



Neutral Citation Number: [2024] EWHC 2 (KB)

Case No: QB-2021-002980

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/01/2024

Before:

MASTER STEVENS

Between:

Houda Chehaib

Claimant

- and -

King's College Hospital NHS Foundation Trust (1)

Defendants

Robert Dudley Cary Elwes (2)

Richard Phillip Selway (3)

Jeremy Pendlebury (instructed by Scornik Gerstein) for the Claimant
Francesca O'Neill (instructed by Gordons Partnership) for the Defendants

Hearing dates: 18th September 2023

Approved Judgment

This judgment was handed down remotely at 12.30pm on Friday 5th January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MASTER STEVENS

MASTER STEVENS
Approved Judgment

Double-click to enter the short title

Master Stevens

Background

1. The claimant issued a claim on 2nd August 2021 for damages for alleged clinical negligence suffered at the hands of 3 defendants in relation to private surgery at King's College Hospital on 1st August 2018. A lengthy pre-action protocol letter of claim was despatched to the defendants only a few days before the issue of the claim in the High Court due to the imminent expiry of the limitation period. Thereafter several extensions of time for service of proceedings were requested and approved by this court to enable the defendants to complete their investigations and prepare letters of response under the protocol. The final extension of time was ordered on 1st March 2023 to expire on 30th March 2023. On 1st March 2023 when consenting to the request for the extension, the legal representatives for the second defendant wrote advising the claimant's solicitors that service should not be effected via e-mail but by post. The first and third defendants were then validly served with the proceedings but when the claimant's solicitor turned their attention to service upon the second defendant, they overlooked the information regarding email service from the second defendant's solicitor. Instead, on 30th March 2023, the final day of validity of the claim form, the claimant's solicitors emailed the proceedings to the second defendant's solicitors. Upon being made aware of the error by the second defendant's solicitors on 12th April, when they also served an acknowledgment of service contesting the jurisdiction of the court on the basis that the claim form was no longer valid, the claimant's solicitors then attempted to re-serve proceedings by post the following day, and advised that an application for relief would be made; that application was issued 1 week later and is the subject of this application.
2. The claimant's application notice was slightly curiously phrased as a request for "*an order granting relief from sanctions*" and for "*a declaration that the amended Claim Form... has been validly served on all Defendants*". The witness statement in support sought relief pursuant to CPR 3.9 suggesting that, without trivialising the errors, the breach was not serious or significant because there was no prejudice to the second defendant and the claimant had always communicated with them by e-mail; it was suggested the breach could therefore be regarded as technical in its nature. The error was explained and it was said that it would be unjust in all the circumstances of the case not to grant relief because the breach had not substantively impacted the litigation, no hearing dates had been imperilled, the second defendant had always been aware that proceedings had been instigated and had consented to extensions of time for service, and finally that it "*would be a disproportionately punitive sanction and it would have the effect of granting the defendants a windfall*" if relief was not granted. However, the skeleton argument filed by counsel sought relief pursuant to CPR 3.10 in the alternative. On the day of the hearing itself, and having reviewed the second defendant's skeleton argument, the claimant contended for a third alternative route to remedy pursuant to CPR 6.15(2); the second defendant confirmed that they did not object to me considering that further provision.
3. On 24th April 2023, the second defendant formally contested and responded to the claimant's application by issuing a cross-application for strike-out of the claim. In their witness statement in support, the second defendant asserted at [19] that "*there is no reasonable reason for the Claimant's solicitors not to have served the claim form by a permitted method within the generous length of time (since December 2021) the Second Defendant had agreed for service of the Claim Form*". They referenced that there had

already been 4 extensions of time for service. They suggested that CPR 3.9 was the wrong test and that any application to perfect service should have been made by way of CPR 6.15.

4. The draft order in support of the second defendant's cross-application issued on 24th of April 2023 more particularly sought:
 - a) a declaration pursuant to CPR part 11 that the court has no jurisdiction or will not exercise its jurisdiction; and/or
 - b) the claimant's claim against the second defendant is struck out pursuant to CPR 3.4(2) (c) on the basis that the claimant has failed to comply with the civil procedure rules.
5. Whilst the 2 applications were listed for hearing together, submissions were very brief, and made relatively early on during the hearing, regarding the jurisdiction application of the second defendant, as set out at 4a) above, so I will deal with that first.

The defendant's jurisdiction application

6. In short, the second defendant argued that the hearing before me, and the proceedings against them, are now null and void as the claim form expired before proper service. As such they maintained that I should give "*serious consideration*" to making that finding and terminating the rest of the hearing. They questioned the purpose of CPR 11, and the relevance of the choice of tick boxes on the acknowledgment of service form, if a jurisdiction challenge could not be brought in a case such as this.
7. The claimant argued quite simply that if it was good law that failure to validly serve proceedings prior to expiry of the validity of the claim form rendered the proceedings null and void, the point would have been taken in the plethora of cases within my authorities bundle where similar problems had arisen with service of a claim form.
8. Having very recently read the judgment in *Pitalia & Anor v NHS England* [2023] EWCA Civ 657, which was not contained within the hearing bundle, I have regard to the judgment of Bean LJ at [21] who reviewed earlier authority and cited from it that it is incorrect to assume "*that there is an analogy between the expiry of a claim form and the death of a living creature. Plainly in some circumstances an expired claim form can be revived*". Not only am I bound by that decision, but I also believe it would be an oversimplistic view of CPR 11 to suggest that it stands alone or can be considered in isolation from CPR parts 6 and 7; the rules are intended to be viewed holistically as they form an integrated code of procedure. I also find force in the claimant's submission that were it otherwise, such an apparently simple solution, if the correct legal one, would have already found its way into the multiple prior judgments on the important topic of failure to serve a claim form correctly. Accordingly, I dismiss that part of the second defendant's application and will say no more about it. The second part of their application is better considered once I have determined the claimant's application.

Relevant provisions within CPR relating to potential remedies to correct errors in service of a claim form

9. The White Book contains references to numerous cases brought pursuant to CPR 7.6 (3), 6.15(2) and 6.16 where there has been invalid service of a claim form and the specific rules which claimants have sought to rely upon to try to make good the defect, with varying degrees of success. In this application, the claimant does not make their primary 2 arguments using any of those well-trodden paths. None of the authorities presented to me in the bundle recognised CPR 3.9 on the facts of those particular cases, to be the correct route, as chosen by the claimant; however within those authorities there was reference to 4 previous cases where CPR 3.10 had been deployed to correct an error of procedure regarding service of originating process. The claimant contends that the reason for their particular choice is because they are in an unusual position where there is:
 - a) No rule governing the validation of service ostensibly by a permitted route but one in contravention of the practice direction (i.e., what should happen when a claimant uses a permitted method but in the wrong circumstances).
 - b) No rule prohibiting the validation of service of a claim form ostensibly by a permitted method of service, but in circumstances contrary to the practice direction.
10. The claimant recognised that rules of service governing the claim form are “*bright line rules*” requiring stricter observance than many other rules, but nonetheless considered that the sanction of a strike out is too draconian and disproportionate to be a just outcome for the claimant on this application.
11. Before turning to consider submissions in detail, I consider it helpful to remind myself of the rules normally relied upon in other cases, which emphasise the very special regard that the court has to the importance of serving the claim form within time.

