jurisdiction, and which I will come onto in due course.
181. CPR11(6) provides that if the application succeeds, there will be made a declaration and consequential orders, effectively setting aside the proceedings, and which relief is sought by the claimant in the application of 28 July 2020.
182. CPR11(7) contains within it a protective provision for the defendant, being that, although they have to provide their own evidence with their application notice, they do not at this point in the procedure have to file a defence in a Part 7 claim or evidence in a Part 8 claim. The reference to such “evidence in a claim under Part 8” is, it seems to me, clearly to evidence which would be the equivalent to a defence i.e. evidence substantively contesting the underlying claim made in the Part 8 claim form (just as a defence in Part 7 proceedings substantively contests the claim made in the Part 7 particulars of claim and claim form).
183. CPR11(7) also provides that if the application to dispute jurisdiction fails, the existing acknowledgment of service ceases to have effect, and the defendant has a further 14 days, or whatever the Court otherwise allows, to file a further acknowledgment of service, and the Court will make directions with regards to a Part 7 defence, or Part 8 further evidence.
184. Thus it is clearly set out that the relevant procedure is the defendant must file an acknowledgment of service and then has 14 days to make the Part 11 application. If in a Part 8 claim an application is made, the defendant will be free at that point from the obligation to file written evidence which otherwise would have had to have been filed with the acknowledgment of service under CPR8.5(3). Likewise in a Part 7 claim, the relevant defendant, on making the CPR 11 application, becomes free from the obligation which would otherwise exist to file a defence. If the application to dispute jurisdiction succeeds the claim will simply fail, but if the application to dispute jurisdiction fails, then the proceedings will be reset with the defendant having an opportunity to file a new acknowledgment of service and with directions being made with regards to filing of either a substantive defence in a Part 7 claim, or substantive written evidence in a Part 8 claim.
185. That is designed to produce a result whereby the defendant can simply go ahead at this very early stage with disputing jurisdiction, without being otherwise prejudiced by a need to advance a substantive defence while jurisdiction is still in issue, or being prejudiced by having gone down this route but failed and in some way or other then being debarred from contesting the substantive claim. The procedure set out by Part 11 is designed to avoid all these problems, but also to ensure that any contest to jurisdiction is both raised and dealt with at a very early stage.
186. As I have said there are two types of waiver which can take place in this context, both of which involve a submission to the Court’s jurisdiction so that it can no longer be disputed and the Court can no longer be asked to decline to exercise it. One type of waiver is a statutory waiver as a result of non-compliance with CPR 11 (4), and the consequent sanction imposed by CPR 11 (5). The other is a common law waiver where a party has so

conducted themselves that they are taken to have submitted to the jurisdiction and in consequence lost their CPR Part 11 rights.

Statutory Waiver

187. It is unclear to me from the claimants' submissions as to whether or not they are seeking to raise the question of any statutory waiver. The existence of the statutory waiver is confirmed by the *Hoddinott* decision, but unlike in that case there have been a number of subsequent decisions where even though the relevant sanction has been held to exist, the Court has been prepared to grant relief from the relevant sanction. Those decisions, have involved some considerable analysis of what is actually required to comply with CPR Part 11, and then gone on to consider as to whether relief should be given against the consequences of any non-compliance.
188. Ms McMahon has not sought to take me through the various decisions, and I have not regarded it as necessary, in the context of the way in which this hearing has proceeded, to require her to do so. However she has referred in particular to *Caine -v- Advertiser And Times Limited & Another* [2019] EWHC 39; *Sawyer -v- Atari Interactive Inc.* [2005] EWHC 235; and the *Macari* decision which I have already cited. I referred her to the decision in *Pitalia & Another -v- NHS Commissioning Board* [2022] EWHC 1636, a decision which is termed by its reference to be a High Court judgment but which I have previously concluded to be a County Court judgment¹, and to my own decision in *Tara Yoga Centre*.
189. Those decisions all make clear that the CPR Part 11 itself is distinctly strict and that where there is any contravention of its provisions the CPR 11 (5) sanction will apply, but that the Court can then grant relief from sanction,s but will apply CPR 3.9 and the three stage *Denton -v- TH White Ltd* [2013] EWCA Civ 906 approach which is referred to in various of the cases.
190. In this particular case, the first acknowledgement of service was sought to be filed on 7 July 2022, but the Court rejected it. A further acknowledgement of service was sought to be filed and was eventually accepted by the Court on 14 July 2022 and the application notice was issued, or at least filed to be issued, within 14 days from that date. Thus the application notice was filed for issue within 14 days of the latest submission of a protective acknowledgment of service on 21 July 2022, itself filed within 14 days of the deemed date of service of the claim form which was 7 July 2022 as I explained earlier in this judgment.
191. In considering any question of statutory waiver, I have borne in mind that there is a potential question as to whether the first filing of the acknowledgment of service should be treated as triggering a 14-day period under CPR Part 11(4)(a), notwithstanding that the filing was rejected.
192. I have also considered the question as to whether the fact that the acknowledgment of service did not have ticked the box stating an intention to contest service could amount to a statutory waiver. Ms McMahon submits to me that it is clear from CPR 11(3) that a filing of acknowledgement of service cannot amount to a statutory waiver, whether or not such a box is ticked, and all the more so where the box on the acknowledgement of service form is not required by any Rule albeit that it is part of the prescribed form.
193. There might also be a technical question as to whether or not the application notice refers to CPR 11 (1) (a) when, in my judgment in *Tara*, I came to the conclusion that it was likely that the application was really being made under CPR 11 (1) (b).

¹ Pitalia was subsequent to this judgment the subject matter of an appeal to the Court of Appeal which affirmed that judgment and its analysis [2023] EWCA Civ 657.