CPR 7.6(3) extensions of time for serving a claim form

12. This rule provides that applications to extend time should be made within the 4-month period of validity of the claim form after issue and, pursuant to 7.6 (3), that an order granting an extension can only be made upon applications brought after that time if there has been default by the court in serving the claim form, or the claimant has taken *all reasonable steps* to comply with the usual time limits but has been unable to effect service. In either situation the claimant needs to have *acted promptly* in bringing the application. Carr LJ (as she then was) helpfully summarised the principles in *ST v (t/a) Brittany Ferries* [2022] EWCA Civ 1037at [62]:
 - a) *the defendant has a right to be sued (if at all) by means of originating process issued within the statutory period of limitation and served within the period of its initial validity of service. It follows that a departure from this starting point needs to be justified;*
 - b) *the reason for the inability to serve within time is a highly material factor. The better the reason, the more likely it is that an extension will be granted. Incompetence or oversight by the claimant or awaiting some other development (such as funding) may not amount to a good reason. Further, what may be a sufficient reason for an*

extension of time for service of particulars of claim is not necessarily a sufficient reason for an extension for service of the claim form;

- c) *where there is no good reason for the need for an extension, the court still retains a discretion to grant an extension of time but is not likely to do so;*
 - d) *whether the limitation period has or may have expired since the commencement of proceedings is an important consideration. If a limitation defence will or may be prejudiced by the granting of an extension of time, the claimant should have to show at the very least that they have taken reasonable steps (but not all reasonable steps) to serve within time;*
 - e) *this discretionary power to extend time prospectively must be exercised in accordance with the overriding objective.”*
13. The notes to the White Book reference cases where the defendant was made aware of the claim within time but not through the proper service routes, as in this case, and the court has declined to extend time. For example, *Elmes v Hygrade Food Products PLC* [2001] EWCA Civ 121 (“*Elmes*”) where the claim form was sent by fax to the defendant's insurers rather than the defendant on the last day of the 4-month validity period. The Court of Appeal declined to exercise their discretion in the claimant's favour. A similar outcome followed in *Nangleman v Royal Free Hampstead NHS Trust* [2001] EWCA Civ 127 (“*Nangleman*”), where the claim form was served on the defendant when solicitors had been nominated.

CPR 6.15 (1) and (2) service of the claim form by an alternative method or at an alternative place

14. This rule succinctly provides that:
- (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.*

The rule goes on to provide that any application must be supported by evidence.

CPR 6.16 Power of the court to dispense with service of the claim form

15. For completeness' sake, I mention this rule briefly simply because the claimant's skeleton argument referenced the rule whilst not relying upon it. The rule makes clear at 6.16(1) that it is only to be deployed in exceptional circumstances. At 6.16(2) the rule also provides that such an application may be made at any time. However, the notes in the White Book at 6.16.3 clearly set out that a retrospective order should not be made where the statutory limitation period has already expired, as to do so would circumvent what is forbidden by the provisions at rule 7.6 (3). These notes are based on the decision in *Godwin v Swindon BC* [2001] EWCA Civ 1478.

16. The decision in the more recent case of *Lacey v Palmer Marine Services Limited* [2019] EWHC 112 (Admiralty) followed previous authority in making clear that where the claim form has not been served in time an application should not be made under CPR rule 6.16 to dispense with service, but the application should be made pursuant to rule 7.6 (3).

CPR 6.3 Acceptable methods of service of a claim form

17. CPR 6.3 sets out acceptable methods of service for claim forms and at 6.3 (1) (d) that includes service by electronic communication in accordance with practice direction 6A. The practice direction further provides that where a solicitor acting for a party has indicated in writing they are willing to accept service by electronic means then it is acceptable to use the email address which they provide for service of the claim form.

CPR 3.9 Relief from sanctions

18. This well-known rule provides that on an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances of the case to enable it to deal justly and at proportionate cost as well as reflecting the need to enforce compliance with court rules. The 3-stage test for consideration of such applications as set out in *Denton v TH White Ltd* [2014] EWCA Civ 906 (“*the Denton test*”) is now one of the most well-known tests in civil procedure. The court has to consider first whether there was a serious or significant breach and then, if so, go on to consider whether there was a good reason for it. The final stage is to consider all the circumstances of the case including the need for litigation to be conducted efficiently and proportionately, as well as the need to enforce compliance with rules and practice directions, so as to enable the court to deal justly with the application.

CPR 3.10 - general power of the court to rectify matters where there has been an error of procedure

19. This rule provides that “*where there has been an error of procedure such as a failure to comply with a rule or practice direction-*

(a) the error does not invalidate any step taken in the proceedings unless the court so orders;

(b) the court may make an order to remedy the error”.

Both parties acknowledged that CPR 3.10 should not be relied upon where any of the provisions set out above (rules 7.6(3), 6.15(2) or 6.16) would expressly apply. The parties differed, at least under the claimant's primary case, as to whether rule 6.15(2) might be an appropriate route to consider in the particular factual context of this case, although the second defendant cautioned that I should be very slow to do so in any event.