194. Notwithstanding these matters, it seems to me that it is clear both that there is no statutory waiver here, and that even if there was, I should grant relief from sanctions. As far as the various possible deficiencies or problems which I have identified are concerned, it seems to me that:
- a. in relation to acknowledgement of service, if the Court has rejected the filing then on a proper construction of CPR 11, the 14-day period should run from an acknowledgment of service which the Court accepts rather than one which it rejects
 - b. in relation to the absence of the ticking of the relevant box, it seems to me that Ms McMahon is right and supported to a degree by the case law, to contend that CPR 11(3) makes clear that the contents of the acknowledgment of service will not affect, or be relevant to, the question of statutory waiver
 - c. in relation to the question of the precise following of CPR 11(1), it seems to me that both the general reasoning of the *Hoddinott* decision and the expansive wording used in this particular application notice and evidence in support makes clear that all facets of CPR 11 (1) are being invoked.
195. However, even if that was wrong I have carried out in my own mind a CPR 3.9 and *Denton -v- White* analysis. It seems to me in the first place that none of these matters, even if they were breaches or contraventions of the law are at all serious or substantial when seen in the overall context. However it would not matter even if they were. Although I do not see if there are in relation to some of them as being a good reason for some of them, although as far as acknowledgement of service is concerned, it seems to me that there would be good reason for a party to rely on the Court's own rejection of an attempted filing. However, again I can go onto the third stage, even if I had decided the first two stages are against the defendants.
196. As far as the third stage as to what is just in all the circumstances of the case, and even assuming that I should have decided the first two stages against the defendants, it seems to me that it clearly is just in all the circumstances of the case for the claimants to be able to advance this argument. Firstly, since, as I will come to later on, it seems to me they were clearly intimating an objection on CPR 7.5 on jurisdiction grounds throughout.
197. Secondly, the claimants have not sought to raise any of those points, and by extension have not in any way asserted any possible prejudice to them by reason of any of any of them.
198. Thirdly, if one looks at the reality and asks whether the spirit of CPR Part 11 has been complied with, it seems to me that it very clearly has been. An acknowledgement of service was sought to be put in within time, and an application under CPR Part 11 based very clearly on late service was sought to be made within 14 days of what the Court was prepared to accept. There is no conceivable way, it seems to me, that the claimant can say, the claimants can really say, that they have been misled or in any way prejudiced, and indeed they have not sought to do so.
199. None of this has disrupted the orderly process of the litigation and notwithstanding the importance of that and the compliance with Rules, Practice Directions and orders, it seems to me clearly just and in accord indeed with the decisions in *Cane*, *Sawyer*, *Macari*, *Pitalia* and *Tara*, that any sanction that was imposed should have relief granted in relation to it. It therefore seems to me that statutory waiver is no objection to the defendants' application.

Common-law Waiver

200. I now move onto common law waiver which is essence is a question of whether there has been some unequivocal submission to the jurisdiction in this case prior to, although I can see no reason as to why it could possibly have occurred after, this application being made.
201. The question which arose in my mind when initially considering the bundle and which

seems to me is being referred to, albeit without any particulars or explanation, in paragraph 18 of the claimants' submissions, is as to whether some combination of the acknowledgment of service and the making of the application of 21 July 2022, amounts to a necessary unequivocal submission by the defendants to the jurisdiction so as to amount to a common law waiver.

202. As I have read from the application of 21 July 2022, although I have considered it in its entirety, it included an application that there should be directions for the proceedings to be continued under the ordinary Part 7 procedure rather than the Part 8 procedure, and, additionally, there was sought a protective extension of time for service of substantive witness evidence.
203. In those circumstances I can see as to how it might be said that what the defendants were doing was seeking to set up a situation where they could substantively defend the proceedings, and which therefore has the possible potential to amount to being an unequivocal submission to the jurisdiction as dealt with in various case law to which I will come.

The structure of CPR7, CPR8 and CPR11

204. However, before coming to the case law, I need again to see this in the context of the relevant Rules where I have already sought to analyse Part 7, Part 8 and Part 11.
205. I remind myself in relation to Part 7 that following the service of the claim form and the particulars of claim, CPR Part 10 provides for the service either of an acknowledgment of service to be followed in due course by a defence, or for service of a defence. A combination of CPR Part 10 and CPR Part 11 effectively requires a defendant to file an acknowledgment of service within 14 days, but that the defendant then has a further 14 days in which either to make an application to dispute jurisdiction under CPR Part 11, or to file a substantive defence in accordance with CPR Part 15. If an application is made to dispute jurisdiction, under CPR 11 (9) there is no requirement to file a defence; and, if the CPR Part 11 application eventually fails, there will be directions for a further acknowledgment of service and a defence to follow that.
206. Under CPR Part 8, the provision is somewhat different. There, an acknowledgment of service has to be provided within 14 days. Also, under CPR 8.5 (3), any written evidence, which would be substantive written evidence, has to be provided with the acknowledgment of service, and with the sanction for failing to do so being contained in CPR 8.6 i.e. that the defendants would be debarred from relying on any written evidence without the permission of the Court. It may be relatively easy to obtain relief from that particular sanction, but like all sanctions it is a serious matter and the granting of relief is not to be assumed. CPR 8.8 also provides that any objections to the Part 8 procedure are to be made at the time of the filing of the acknowledgment of service albeit the CPR 8.8 does not require any application to be made by the defendants - the provision of the objections will itself be treated as being an application and considered by the Court accordingly.
207. I note, as stressed by Ms McMahon in her submissions, that, if an application to challenge jurisdiction is eventually brought under CPR Part 11, sub-rule (9) will remove the requirement for substantive evidence to have been filed at that point in time. Additionally, sub-rule (6) will then have the effect that, if the application fails, there will be directions for a new acknowledgment of service; with which CPR 8.8 objections to the Part 8 procedure can be included, and, following which, written evidence can be filed either under CPR 8.5 (3) or under other directions given by the Court under CPR 11 (6) (b).
208. Nevertheless, as Ms McMahon submits, there is something of an area of shadow in that particular situation because during the period between the filing of the (first)

acknowledgment of service and the issuing of the CPR Part 11 application, the questions as to whether or not written evidence on the substantive issues has had to have been filed, and as to whether or not any objections to the Part 8 procedure have had already to have been made, will be dependent upon whether or not the Part 11 application is actually made in due course. If it is not made, the defendants who have failed to take those steps previously will find themselves potentially subject to sanctions; being either the express one in CPR 8.6 barring them from relying on written evidence on the substantive case or a possible implied one in CPR 8.8 barring them from continuing from making objection to the use of a Part 8 procedure.