Authorities cited

***Abela and others v Baadarani and another* [2013] UKSC 44 (“*Abela*”)**

20. This claim was brought for damages for alleged fraudulent and dishonest activity in relation to a contract for the purchase of shares. It was thought by the claimants' solicitor that the first defendant resided at a particular address in Lebanon, and the court granted permission to serve the party at that address out of jurisdiction. That belief was based on what the claimants' Lebanese lawyer had been told by others, and the fact that he had previously effected service of legal proceedings there a couple of years earlier by leaving documents with the first defendant's wife. That same lawyer had arranged personal service of the new proceedings, at the same address, over a period of 4 consecutive days during official working hours, but the first defendant could not be located at the property. Thereafter further papers (not in translated form as required by the court's permission order) were served at the offices of the first defendant's Lebanese lawyer in Beirut. In parallel, the claimants' solicitors continued to try to effect service through diplomatic channels using the foreign process section of the High Court. Meanwhile the first defendant's lawyer returned the documents received at his business address stating that the address cited in the court's order was not one where the first defendant had, to his knowledge, ever lived or had a connection with, and confirming he had never had instructions to accept service of documents in these particular proceedings; he gave no indication where the first defendant could be served.
21. The claimants applied without notice under CPR rule 6.15 and/or 6.37(5), (the latter provision relating to service out of the jurisdiction which is not relevant to the dispute before me), for an order that the steps already taken to serve the claim form amounted to good service, and/or that there be permission to serve the claim form and other documents by alternative means, namely on the first defendant's lawyers, and for an extension of time for service. There were in fact numerous interim applications and the matter went on appeal to the Supreme Court.
22. The relevant provision for me to focus on is the court's interpretation of CPR 6.15. Lord Clarke held that whether there was good reason to order that the delivery of the proceedings to the first defendant's lawyer, was to be treated as good service, was essentially a matter of fact. Further, that it was not appropriate, "*to add a gloss to the test by saying that there will only be a good reason in exceptional circumstances*". He went on to add at [36], "*The mere fact that the defendant learned of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under rule 6.15 (2)*". He decided it was however a critical factor. He continued, "*The particular significance of rule 6.15(2) is that it may enable a claimant to escape the serious consequences that would normally ensue where there has been mis-service and, not only has the period for service of the claim form fixed by CPR rule 7.5 run, but also the relevant limitation period has expired*". Lord Clarke emphasised that while service has a number of purposes, the most important is to ensure that the contents of the document served are communicated to the defendant. It was also held that the relevant consideration is whether there was good reason for the court to validate the method of service used, rather than whether the claimant had good reason to choose that method. He declined to criticise the claimants for the 3.5-month delay in instructing counsel to settle particulars following issue of the claim form, as the proceedings were delivered to the defendant's lawyer within the 6-month validity of the claim form.
23. In this case other relevant factual aspects considered were the attempts to serve through diplomatic channels in Lebanon which had proved impractical, and which would be expensive and cause more delay if further pursued, the unwillingness of the defendant

to cooperate with service by providing an address was also seen as “*highly relevant*”. It was said that a critical point in the determination was that the documents were delivered within the validity of the claim form and brought to the defendant's attention. There was no evidence that the claimants could have discovered the correct personal address of the first defendant, and their belief as to the correctness of the address they had used initially was accepted.

Barton (Appellant) v Wright Hassall LLP (Respondent) [2018] UKSC 12 (“Barton”)

24. In this case a litigant in person purported to serve a claim form on the defendant’s solicitors by e-mail, but they had not indicated that they were prepared to accept service by that method. The court had to consider whether to retrospectively validate service.
25. The only communication which the claimant had with the defendant’s solicitors, apparently until the last day before the expiry of the claim form, was an e-mail concluding with the words, “*I will await service of the Claim Form and Particulars of Claim*”. On a subsequent application, the claimant requested an order confirming that his method of service had complied with the rules because the defendant's solicitors’ e-mail amounted to “*an indication*” that they would accept service by e-mail, alternatively retrospective validation of service under CPR rule 6.15 (2). His final request was for an extension of the validity of the claim form. He failed on all 3 grounds and Lord Sumption on the final appeal provided some helpful pointers as to how the discretion until CPR 6.15(2) should be exercised. He noted at [8] that disciplinary factors are less important (than under CPR 3.9) and at [9] that decisions are essentially “*a matter of factual evaluation, which does not lend itself to over-analysis or copious citation of authority*”. Further, at [10] that “*attempts to codify this jurisdiction are liable to ossify it in a way that is probably undesirable*” but that the main relevant factors likely to be whether the claimant has taken reasonable steps to effect service in accordance with the rules whether the defendant or his legal representative were aware of the contents of the claim form when it expired, and whether they would suffer prejudice if there was retrospective validation of non-compliant service. None of these factors were said to be decisive in themselves.
26. In reviewing what the lower courts had decided, Lord Sumption made it plain that the court’s exercise of discretion when applying rule 6.15, had been based upon an evaluation of the relevant facts, such that a more senior court would not usually disturb those decisions unless a judge had erred in principle, or reached a conclusion that was plainly wrong. He went on to explain at [16] that it is not enough for a claimant to show that they have successfully brought the claim form to the attention of the defendant, “*Otherwise any unauthorised mode of service would be acceptable, notwithstanding that it fulfilled none of the other purposes of serving originating process*”. He referenced the need for a bright line rule to determine the exact point from which time runs for the taking of further steps. He also referenced at [17] the practical difficulties for a law firm in monitoring electronic mail receipts, which may be voluminous, and may not automatically be distributed to appropriate people who are “*standing in for the person primarily responsible for the matter when he is unable to attend to such communications as they arrive*”.
27. Lord Sumption accepted at [21] that it is not necessary under CPR 6.15 that the claimant should have left no stone unturned in attempting service; he just needed to “*take such steps as are reasonable in the circumstances to serve the claim form within*

its period of validity". The problem for Mr. Barton, as identified by Lord Sumption, was that he had made no attempt to serve the proceedings in accordance with the rules, "All that he did was employ a mode of service which he should have appreciated was not in accordance with the rules". Lord Sumption declined any suggestion of making a finding that the defendant was simply playing technical games in taking the point on invalid service, appreciating as he did so that it was hardly conceivable that a client would authorise the deprivation of the possibility of a limitation defence. I note that in a dissenting judgment, which I will come to shortly, Lord Briggs found no favour with this aspect of Lord Sumption's determination, considering the acquisition of a limitation defence as a "windfall". Lord Sumption was critical of Mr. Barton for not only issuing the claim form at the very end of the limitation period, but also in not serving it until the very end of its period of validity. Lord Sumption found no merit in an argument that there would be a breach of the claimant's right to a fair trial under Article 6 of the European Convention on Human Rights, if he was deprived of the ability to press on with his claim.

28. Lord Briggs, dissenting from the majority view, considered that if attempted service by e-mail achieved the 3 underlying purposes of the relevant rules, then the court should have retrospectively validated service. Those 3 purposes were (i) had the claim come to the attention of the defendant, (ii) had they been notified of the particular day when time would start running for their response and (iii) had the defendant's solicitors had the opportunity to put in place administrative arrangements for monitoring and dealing with service by e-mail. He considered at [30] that where all those 3 purposes had been achieved, there would at least be a prima facie good reason for validating service, but only provided there were not adverse factors against validation, which would outweigh the full achievement of those purposes. Included within a non-exhaustive list of adverse factors, were failures due to professional negligence by professionals who were expected to know the court rules on service and failure due to sheer neglect of the requirement for due service until the very last moment. He emphasised at [32] "*there should not be a vain search for an additional good reason beyond full achievement of the purposes of the rules as to service*", for example, if the failure to comply was readily understandable, perhaps because the relevant rule was obscure, or was less accessible to a litigant in person than to an experienced and skilled lawyer.