209. This is to be contrasted with the Part 7 provisions which give rise to no such difficulties for the defendant, because they can simply decide whether to file a defence at the end of the 14 days or instead to make a CPR Part 11 application with no equivalent sanction of a retrospective nature if they do not make the CPR Part 11 application but instead file a defence.

Case-Law on Common-law Waiver

210. The question of whether a common-law waiver has taken place has been considered in a number of cases.
211. In *Smay Investments Ltd & Another -v- Sachdev & Others* [2003] 1 WLR 1973 it was held that, in circumstances where the acknowledgement of service box with regards to disputing jurisdiction had not been ticked and a desire had been indicated for an extension of time to serve defence, such circumstances could amount to a voluntary submission to the jurisdiction. However, in the particular circumstances of that case there was no such submission, in particular because the relevant defendants had throughout indicated that they were intending to contest jurisdiction notwithstanding their failing to tick the relevant box on the acknowledgment of service.
212. The next relevant decision is *Global Multimedia International Limited -v- ARA Media Services* [2006] EWCA 3612 (Ch). There, an application under CPR Part 11 was made out of time, and there had been a request for an extension of time in relation to the service of the defence. In the circumstances of that particular case it was held that there had been a voluntary submission to the jurisdiction.
213. Those cases and others are considered in the decision of *AELF -v- Surinaamse* [2022] 1 WLR 1281, a decision which I also considered in my own decision in *Tara Yoga Centre*, although which latter decision it seems to me for the purposes of this case is confined to its own facts and does not add anything to the *AELF* decision. In *AELF* an acknowledgement of service was filed without ticking the intent to contest jurisdiction box. An application was made for an extension of time for service of the defence, and then out of time an application was made under CPR Part 11. That resulted in the Court considering both the question of statutory waiver and whether there should be relief from sanctions. I have considered the relevant judgment in relation to statutory waiver but it does not seem to me it adds anything to what I have already said above. However, the Court then went on to deal with the question of common law waiver.
214. The various preceding authorities and relevant elements of them were considered in paragraphs 59-64 of that judgment as follows:
“The authorities

59. In *Global Multimedia International Ltd v ARA Media Services* [2006] EWHC 3612 (Ch); [2007] 1 All ER (Comm) 1160, para. 27-31, the Chancellor identified and applied the test for determining whether there has been a submission to the jurisdiction as follows:

“27. The test to be applied in determining whether any particular conduct amounts to a submission to the jurisdiction was considered by Colman J. in *Spargos Mining NL v Atlantic Capital Corporation* [1995] reported only in “The Times” for 11th December, but quoted in full by Patten J. in *SMAY Investments Ltd. v Sachdev* [2003] 1WLR 1973 at p.1976. I reproduce the whole of the quote as set out in that paragraph 41 from the Judgment of Patten J:

“In approaching the question of submission, I have in mind the following authorities. In *Astro Exito Navagacion S.A. v. W.T. Hsu*, otherwise known, more pronounceably, as *The ‘Messiniaki Tolmi’*, [1984] 1 Lloyd’s Reports, 266, Lord Justice Goff (as he then was) at page 270, said this:

‘Now a person voluntarily submits to the jurisdiction of the Court if he voluntarily recognizes, or has voluntarily recognized, that the Court has jurisdiction to hear and determine the claim which is the subject matter of the relevant proceedings. In particular, he makes a voluntary submission to the jurisdiction if he takes a step in the proceedings which in all the circumstances amounts to a recognition of the Court’s jurisdiction in respect of the claim which is the subject matter of those proceedings. The effect of a party’s submission to the jurisdiction is that he is precluded thereafter from objecting to the Court exercising its jurisdiction in respect of such claim. Whether any particular matter, for example an application to the Court, amounts to a voluntary submission to the jurisdiction must depend upon the circumstances of the particular case.’

In *Sage v. Double A Hydraulics Ltd*, [1992] Times Law Reports, 165, Lord Justice Farquharson said
(and this is a report of the judgment which is not reported in *oratio recta*):

‘A useful test was whether a disinterested bystander with knowledge of the case would have regarded the acts of the Defendant, or his solicitors, as inconsistent with the making and maintaining of his challenge.’

In arriving at the view to be imputed to the disinterested bystander, it seems to me that one has to bear in mind that there will be an effective waiver, or a submission to the jurisdiction, only where the step relied upon as a waiver, or a submission to the jurisdiction, cannot be explained, except on the assumption that the party in question accepts that the court should be given jurisdiction. If the step relied upon, although consistent with the acceptance of jurisdiction, is a step which can be explained also because it was necessary or useful for some purpose other than acceptance of the jurisdiction, there will, on the authorities, be no submission.

If the well-informed bystander had been left in doubt because what the defendants had done was equivocal, in the sense that it was explicable on other grounds in addition to agreement to accept the jurisdiction of the court, then the conclusion must be, on the authorities, that there would have been no submission to the jurisdiction. The representation derived from the conduct of the party said to have submitted must be capable of only one meaning.”

28. Thus the test to be applied is an objective one and what must be determined is whether

the only possible explanation for the conduct relied on is an intention on the part of the defendant to have the case tried in England ...

30. I can express my conclusion quite shortly. I will assume for the purposes of the argument that both orders for service had been improperly made so that Mr. Aljadail did have grounds for challenging the jurisdiction of the court. I also recognise that solicitors instructed to advise and represent the client in relation to a claim such as this have little time to determine whether to contest the jurisdiction. Consequently, in cases of doubt the solicitor would be well advised to tick box 3 on the acknowledgement of service and obtain an extension of time under Rule 11(4) without delay. If he genuinely wishes to preserve his client's ability to contest the jurisdiction of the court he will refrain from entering on the merits of the claim or at least only do so on a clear and express without prejudice basis.

31. The solicitor for Mr. Aljadail adopted none of these courses. To any objective outside observer his conduct, and accordingly that of Mr. Aljadail from the giving and receipt of instructions on 3rd April to the letter of 10th May - a period of over five weeks - was only consistent with an acceptance of the jurisdiction of the court to determine the claims of AMS on their merits. A defendant who intends to challenge the jurisdiction of the court does not seek an extension of time for his defence, he does not advance a defence on the merits in the form of the settlement agreements, nor does he threaten to strike-out the claim if the claimant refuses to discontinue it ... In my judgment Mr. Aljadail had submitted to the jurisdiction before his solicitor's letter of 10th May was sent, and before his application for an extension of time was issued on 23rd May 2006 ..."

60.

In *SMAY Investments Ltd v Sachdev*[2003] EWHC 474 (Ch); [2003] 1 WLR 1973, which was cited in *Global Multimedia International Ltd v ARA Media Services*, Patten, J said at para. 40-43:

"40. One would have thought that, with the advent of the CPR, we could finally have adopted an all embracing and exhaustive code for dealing with challenges to jurisdiction and assigned to history arguments about implied waiver and submissions to jurisdiction, which seem to me to be an affront to any mature legal system. As it is, it still appears to be open to argument, and it has been argued in this case, that by placing a tick in the wrong box and by obtaining, necessarily or unnecessarily, an extension of time for a defence, the first defendant has waived his right to apply for a stay.

41. It seems to me that when a defendant has complied with CPR Pt 11 with a view to challenging the jurisdiction of the court, and the time for making his application under CPR r 11(4) has not yet expired, then any conduct on his part said to amount to a submission to jurisdiction, and therefore a waiver of that right of challenge, must be wholly unequivocal ..."

61.

Patten, J then quoted the decision of Colman, J in *Spargos Mining NL v Atlantic Capital Corporation* (also referred to above) and then said:

"42. That was a case in which the defendants applied unsuccessfully to set aside service of the writ outside the jurisdiction. After judgment was handed down the parties asked the

court to give directions for the service of pleadings and for discovery. The directions were given. The defendants did not make any application for leave to appeal the refusal to set service aside, nor was there any reservation of their position on jurisdiction. When they subsequently applied for leave to appeal, Colman J held that, by seeking and obtaining directions in the manner I have described, there had been a submission to the jurisdiction. Such conduct was only explicable on the basis that they intended to have the case tried in England. The same conclusion, in similar circumstances, was reached in *In re A Company* (No 002015 of 1996) [1997] 2 BCLC 1.

43. In the present case, however, the first defendant's conduct was anything but unequivocal. He indicated in the affidavit sworn on 5 December and served prior to the hearing on 6 December that he intended to contest jurisdiction. Mr Deacon indicated to Peter Smith J that the full inter partes hearing would involve a contest on jurisdiction, and the undertakings offered were only until that effective hearing. Therefore the only order sought and obtained by the first defendant from the judge on 6 December which was in any way inconsistent with the challenge to jurisdiction being maintained was the extension of time for service of the defence. That was strictly unnecessary, see CPR r 11(9), but it can only operate as an unequivocal submission to the jurisdiction if the only possible explanation for it is an intention on the part of the first defendant to have the case tried in England. In making that assessment the court cannot ignore the background circumstances as they were on 6 December. The acknowledgment of service had not yet been filed and the position was therefore as set out in the affidavit of 5 December and in counsel's skeleton argument. It is true that when the first and third defendants did later file acknowledgments of service on 16 December, these had the "intention to defend" box ticked, but they also indicated that these defendants intended to contest jurisdiction, and the notification of an intention to defend was therefore at best equivocal. Given the assertions by the first defendant in his affidavit about a challenge to the jurisdiction and the subsequent affirmation of that position in the acknowledgment of service, the position, in my judgment, could only have become unequivocal either by his failure to issue an application challenging jurisdiction within the time limit prescribed by CPR r 11(4) or by his indicating to the court in clear and express terms that he had abandoned his intention to contest jurisdiction. Neither of these events occurred. In so far as the extension of time for a defence was sought and obtained, that is not inconsistent with a continuing intention to challenge jurisdiction. On the contrary, it seems to me equally consistent with a desire to postpone any obligation to serve a defence until after the issue of jurisdiction had been determined."

62.

In *Deutsche Bank AG London Branch v Petromena ASA* [2015] EWCA Civ 226; [2015] 1 WLR 4225, the Court of Appeal referred to the decision in *Sage v Double A Hydraulics Ltd* (cited in *Global Multimedia International Ltd v ARA Media Services* above), where the defendant had applied to set aside service of a claim form pursuant to the predecessor to CPR rule 11 (RSC Order 12, rule 8), but did not attend the hearing of the application due to an oversight and so the application was dismissed. Thereafter, the statement of claim was served and before the defendant issued a further application to set aside service, the defendant applied for an extension of time in which to serve a defence. At para. 27-28 and 32 in *Deutsche Bank v Petromena*, Floyd, LJ summarised the findings in *Sage v Double A Hydraulics* as follows:

“27. Farquharson LJ delivered the judgment of the court, which also included Lord Donaldson MR and Stocker LJ. In a passage dealing with the law applicable to both appeals, he said:

“The danger inherent in the defendant doing anything further after [the defendant] has issued a summons to set aside, lies in the risk that he may be taken to have waived his right to challenge the writ or the court’s jurisdiction. It is necessary in each case to determine whether any step taken, looked at objectively, falls into this category. A useful test is whether a disinterested bystander with knowledge of the case, would regard the acts of the defendant (or his solicitor) as inconsistent with the making and maintaining of a challenge to the validity of the writ or to the jurisdiction.”