R (on the application of the Good Law Project) v Secretary of State for Health and Social Care [2021] EWHC 1782 (TCC) ("Good Law")

29. This case concerned ineffective service of a claim form in a judicial review claim. An *unsealed* claim form reached the designated electronic service address for the Treasury Solicitor within time, and a *copy* of the sealed claim form reached the relevant case officer at the Government Legal Department within time, neither method being permitted under the rules. At first instance the judge refused to cure the irregularity under CPR 3.10 or to permit service at an alternative place under CPR 6.15, or to allow an extension of time for service pursuant to CPR 3.1(2)(a).
30. By the time of the appeal the claimant accepted that there was binding authority that they could not rely on CPR 3.10 to correct an error where an unsealed claim form had been served.
31. Carr LJ (as she then was, and whom I will continue to refer to as "Carr LJ" in respect of the *Good Law* judgment) observed at [37] that it was not the appellate court's

function to carry out a balancing task afresh of the relevant facts, but just to consider whether the judge's determination lacked logic or "*failed to take account of some material factor which undermines the cogency of the conclusion and which takes the decision outwith the generous ambit within which a reasonable disagreement is possible*". As the decision followed the 2 Supreme Court determinations in *Barton* and *Abela*, which I have already described in some detail, I will restrict my summary of this decision. Carr LJ stipulated at [57], "*Provided that a defendant has done nothing to put obstacles in the claimant's way, a potential defendant is under no obligation to give any positive assistance to the claimant to serve. The potential defendant can sit back and await developments*". She acknowledged that the application of the principles can result in harsh outcomes and referenced cases where retrospective validation of service had been refused, and the only prejudice to the defendant was the loss of an accrued limitation defence.

32. At first instance the claimants were unsuccessful in their attempt to validate defective service retrospectively, in a situation where they had not taken any step to serve the sealed claim form by any specified method within the period required by court rules. At [62] Carr LJ observed that "*Nothing could have been simpler than e-mail service on the new proceedings address*". She noted that there had been no obstacles put in the way of valid service such as an evasive or overseas defendant or diplomatic channels proving impossible to achieve in time. At [63] she commented that, "*The level of care required cannot be divorced from the significance of the procedural step in question. Thus, service of a claim form requires the utmost diligence and care to ensure that the relevant procedural rules are properly complied with. In the event, this was serious carelessness. The Judge was entitled to lay heavy weight on this consideration*". She held that loss of a limitation defence is a relevant but not determinative factor at [65]. At [70] she concluded that, "*It would be both undesirable and unprincipled for the outcome of an application under CPR 6.15 to be influenced by reference to the nature or importance of the claim in question*".
33. The court was asked to reflect on the fact that the claimant's solicitor had served the sealed claim form on the correct address swiftly, after being notified of the defect in service. Carr LJ consider that this did not assist the claimant because instead of acknowledging the error, the solicitor had incorrectly maintained that valid service within time had been effected.
34. Underhill LJ agreed with Carr LJ and identified 2 situations where it would typically be just to retrospectively validate non-compliant service, as ones where either the defendant has obstructed service, or the claimant has been thwarted in their attempts at good service by an unforeseen external occurrence. He acknowledged that the loss of a limitation defence was an important element in the exercise of the court's discretion and could on occasion be sufficient prejudice to justify refusing an application by itself. He categorised the careless error by the claimant's solicitors in failing to effect service by a permitted method as clearly not a reasonable step. He concluded, "*But it is important to keep in mind the real issue in an application under CPR 6.15(2). A claimant is asking for a retrospective validation of non-compliant service in order to circumvent a limitation defence. Quite trivial errors can sometimes lead to limitation deadlines being missed. That can be harsh, and may be characterised as technical; but it is recognised as a necessary consequence of a limitation regime*".

35. Phillips LJ dissenting considered that in all the circumstances of the case, the failure was highly technical and did not have any practical consequences whatsoever. In the *Good Law* case service through the permitted method would simply have resulted in the case handler receiving yet another copy of documents he already had. He believed that “*If service is not to be validated retrospectively in such circumstances, form really has triumphed over substance and litigation has become a game of forfeits: the overriding objective to deal with cases justly, has itself been overridden*”.

Ideal Shopping Direct Limited And Others v Mastercard Incorporated And Others [2022] EWCA Civ 14 (“Ideal Shopping”)

36. This case concerned an appeal relying upon CPR 3.10 to rectify an error of procedure where an unsealed amended claim form had been served. The first instance decision had followed the Court of Appeal authority in *Vinos v Marks & Spencer plc* [2001] 3 All ER 784 (“*Vinos*”). The evidence of the applicant's solicitor was that it had not occurred to her or any member of her team that they required a sealed amended claim form in order to effect valid service. At first instance, it had been found that the appellants could have served both the original claim forms without any difficulty, and that they had enough time to amend those forms prior to service as well. There was no application for an extension of time under CPR 7.6. At first instance the judge summarised the likely reason for this, “... *it was perhaps implicit that the appellants recognised that they could not show that they had taken all reasonable steps to comply with rule 7.5 or that they had been unable to comply.*” There was said to be no relevance of CPR 6.15 because it was not the method of service which was in contest but the actual thing that was to be served, however the first instance judge had adopted the general approach of considering whether there was “*good reason*” to permit the alternative service and held that there was not. This was because the reason for the mistake was due to the solicitor's error which was not a good reason. There was no appeal from the judge's decision to dismiss the application under rule 6.15. Similarly, there was no appeal from the first instance decision that there were no exceptional circumstances to justify an order under rule 6.16.
37. Regarding rule 3.10 the first instance judge found that previous Court of Appeal decisions had concluded it was “*a general provision which does not prevail over the specific rules as to the time for, and the manner of service of a claim form*” at [40]. However, the appellants sought to persuade the court that there was authoritative obiter dictum from the House of Lords such that rule 3.10 could come to their aid. At [145] Sir Julian Flaux C held that in substance the claimants were “*asking the Court to treat the service of unsealed amended claim forms as good service and to dispense with the requirement for any further service*”. Those were both matters to which rules 6.15 and 6.16 are applicable but were not the provisions relied upon. He also noted they had not sought an extension of time under rules 7.6 3. At [146] he continued, “*It follows that the appellants are asking the Court to do the very thing which Vinos and the line of authority which follows it does not permit. The general provision in rule 3.10 cannot be used to override a specific provision, here rule 6.15 or rule 6.16. The appellants could not satisfy the “good reason” or “exceptional circumstances” criteria under those two rules and they are not permitted to use rule 3.10 to bypass the requirements of those specific provisions. Likewise, since the appellants could not have satisfied condition (b) of rule 7.6(3), as they could not have shown that they had taken all reasonable steps to comply with rule 7.5 or that they had been unable to do so, they*

cannot be permitted to use rule 3.10 to bypass the requirements of rule 7.63". And at [150] he continued, "The provisions on service of originating process in rules such as 6.15 or 6.16 or 7.6(3) form part of what Peter Gibson LJ described in Vinos at [27] as a "specific sub-code" dealing with service and cannot be overridden or bypassed by the general power in rule 3.10". At [154] he continued that as rule 3.10 was not available in principle to cure the defect in service it was unnecessary to consider whether, if it had been available, the court should have granted a remedy as a matter of discretion. However, he did address the matter briefly, and held at [155] that where the claimant leaves the filing of claim forms until the last day for service, the claimant "courts disaster and has a limited claim on the indulgence of the Court. This is all the more so where the failure to serve sealed amended claim forms was due to a mistake on the part of the appellants' solicitors, as in this case". He further noted that knowledge of the claims by the defendant was a necessary but not sufficient factor for the court to consider when exercising its discretion around granting relief. Furthermore, that where claims would become time-barred, the prejudice to the defendants of being deprived of limitation defences was a powerful argument against granting relief under rule 3.10, even though not a decisive factor at [157].