28. Applying this disinterested bystander test to the facts of the Sage case, the court regarded the issue of a summons seeking an extension of time, in the period when there was no extant challenge to the jurisdiction, as an act inconsistent with the maintenance of such a challenge. The challenge to the validity of the writ therefore failed ...

32. ... The Sage case was a case of what one might call common law waiver, the doing of an act inconsistent with maintaining a challenge to the jurisdiction. Such a waiver must clearly convey to the claimant and the court that the defendant is unequivocally renouncing his right to challenge the jurisdiction, and the application of a bystander test is plainly apt ...”

63.

As explained by the Court of Appeal in *Deutsche Bank AG London Branch v Petromena ASA*, there are two forms of submission to the jurisdiction: a statutory form of submission to the jurisdiction (pursuant to CPR rule 11(5) and (8)) and a common law submission to the jurisdiction or a common law waiver. On the basis of the authorities referred to above, the law concerning “common law waiver” or a common law submission to the jurisdiction (in the sense used in *Deutsche Bank AG London Branch v Petromena ASA*, para. 32, 46) may be summarised as follows:

(1) A defendant will be precluded from disputing the Court’s jurisdiction if the defendant voluntarily recognises or has voluntarily recognised that the Court has jurisdiction to hear and determine the claim, that is if the defendant voluntarily submits to the Court’s jurisdiction.

(2) The defendant makes such a voluntary submission to the jurisdiction if the defendant takes a step in the proceedings which in all the circumstances amounts to a recognition of the Court’s jurisdiction.

(3) There will be a submission to the jurisdiction where the defendant’s conduct cannot be explained, except on the basis that the defendant accepts that the Court has jurisdiction. That is, the defendant’s conduct must be unequivocal in submitting to the jurisdiction in order to deprive the defendant of its right to apply to dispute the Court’s jurisdiction. This is especially the case where, at the time of the relevant conduct alleged to amount to a submission to jurisdiction, the defendant has issued an application to contest jurisdiction within time or the time for filing such an application has not yet expired. Of course, if the defendant has not applied to contest jurisdiction within the requisite time, it will be treated

as having accepted that the Court has jurisdiction pursuant to CPR rule 11(5) (this is a statutory submission to the jurisdiction, as opposed to a common law waiver: *Deutsche Bank AG London Branch v Petromena ASA*, para. 36).

(4) If the defendant's conduct is both consistent with the acceptance of jurisdiction but also can be explained because it was necessary or useful for some purpose other than the acceptance of the jurisdiction, there will be no submission to the jurisdiction.

(5) Examples of conduct which might amount to a submission to the jurisdiction include the defendant applying for an extension of time in which to serve a defence or advancing a defence on the merits or threatening to strike out the claim (other than on the grounds of the Court's lack of jurisdiction). It is worth noting that under the now repealed Rules of the Supreme Court and an earlier version of CPR rule 11, the time within which an application to dispute jurisdiction had to be made was defined by reference to the period within which a defence had to be served. Now under CPR rule 11(4) the application to dispute jurisdiction must be within 14 days after filing of an acknowledgment of service, although in the Commercial Court the period is 28 days after filing of an acknowledgment of service (CPR rule 58.7(2)). Therefore, whereas an application for an extension of time in which to serve a defence may have been equivocal at least under the Rules of the Supreme Court, given that the effect of the application was to extend time in which to apply to dispute jurisdiction, this consideration no longer applies under the current version of CPR rule 11 (*The Burns-Anderson Independent Network plc v Wheeler* [2005] EWHC 575 (QB); [2005] 1 Lloyd's Rep 580, para. 30-34). However, where the relevant conduct is accompanied by a clear statement that it is without prejudice to the defendant's challenge to, or right to challenge, the Court's jurisdiction, that is likely - although not necessarily, as it depends on the facts - forestall a submission to the jurisdiction (*SMAY Investments Ltd v Sachdev*; *Winkler v Shamoan*[2016] EWHC 217 (Ch)). Similarly, where the defendant has indicated an intention to dispute jurisdiction in its acknowledgment of service, that will often - but again it depends on the facts - be sufficient to prevent a defendant from being treated as having submitted to the jurisdiction.

(6) The mere indication of an intention to defend the claim, as opposed to an indication of an intention to contest the Court's jurisdiction, in ticking or checking the relevant box in the acknowledgment of service form is of itself not sufficient to amount to a submission to jurisdiction, without additional conduct which demonstrates an unequivocal intention to submit to the jurisdiction, such as failing to apply to dispute the Court's jurisdiction within the requisite time period imposed by the Civil Procedure Rules or a statement or conduct which is fundamentally inconsistent with such an intention to dispute jurisdiction. This is made plain by CPR rule 11(3) which provides that "A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction".

(7) The timing of the conduct alleged to constitute a submission to the Court's jurisdiction is important. If the conduct took place before an application contesting the Court's jurisdiction was intimated or issued, then it is more likely to be an unequivocal submission to the jurisdiction; if the relevant conduct occurred whilst there was a pending application to contest the Court's jurisdiction or a reservation of the right to do so, then it is unlikely, perhaps very unlikely, to constitute a submission to the jurisdiction (see e.g. *Zumax Nigeria*

Ltd v First City Monument plc[2016] EWCA Civ 567; [2016] 1 CLC 953, para. 44-51). In each case, however, it is dependent on an examination of all of the facts.

(8) The assessment of the defendant's conduct must be undertaken objectively, sometimes said to be from the perspective of the disinterested bystander.