Boxwood Leisure Ltd v Gleeson Construction Services Ltd [2021] EWHC 947(TCC)
("Boxwood")

38. Boxwood instructed solicitors to commence proceedings for damages for breach of contract and/or negligence for faults in respect of the design and construction of a leisure centre. An order was obtained granting an extension of time for the period of service for both the claim form and particulars of claim. The claimant's solicitors' trainee sent an e-mail to the defendant's solicitors enclosing the particulars of claim, 2 days prior to the expiry of the claim form, but omitting to include the claim form itself, which was only served after the expiry of the validity of the originating process. They subsequently explained that usually when they received orders in hard copy from the court, those orders would be passed to the matter partner and reminders entered into a key dates' diary accessible to all the legal team. Furthermore, weekly extracts from that diary would be circulated in advance of deadlines so that nothing was missed. At the time the claim came to be served, the office was in COVID lockdown, with the court order only being received electronically, and therefore not added to everyone's diaries in the normal way. The conducting solicitor was the only person whose diary was updated with the reminder, and she was on annual leave during the week of service.
39. Boxwood applied for relief pursuant to CPR 3.9, 3.10 and 3.1(2) (m). O'Farrell J reviewed relevant authorities and held that where a request for an extension of time was made after the period for service in CPR 7.5(1), then the court's powers were circumscribed by the conditions set out in CPR 7.6.3, such that the claimant needed to have taken all reasonable steps to comply with the service rules, and to have acted promptly, to be successful on their application. As Boxwood had not taken any steps to serve within time (and indeed had not sought an order on those grounds), the court could not order relief under those service provisions.
40. In the judgment it was noted that CPR 3.1.2 is a general power used to extend time but is not available where the rules provide a specific procedure for a specific situation; as CPR 7.5 is a specific rule governing service then a claimant cannot rely on the more general powers to correct errors made under the service provisions.

41. At [46 (ii), (iii) and (v)], O’Farrell J held that, “*Whilst the court has a wide, general power under CPR 3.10 to correct an error of procedure so that such error does not invalidate any step taken in the proceedings*”, in cases where the power had been exercised, there had been a relevant defective step that could be corrected. She recognised that there was doubt that rule 3.10 was applicable where no relevant procedural step had been taken (i.e., a total failure to serve the claim form at all before expiry of the relevant period). She also noted that notwithstanding her decision about the applicability of CPR 3.10, there was another “*very powerful argument against extending time for service of the claim form*”, namely the injustice of depriving the defendant of a limitation defence, although that was not necessarily conclusive.
42. In reaching views concerning the importance of maintaining an opportunity for a limitation defence to be argued, the most relevant authorities cited by O’Farrell included situations where a defendant was aware of the issue of a claim form but not served within the relevant period, where the claim form was served on the defendant’s insurers but not the defendant, and where the claim form was posted in time but under the deemed provisions for service it did not arrive in time before the validity of the claim form had expired. In all of these cases no relief was granted.
43. In *Steele v Mooney* [2005] 1WLR 2819 (“*Steele*”), reviewed by O’Farrell J at [38], the Court of Appeal did allow relief under CPR 3.10 where there had been an error in procedure as an in-time application for an extension to serve originating process had mistakenly only been made for the particulars of claim, but the application had omitted a request in respect of the claim form too. Distinguishing this case from others Vos LJ had held at [28], “*It was in substance an application to correct the application for an extension of time*”, which would have failed if no application had been made at all.
44. In *Phillips v Nussberger* [2008] 1WLR 180 (HL) (“*Phillips*”), reviewed by O’Farrell J at [39], the court also granted relief where the error had been to serve proceedings out of the jurisdiction using the local language translated copy only and not the original sealed claim form in English. Effectively the service of the translated copy made up for the absence of the original sealed English version.
45. In *Bank of Baroda v Nawany Marine Shipping FZE* [2017] 2 All ER (Comm) 763, (“*Bank of Baroda*”), reviewed by O’Farrell J at [41], the Deputy High Court Judge had allowed an application under CPR 3.10 to remedy defective service where there had been an attempt at service and the step taken was permitted by the rules, finding that it would be harder to engage 3.10 to remedy a situation where neither of those conditions was met. The factual situation in this case related to provision of 1 claim form and 4 response packs to a process server who was tasked with serving 5 defendants. At [45] O’Farrell J noted that in a subsequent judgment of the High Court it was held that if it was not possible to distinguish this decision with that in *Piepenbrock v Associated Newspapers Ltd & others* [2020] EWHC 1708(QB), (“*Piepenbrock*”), then the reasoning in *Piepenbrock* would prevail concerning rule 3.10. I consider that decision at [45] below.
46. Similarly in *Dory Acquisitions Designated Activity Company v Ioannis Frangos* [2020] EWHC 240 (Comm) (“*Dory*”), reviewed by O’Farrell J at [43], the court granted relief under rule 3.10 where the claim form did not have a court seal or claim a number on its face. At [76] of *Dory*, Bryan J had held that CPR 3.10 was a beneficial provision to be given a very wide effect and to be used where the defect has no prejudicial effect on

the other party, thus preventing a triumph of style over substance. Bryan J referred to earlier authorities where the rule had been deployed to correct defects constituting failures to serve sufficient claim forms on all the defendants, or failure to deliver the correct claim form to the correct defendant, or even where the defendant only received an acknowledgment of service form, but co-defendants had been properly served. He emphasised that where there has been a complete failure of service it would be more difficult to deploy the relief and where the defendant has suffered any prejudice as a result of the procedural error. In the case before him Bryan J noted that service of an unsealed claim form had not deprived the defendant of knowledge of the fact the proceedings had been, or were about to be, started or the nature of the claim against them. Similarly, he could detect no prejudice suffered by the defendant and I note that there was no argument as to loss of an accrued limitation defence. Finally, he suggested that any fault by the applicant who was seeking the relief was just a subsidiary factor in the overall consideration.