64. I confess that I share similar concerns to those of Patten, J in SMAY Investments Ltd v Sachdev about the ease with which a defendant might be treated as having submitted to the jurisdiction and thereby lose the right to contest jurisdiction, especially where the time for making an application to dispute jurisdiction has not yet expired. Nevertheless, the law in this respect as described above is well settled.”

215. The Judge's conclusion was that, applying the objective approach as to whether or not there had been an unequivocal submission to the jurisdiction, in the circumstances of that case there had been such an unequivocal submission. This was in particular because there had been an application to extend time for service of the defence in the absence of any indication of an intention to contest jurisdiction. This is set out in paragraphs 72-79 of that judgment:

“72. Of course, for this purpose, I must consider SLM's conduct objectively. It seems to me that any subjective intention entertained by SLM is not relevant to this exercise. Even if it was, it is but one factor to be considered.

73. In my judgment, SLM has submitted to the jurisdiction by reason of (a) its application (and request) on 8th July 2021 for an extension of time for the service of its Defence until 30th July 2021, (b) its earlier indication in the First Acknowledgment that SLM intended to defend the claim (rather than to contest jurisdiction), and (c) there had been no indication by SLM that it intended to contest jurisdiction prior to 23rd July 2021 and no indication of a reservation of rights to do. I should also make clear that I would have come to the same conclusion even if I ignored the indication in the First Acknowledgment; I mention this as it might well be legitimate to ignore it, because it was not an acknowledgment of service compliant with CPR Part 10. My reasons for this decision are as follows.

74. First, the Court has traditionally considered an application for an extension of time in which to serve a defence to be inconsistent with an intention to contest jurisdiction, as in Global Multimedia International Ltd v ARA Media Services, para. 30-31. The position in SMAY Investments Ltd v Sachdev was different; in that case, the indication of an intention to defend the claim in the acknowledgment of service and the application and obtaining of an extension of time in which to serve a defence were held to be equivocal conduct, in circumstances where both steps were preceded by a statement made in an affidavit and during a hearing before the Court that the defendant intended to contest the Court's jurisdiction.

75. Second, it is apparent from the scheme adopted by CPR rule 11 that, where an application is made to contest jurisdiction, there is no requirement to serve a defence before the hearing of the application (CPR rule 11(9)) and, moreover, if the application is unsuccessful, the defendant must file a further acknowledgment of service and the Court shall make directions for the filing and service of a defence (CPR rule 11(7)). The service of a defence is an answer to the claim made against the defendant on the merits. It follows that an application to extend time in which to serve a defence is a step in the proceedings whose

object is to determine the merits of a claim. In this case, SLM sought an extension of time for the service of its Defence until 30th July 2021. Such an application indicated that SLM would serve its Defence on the merits within the space of some three weeks; there was no indication that the extension of time was intended to postpone the service of the Defence until the Court's disposal of any application to contest jurisdiction. Thus, in *SMAY Investments Ltd v Sachdev*, the facts were materially different in that Patten, J said that "In so far as the extension of time for a defence was sought and obtained, that is not inconsistent with a continuing intention to challenge jurisdiction. On the contrary, it seems to me equally consistent with a desire to postpone any obligation to serve a defence until after the issue of jurisdiction had been determined". In the present case, there was no suggestion that the Defence was to be deferred until after the issue of jurisdiction was determined by the Court.

76. Third, on the evidence, I cannot think of an explanation which underlies SLM's application for an extension of time in which to serve its Defence to 30th July 2021 which is consistent with an intention to contest jurisdiction. The only explanation offered by SLM in its evidence was that it was "a protective measure to safeguard the Defendant's position" (paragraph 14 of Mr Vrede's witness statement). During the hearing, Mr Stewart Coats on behalf of SLM relied on the facts that (a) W Legal had failed to inform Bird & Bird that a request for default judgment had been made by AELF; (b) W Legal had failed to inform Bird & Bird that AELF challenged the validity of the First Acknowledgment; (c) W Legal had failed properly to engage with Bird & Bird's informal request for an extension of time; and (d) the application for an extension of time was clearly intended to be a protective measure to avoid a default judgment whilst Bird & Bird were reading into the case and it was not a clear expression of SLM's intention to abandon any right to challenge to jurisdiction.

77. I do not think that these considerations ameliorate the inconsistency between the application to extend time for the service of the Defence on the one hand and any intention to contest jurisdiction on the other hand. Indeed, it seems to me that any conduct motivated to forestall the entry of default judgment does not indicate an intention to contest jurisdiction. Indeed, if an application to contest jurisdiction had been made, there would have been no need to serve a defence (CPR rule 11(9)). There may be circumstances where steps taken to prevent a default judgment being entered is consistent with an intention to contest jurisdiction (cf. *Winkler v Shamoony* [2016] EWHC 217 (Ch), para. 48, where the defendant applied to set aside a default judgment). However, in the present case, no reference was made by SLM in Part C of its application notice for an extension of time for the service of the Defence and, as far as SLM was aware, there was no reason why a default judgment could be entered when it had filed its First Acknowledgment the previous week and was not aware of any defect in the First Acknowledgment until 22nd July 2021.

78. Fourth, there was no hint of an attempt by SLM to reserve its rights, or to make the application without prejudice to, any intention to contest jurisdiction. I appreciate that SLM instructed solicitors in England only shortly before the application was made and that Bird & Bird were in a difficult position (as observed by the Court in *Global Multimedia International Ltd v ARA Media Services*, para.(30) where they had been only recently instructed and had a looming deadline for the service of the Defence, but this is not sufficient to explain why the application to extend time (together with the indication made in the First Acknowledgment to defend the claim) could be said to be consistent with

an intention to contest jurisdiction.

79. In these circumstances, and subject to the issue which I consider below, in my judgment, SLM's application to dispute the Court's jurisdiction should be dismissed by reason of SLM having submitted to the Court's jurisdiction by way of a "common law waiver".

Principles of Common-law Waiver

216. Ms McMahon submitted to me that a number of principles can be extracted from those citations from the *AELF* decision. In circumstances where I have had no opportunity as a result of their non-attendance to hear any specific submissions from the claimants, I have sought to consider those various submissions carefully, but have come to the conclusion that each of them is made out.
217. Ms McMahon submitted as follows: Firstly, that the behaviour of the defendants must be assessed objectively, being essentially from the position of a disinterested, well-informed bystander. It seems to me that that submission is supported by numerous references within the *AELF* case. It appears in the condensed summary of elements of the *Smay* case in paragraph 59 of the *Global* case and the citation there of a passage from *Sage -v- Double A Hydraulics Limited* [1992] TLR 165.
218. Secondly, Ms McMahon submitted that there will only be a common law waiver where the behaviour of the defendant is said to indicate waiver is wholly unequivocal. It seems to me that that is the case, at least in relation to a point of time where the time periods under CPR Part 11 were still running as was the case here. It seems to me that that is clearly stated in paragraph 41 of the *Smay* decision cited at paragraph 60 of *AELF*.
219. Thirdly, Ms McMahon submitted that the behaviour will only be unequivocal if it is only consistent with waiver and will not be unequivocal if it is consistent with, or explicable by some other intention, including preserving a particular position. It seems to me that that is both inherent within the concept of equivocality itself, but also specifically stated in paragraph 63(3) of *AELF*, and also repeated in paragraph 63(4).
220. Fourthly, she submitted that the ticking of the box on the acknowledgment of service marked, "I intend to defend the claim", rather than that indicating an intention to challenge jurisdiction is not on its own evidence of waiver. It seems to me that that also is made clear by the case law and is specifically stated at paragraph 63(6) of the *AELF* judgment.
221. Fifthly, she submitted that conduct that takes place before a defendant intimates contesting jurisdiction is more likely to be an unequivocal submission to jurisdiction. It seems to me that that also is specifically stated in paragraph 63(7). Whilst it is made clear in that sub-paragraph that this involves an examination of all of the facts; it seems to me that, as it did to the Judge in *AELF*, and indeed the Judge in *Smay*, that if a person is intimating contesting jurisdiction then they cannot be saying at the same time that they are determined to submit to it.
222. Sixthly, she submitted that seeking an extension for time for service of a defence may in certain circumstances evidence an intention to defend the claim substantively rather than challenge jurisdiction, but not always. It seems to me that that is also right as can be seen by the outcome in *AELF* where such seeking of an extension was held to amount to an unequivocal submission to the jurisdiction, whereas in *Smay* it was held not to do so.
223. Further it seem to me, having considered the *AELF* judgment generally, and in particular those elements which I have cited, that a key question to ask, although all the circumstances need to be considered, is whether when some intimation such as by seeking an extension of time for service of a defence is made by a defendant, which would point to an intention by

them to contest the claim substantively, as to whether at or by that time the defendant is also saying that they are intending to contest jurisdiction, or at least questioning whether the Court has and should be exercising jurisdiction over the case.

224. That is all very fact-specific because it may be that the degree, either in terms of forcefulness or in terms of time over which it takes place, of the intimation to query or contest jurisdiction will be sufficiently outweighed by an intimation of, or an application with regards to, something which is only consistent with an intent to substantively contest the claim, and thus to submit to the jurisdiction.
225. However, even in those circumstances I have to remind myself that the question is whether the defendants have engaged in conduct which is wholly unequivocal, rather than merely conduct which can be seen to be inconsistent with contesting jurisdiction. I bear in mind that any particular conduct may appear to be directed towards a number of potential alternative outcomes, rather than simply only being explicable by the defendant having determined to substantively contest the claim on its merits and thus submit to the jurisdictions.

Whether there has been a Waiver at Common-Law and Unequivocal Submission to the Jurisdiction

226. I turn to Ms McMahon's submissions that there has been no unequivocal submission by the defendant to the court having and exercising jurisdiction in the circumstances of this case.
227. Ms McMahon has referred me to a number of matters. In particular she has referred me to the correspondence which preceded and then continued through, the making of the application of 21 July 2022. She refers me in particular: firstly, to the assertion in the initial email from Ms Guiver of 5 July 2022 that the proceedings were said to have in some unspecified way been previously filed and served by the claimants themselves; and also to the fact that Ms Savage very soon afterwards raised the question as to what it was said had been done, this being in her email of 5 July 2022, timed at 14.13pm, and in the days and weeks thereafter repeatedly asked for a response with regards to this and other matters; and where, although responses were promised, none were forthcoming directed to this point.
228. Secondly, Ms McMahon relies on the defendants' actually raising the time of service point, and the question as to whether or not there was valid service within the permitted timescale in the email of 12 July 2022, timed at 15.16pm. A response to that particular issue was again sought, again and again, starting with the 5 July 2022 email, and repeated in the email of 19 July and the email of 20 July (which itself attached a copy of the application notice which was to be filed and issued on 21 July 2022).
229. Ms McMahon submits that in those circumstances, although she accepts that the acknowledgement of service which was also sent did not tick the intent to contest jurisdiction box, and that both the acknowledgment and service and the application sought some sort of extension of time for service of evidence generally, there was an original and continuing intention expressed to at least query and potentially challenge jurisdiction; and that, in those circumstances, the defendants' conduct viewed overall could not be seen to have involved anything which was unequivocal.
230. She further submits that the Court should approach this Part 8 matter, as far as the defendants are concerned, in something of a more relaxed and less strict fashion than it would in a Part 7 context where an extension is sought for service of a defence; although she accepts that, under the modern form of CPR11, in a Part 7 context an application for extension of time for service of a defence is unnecessary where a challenge to jurisdiction is considered, and thus such an application might be regarded as an unequivocal acceptance of jurisdiction.
231. She reminds me that, for the reasons which I have already given, all that a Part 7 Claim