47. Before concluding my review of the *Boxwood* decision, I will mention 2 further authorities reviewed by O'Farrell J where applications for relief had been unsuccessful. The first, *Piepenbrock*, was pretty much on all fours with the current situation that I am asked to determine. The claimant's wife purported to serve the claim form by e-mail on solicitors for the defendants without obtaining confirmation that they were instructed to accept service, or that service could be affected by e-mail. As such service was invalid and the 4-month period for service of the claim form had expired. Nicklin J refused both an application retrospectively for an extension of time under CPR 7.6(3), but also under CPR 6.15, 6.16, 3.9 and 3.10. Nicklin J held at [81], "*there is a consistent line of authority that suggests that CPR 3.10 cannot be used to rescue a claimant who, having failed to serve the Claim Form by a permitted method, cannot bring him/herself within CPR 7.6, 6.15 or 6.16*" and at [82] he continued, "*My conclusion is that CPR 3.10 cannot assist the Claimant in this case*".
48. Nicklin J went on to reflect that comments upon the usefulness of CPR 3.10 for validating service of a claim form in the other cases cited to him were purely obiter, and he considered that the analysis of Lord Sumption as to why CPR 3.9 was inappropriate would apply equally to CPR 3.10. He considered that part of the logic of previous cases was that if CPR 3.10 was permitted to retrospectively validate service that was not in accordance with the CPR, it would not only make CPR 6.15 (2) redundant which would be "*a surprising result*", but would also allow the court a discretion to dispense with statutory limitation periods which was contrary to the clear policy statement in *Barton*. Finally, he observed that the court's discretion under CPR 3.10 must be exercised in accordance with the overriding objective of dealing with cases justly, and if the remedy for 1 party would cause injustice to the other, then the court would be unlikely to give leave under that rule. The reasoning in *Piepenbrock* regarding CPR 3.10 was adopted in the subsequent case of *Ideal Shopping* which I have already mentioned at [34] above. That case concerned service of sealed claim forms only after the expiry of the validity of the claim form, unsealed copies having been served earlier.
49. Finally in respect of CPR 3.9, O'Farrell J reviewed the decision in *Kaur v CTP Limited* [2001] CP Rep. 34, where the earlier 2001 Court of Appeal judgment in *Vinos* was relied upon to the effect that in the situations where CPR 7.6 applies, the same reasoning for declining relief under CPR 3.10 would be equally applicable under CPR 3.9. She

also reviewed the decision in *Barton* which I have set out at [22] where the court declined to grant relief to the applicant in respect of non-compliant service of the claim form noting Lord Sumption's comments at [21], “the *problem was that Mr Barton made no attempt to serve in accordance with the rules. All that he did was employ a mode of service which he should have appreciated was not in accordance with the rules*”.

50. Reaching her final conclusions on the applicability of CPR 3.9 at [52] to [58], O’Farrell J held that the claimant was not entitled to allow general powers under CPR 3.9 to circumvent specific conditions in 7.6(3), but that even if the rule was relevant, following the guidance in *the Denton test*, at the first stage the breach was both serious and significant with a delay of days, “*rather than minutes*”. As to the second stage, noting the genuine mistake made by solicitors and the conditions of the pandemic, she found it was “*incumbent on the solicitors to ensure that the extended dates ordered by the court were met*”. Finally at the third stage considering all the circumstances of the case she held that it was not appropriate to deprive the defendant of any accrued limitation defence.

Claimant’s submissions

51. I have previously described that the claimant sought relief pursuant to 3 separate provisions within CPR, relying upon a somewhat novel argument, or at least one not replicated within any of the authorities brought to my attention, which they said distinguished their position from prior authority. I introduced their argument at [7a) and b)] above and which can be summarised as one where they find themselves in a position totally uncatered for by the CPR, where they have used a permitted method of service for the claim form, but in the wrong circumstances, and for which there is no rule of prohibition, nor one dedicated to rectification.

Under CPR 3.9

52. Under stage 1 of the *Denton test* referred to above, the claimant quite sensibly did not seek to persuade me that the failure to serve a claim form in accordance with the rules is not a serious breach. However, they sought to remind me that e-mail is a permitted method of service generally, and that the documents came to the attention of the defendant, therefore they categorised the breach as at “*the low end of serious and the significance is less than it would be if the Claim Form and documents had not been received or could not be accessed*”.
53. Acknowledging that the breach was an oversight, the claimant did not seek to persuade me that there was a good reason for the breach.
54. Under the third limb of the test, regarding all the circumstances of the case, the claimant made 8 points as follows which they submitted justified the court in granting their application:
- a) As the second defendant has been aware of the claim since at least 28th July 2021 they have not been ambushed by the invalid service of proceedings.
 - b) The breach was said to be “*technical*” in nature as the second defendant had actually received the documents.

- c) The claimant did not believe the second defendant has suffered any prejudice.
- d) Invalid service has not caused any delay or disruption to the litigation.
- e) The sanction of losing the ability to bring the claim against the second defendant would be “*inappropriately severe punishment*” for invalid service by e-mail.
- f) The application was made promptly.
- g) The second defendant will not escape involvement in the future of this claim even if the claim against them is struck out; they will be a principal witness for the first defendant.
- h) In granting relief, the court will not be undermining the need for litigation to be conducted efficiently and proportionately, nor would my decision undermine the need for the court to enforce compliance with court rules, therefore granting relief would be just.

Under CPR 3.10

- 55. As set out in introductory remarks, the claimant sought relief pursuant to CPR 3.10 if their principal argument under rule 3.9 was unsuccessful. They argued that it must be the case that the court has a power to use its discretion to remedy a situation when what has been done is neither expressly prohibited, nor expressly provided for, within the rules. To this end they maintained that CPR 3.10 is the only available power, if I have found against them under rule 3.9.
- 56. The claimant made it clear that they accepted that a “*bright line rule*” was necessary for service of a claim form, because it determines the precise timing when any period for raising a statutory limitation defence runs. As a consequence of this they also recognised that the test to be satisfied would be stricter than for breach of a lesser rule, and therefore akin to the *Denton test*, even under rule 3.10.
- 57. The claimant sought to rely upon *Steele* (summarised at [41] above), as authority for employing CPR 3.10 when the mistake made was not governed by a rule. Similarly, they relied upon the House of Lords decision in *Phillips* (summarised at [42] above), for stipulating that you can rely upon a general rule where there is no specific provision within the CPR catering for the situation at hand. They noted that this authority had been followed by Popplewell J (as he then was) in *Integral Petroleum v SCU Finanz AG* [2014] EWHC 702 (Comm) (“*Integral*”). However, as the judge had expressed the view that a narrower approach to CPR 3.10 would be appropriate when considering service of originating process, rather than service of the particulars of claim as in the application before him, the claimant submitted they would encourage me to consider their approach through the stricter lens of the test under CPR 3.9.
- 58. With regard to the decision in *Piepenbrock* (summarised at [45] above), it was asserted that Nicklin J’s approach had been misconceived in finding that a party was unable to rely upon rule 3.10, when they should have sought relief pursuant to 6.15(2). The claimant sought to persuade me that where rule 6.15 was not available then there was good recourse back to the more general provision for relief under CPR 3.10. The

claimant was keen to emphasise that they were not seeking to rely on either rules 3.9 or 3.10 to achieve what was prohibited by any other specific rule.