defendant has to do is file an acknowledgment of service, and they have a further 14 days in which either to bring a Part 11 application or to serve a defence. If no Part 11 application is brought, the defendant is not prejudiced, they can simply serve a defence. She draws my attention to the difference between that and the Part 8 situation where, given that the filing of an acknowledgment of service is filed does not give rise of itself to any extension of time for service of substantive evidence or contesting of the use of the Part 8 procedure, and so that then the defendant then becomes subject to sanctions, assuming they do not file evidence or make an application for extension of time or to contest the use of the Part 8 procedure at the same time as they acknowledge service, unless they subsequently make a Part 11 application. Thus, if defendants have wished to delay their consideration of what course to take for the full period allowed by Part 11 of 14 days (to filing of acknowledgment of service) plus 14 days thereafter (CPR11(4)(a)), they are put in the position effectively of being forced to make a Part 11 application because if they do not they will then be sanctioned retrospectively (i.e. as a result of not filing evidence or an application to contest the use of the Part 8 procedure when filing the acknowledgment of service). That is a problem for a defendant which does not exist in the Part 7 context where they can take a full decision as to what to do within the 14 days following their filing the acknowledgment of service.

232. She therefore submits that it is much more obviously unequivocal to seek an extension of time for service of a defence in a Part 7 claim, than to do in a Part 8 claim, such as this, what was part of what was set out in the application notice of 21 July 2022 being to seek an extension of time for service of evidence under the Part 8 procedure.
233. She therefore submits that in all these circumstances, this is not the situation of unequivocality, it is more akin to *Smay* than to *AELF*.
234. As I have said, I have not had the benefit of any detailed submissions, or indeed any real submissions from the claimants' side, although that seems to me to be wholly their fault to failing to attend these hearings. I have balanced everything up together in my own mind, in circumstances where, since this is jurisdictional, and the defendants' application will effectively deprive the claimants of their ability to pursue the claim under this claim form, and, perhaps, as a result of limitation issues, altogether. It is a distinctly serious matter.
235. I do in fact consider that the case somewhat close to the relevant line and which is why I have spent so much time dealing with this aspect of it. Nevertheless, I conclude that I should accept Ms McMahon's submissions that what has occurred here has not been an unequivocal submission to the jurisdiction.
236. As far as the acknowledgment of service box is concerned, it is quite clear from *AELF* that a failure to tick the intention to contest jurisdiction is not enough of and on its own to amount to an unequivocal submission to the jurisdiction, even though it has to be seen as part of the overall circumstances.
237. Further, it does seem to me in the peculiar circumstances of this case, that there was a real and constant intimation by the defendants to query jurisdiction which can be said to go at least to an extent to an intimation of an intention to contest jurisdiction or, at least, and which is the most important point, not to unequivocally submit to it. The claimants raised from a very early stage, and before the occurrence of any matter which could be said to be an unequivocal submission to jurisdiction, points about service; and which included a specific point that the claim form had not been served within the permitted time. This was a matter in relation to which they continually sought a response from the claimants, and which must, to my mind, indicate that they were at least querying this aspect; and, by extension, querying whether there had been good service; and, by further extension, querying whether the Court had or should exercise jurisdiction; and thus not accepting

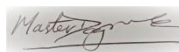
- unequivocally that such was the case and not unequivocally submitting to the Court's jurisdiction.
238. As far as the application which they did make is concerned, being for the procedure to be converted to Part 7 from Part 8, it may well not have been necessary in any event bearing in mind the actual wording of CPR 8.8. However, the essential application was simply to change the procedure. That itself is not necessarily inconsistent with a contest to jurisdiction because it merely related to the format of the claim, and where either format could be met by a jurisdiction challenge, rather than of itself stating that the defendant proposed to substantively defend the claim.
239. The request for an extension of time for evidence goes somewhat further and, it seems to me could, in various circumstances, amount to an unequivocal submission to the jurisdiction. However, I have to balance against that: firstly, the procedural scenario laid down by the Rules in Part 8 circumstances, as I have covered earlier in this judgment, and which leaves a defendant who is wishing to contest jurisdiction in what at first sight is a somewhat unsatisfactory shadowy period where they need to have some certainty that they are not going to be simply subject to a sanction in relation to their ability to file substantive evidence by having waited for the permissible period under the Rules to take a decision as to whether or not to make a jurisdiction challenge. Thus, an application for an extension of time to file substantive evidence is consistent with the defendant not yet having decided either way as to whether or not to make a jurisdiction challenge and is therefore not unequivocal.
240. Secondly, and it seems to me more importantly, both the application notice and the accompanying acknowledgement of service have to be seen in the context of the emails which had already been written querying jurisdiction. Indeed, when those documents were first provided to the claimants that was under cover of an email which was continuing to seek a response to the jurisdictional queries which the defendants had raised. There is an essential inconsistency between the defendants continuing to seek a response on those service and jurisdiction, and the defendants having in some way or other unequivocally submitting to the jurisdiction, when in which latter circumstances they would not require any response to such former matters which would simply be irrelevant occurrences in the past. I also note that when the sealed application notice of 21 July 2022 was served, it was provided together with an unsealed copy of the application notice for 28 July 2022 which would make absolutely clear to the objective recipient that the jurisdictional point was being taken.
241. I have had to balance all of these matters together in circumstances where I am looking at the situation, in the general context and knowledge of the matters with which the informed bystander would have knowledge, with the question in my mind of whether the defendants acted in a manner which would be seen by such an informed reasonable bystander to amount to an unequivocal acceptance of and unequivocal submission to the Court's jurisdiction. In my judgment, for all the reasons which I have set out above, the defendants have not.

Conclusion

242. I will therefore relevant declaration; and which it seems to me, in the light of the case-law, ought to be that the Court declares that it will not exercise any jurisdiction which it may have. I will make a consequential order setting aside the claim form.

End of Judgment

Approved



24.4.2024

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Ubiquis hereby certify that the above is an accurate and complete record of the proceedings or part thereof