59. The claimant argued that the *Ideal Shopping* case was irrelevant to the factual circumstances before me, as in that case no valid claim form had been supplied to the defendant so the service method was not the point of dispute and reminded me that Lord Sumption had ruled in *Barton* that it was particularly important to consider the facts specific context of each case where relief was sought.
60. Similarly, the claimant argued that the *Good Law* decision was of no relevance to my determination, at least under CPR 3.10, as it dealt with the special procedures in a judicial review case and was factually very different to this one, being concerned with service of an unsealed claim form, where there had been no step in the proceedings, rather than an attempt to correct a step taken in the proceedings.
61. The claimant acknowledged that the decision in *Barton* was the “*high point of the second defendant's case*” as the facts were similar to those presented to me. But they were keen to stress that the decision was not authority for saying service by e-mail in a non-compliant manner under the practice direction could never be retrospectively validated by CPR 3.9 or 3.10. They submitted that *Barton* was a decision all about rule 6.15(2) only and drew my attention to the important dissenting paragraphs of Lord Brigg’s judgment. In that case, service had only been attempted after the expiry of the limitation period, such that the defendant would have been deprived of an accrued limitation defence if relief had been given, unlike the position before me.

Under CPR 6.15 (2)

62. The claimant submitted that if I had not accepted their primary or secondary arguments then, as set out in their supplemental skeleton argument, they would pursue their application under rule 6.15 (2), as a specific rule directed to resolving the problem they face.
63. To this end the claimant relied upon the Supreme Court decision in *Abela* (as referenced subsequently in the Supreme Court decision of *Barton*). They submitted that it was only necessary to satisfy 1 of the 3 main relevant factors from *Abela* (as per Lord Sumption at [10] of the judgment in *Barton*) and that the weight attaching to those factors would vary in all the circumstances. In respect of those factors:
 - a) Reasonable steps: it was conceded that the claimant’s solicitor had not taken reasonable steps to effect service in accordance with the rules, as there had been an oversight.
 - b) Defendant’s awareness of the claim: it was argued that the second defendant was aware, as they had consented to numerous extensions of time for service.
 - c) Prejudice: it was submitted that the second defendant did not complain of any prejudice.
64. Furthermore, it was argued that whilst the Supreme Court had declined to exercise their discretion under this rule in *Barton*, that was simply because they did not wish to disturb the findings of fact of the lower courts. As such they considered that *Barton* was not

authority for a proposition that service of proceedings by e-mail, in circumstances contrary to the practice direction, could never be retrospectively validated pursuant to rule 6.15 (2). In the particular circumstances of this case, they submitted it would be proper and just to grant relief retrospectively, by reference to the relevant *Abela* factors, which included not just the 3 principal ones above but also proper consideration of the facts of the case.

65. Finally, the claimant submitted that the consequence of refusing their application, would not be to bring a conclusion to matters, as they would simply commence new proceedings and seek a ruling disapplying the limitation period under section 33 of the Limitation Act 1980.

Defendant's submissions

Under CPR 3.9

66. The second defendant's main argument was that rules 3.9 and 3.10 are not the appropriate provisions under which to seek a remedy for failure to comply with the rules of service, and they relied extensively upon the authorities in *Boxwood* and *Ideal Shopping* as binding upon me. The main thrust of submissions was that the authorities have made plain that a claimant cannot rely upon general powers under CPR 3.9 or 3.10 to circumvent specific conditions set out in CPR 7.6(3) which is the appropriate rule for extending the period for service of a claim form. As I have already set out fulsome summaries of those decisions, including the paragraphs which I was taken to in submissions in preceding paragraphs, I will not repeat them.
67. Turning to consider the specific requirements under part one of the *Denton test*, the second defendant submitted that a failure to serve the claim form is "*a particularly serious and significant breach*" and the importance of good service cannot be overstated. They submitted it is a "*bright line rule*" from which proceedings originate. They recognised that it was not appropriate for the parties to take de minimis points generally regarding breach of court rules but emphasised that service of originating process is in a class of its own. In this regard, they relied upon the decision of the Supreme Court in *Barton* as summarised in the High Court decision in *The Queen (on the application of the Good Law Project) v Secretary of State for Health and Social Care v Pharmaceuticals Direct Limited* [2021] EWHC 1782 (TCC), ("*Good Law 1*"), at [59], "*Service of originating process can be distinguished from other procedural steps because it is the act by which the defendant is subjected to the court's jurisdiction. For that reason, "a bright line rule", is necessary to determine the exact point, from which time runs for subsequent steps in the proceedings, or to confirm the point at which time stops running for the purposes of limitation.*"
68. Similarly, relying upon Lord Sumption's reasoning in *Barton* at [9] where he said, "*What constitutes "good reason" for validating the non-compliant service of a claim form is essentially a matter of factual evaluation, which does not lend itself to over-analysis or copious citation of authority*", they maintained that the facts of the case were analogous to those in the dispute before me, save that the claimant had been a litigant in person in *Barton*, but even so they were unsuccessful in persuading the court that relief was appropriate in those circumstances

69. When considering all the circumstances of the case the second defendant's submissions can be usefully summarised alongside those brought to the attention of the court by the claimant as follows:

Relevant circumstances considered by the claimant	Submissions on circumstances by the second defendant
There has been no ambush-the second defendant had prior knowledge of proceedings	Knowledge of the proceedings alone is not a good reason to allow the claim to proceed as the decision in <i>Good Law</i> makes clear
There has been a technical breach only as the documents were received	Reasonable steps should have been taken to effect service in accordance with the rules as set out at [59 (v)] of <i>Good Law 1</i>
There has been no prejudice	The defendant would suffer prejudice if deprived of an accrued limitation defence
There has been no disruption to the litigation	There is no good reason to subvert a “ <i>bright line rule</i> ” as set out by the Supreme Court for originating process
Striking out the claim would be a disproportionate sanction	There is no obligation to give any positive assistance to a claimant to serve properly
Promptness of making the application should be recognised	Not disputed but this alone is not enough
Continuing involvement of the second defendant as a witness in the proceedings in any event	Not disputed but this alone is not enough

Under CPR 3.10

70. The second defendant submitted that the court has no jurisdiction over expired claim forms and referred me to the relatively recent decision by O’Farrell J in *Boxwood* at [46] to [48], “A claimant is not entitled to rely on the wide general powers under CPR 3.10 or CPR 3.9 to circumvent the specific conditions set out in CPR 7.63) for extending

the period for service of a claim form... “Boxwood is not entitled to rely on the court's general power under CPR 3.10 to correct a procedural error so as to validate its failure to serve the claim form within the prescribed period. ..”

71. The second defendant also relied upon the Court of Appeal decision in *Ideal Shopping* that I set out above at [34] as emphasising that an application under rule 3.10 is the wrong approach to perfect time for service of the claim form.
72. The second defendant submitted that the claimant's application was misconceived and reminded me that the application notice had only been issued on the basis of a relief from sanctions application under rule 3.9.

Under CPR 6.15 (2)

73. The second defendant argued that insofar as I might be asked, belatedly, to perfect defective service under this rule, I should be very slow to do so; they argued any such application was “*doomed to failure*”. They sought to distinguish the decision in *Abela*, because there had been no deliberate evasion of service or proceedings. They also sought to remind me that the Supreme Court had held in that case that, the mere fact the defendant had learned of the claim was not good reason by itself to make an order under rule 6.15(2). They also referred to the decision in *Barton* where Lord Sumption had again set out that mere knowledge of the claim form could not be a good reason for making an order under this rule “*without more*”.
74. To examine what constitutes “*without more*” the defendant relied upon the careful exposition of O’Farrell J in *Good Law 1* (but upheld by the Court of Appeal as I have summarised at [27] above). In that case the defendant had accepted they had knowledge of the proceedings but that was found to be inadequate to secure the relief sought. They referred me to [56] of *Good Law 1* where the judge at first instance had held, “*This is not a case in which the Claimant should have had any difficulties in effecting valid service. It made a careless mistake in emailing the claim form to the wrong address. If the court were to grant the Claimant’s application, the defendant would suffer prejudice in that it would be deprived of an accrued limitation defence to the claim*”.
75. Turning to the decision in *Barton* at [21], the second defendant relied upon Lord Sumption’s reasoning concerning CPR 6.15, “*...I agree with the general point that it is not necessarily a condition of success in an application for retrospective validation that the claimant should have left no stone unturned. It is enough that he has taken such steps as are reasonable in the circumstances to serve the claim form within its period of validity. But in the present case there was no problem about service. The problem was that Mr Barton made no attempt to serve in accordance with the rules*”.
76. The second defendant drew my attention again to the authorities which demonstrate the very firm stance taken by the courts to uphold the “*bright line rule*” regarding service of originating process. They reminded me that Carr LJ (as she then was) in *Good Law* had held that there was no obligation upon them to give any positive assistance to a claimant to serve properly, and reminded me that they would suffer prejudice if they were denied the opportunity of a limitation defence.

Defendant’s application for a strike out

77. The second limb of the defendant’s application referred to at [4], if I was to consider there was still a live claim against the second defendant, was that it ought to be struck out because of the failure to comply with rules of court. I have already summarised their submissions in respect of the *Denton test* principles in the preceding paragraphs so I will not repeat them. They relied upon the decision in *Barton* where the claim was struck out because there had been a failure to comply with a “*bright line rule*”.

Analysis & Conclusions

Under CPR 3.9

78. I have not been referred to any authority where rule 3.9 has been successfully deployed to achieve relief where a claim form has not been validly served under the rules. The claimant has sought to reassure me that I have the necessary discretion, by adopting a somewhat novel submission that there is no rule governing the situation where a permitted route for service has been adopted in the wrong circumstances, hence they argue I am free to rely on my general powers under rule 3.9.
79. The second defendant suggested this submission, based on semantics, simply does not hold water. In summary, their view is that as the claim form has expired it can only be revived by an application using the specific powers set out in CPR 7.6 (3), which is not the application before me, or remedied under rule 6.15(2), very belatedly adopted as a potentially viable route to relief by the claimant the day prior to the hearing.
80. My review of the materials within the authorities’ bundle set out above, demonstrates that there have been many situations in the past where permitted methods of service have been used in the wrong circumstances, causing a total failure of service. The correct and consistent approach of the courts has been to identify the facts that led to things going wrong, and then to select the appropriate rule under which a remedy could be considered, but reliance upon CPR 3.9 has never been validated as the correct approach. It was rejected by the Court of Appeal in *Kaur* in 2001, and by the High Court in both *Piepenbrock* in 2020 and in *Boxwood* in 2021. My inescapable conclusion is that CPR 3.9 is not the appropriate rule to deploy in the circumstances of this case.
81. Even if I had applied the *Denton test*, it would not have produced a happy outcome for the claimant. There is absolutely no doubt that the error in failing to comply with the practice direction, in the context of the “*bright line rule*” highlighting the importance of correctly serving originating proceedings, is a serious and significant breach.
82. Under stage 2 of the test, there is no good reason for the mistake made, and no proper explanation either. The witness evidence filed in support of the claimant’s application did not amount to the “*full account*” that O’Farrell J considered she had received in *Boxwood* at [56]. The claimant’s solicitor’s statement at [11] simply recorded “*Unfortunately, the request was overlooked*”. The “*request*” was that of the second defendant’s solicitor that service should not be made via e-mail, but by post to their offices in Guildford.

83. Under stage 3, considering all the circumstances of the case, I accept all the submissions of the second defendant as set out at [67] above.

Under CPR 3.10

84. This provision has been relied upon in at least 10 previous cases brought to my attention within the authorities' bundle, where service of originating process has failed, the majority of them being finally determined at Court of Appeal level or above. However, only 3 of the authorities brought to my attention were successful in rescuing claim forms invalidly served, using the powers available to the court under rule 3.10. The notes in the White Book at 3.10.1 make plain that "*it is now firmly established that this general power cannot be used to correct or waive errors such as the late service or defective service of a claim form (see para 3.10.4)*". That sentiment resonates well with the recent very clear guidance given by the Court of Appeal in *Ideal Shopping*. I do not accept the claimant's submissions at [57] that it was irrelevant on the facts; the broader principles are applicable and speak for themselves and there is nothing meritorious about the facts in the case before me to distinguish it from the mistake made in *Ideal Shopping*. At [146] of *Ideal Shopping* it was held that "*the general provision in Rule 3.10 cannot be used to override a specific provision, here rule 6.15 or rule 6.16. The appellants could not satisfy the "good reason" or "exceptional circumstances" criteria under those two rules and they are not permitted to use rule 3.10 to bypass the requirements of those specific provisions. Likewise, since the appellants could not have satisfied condition (b) of rule 7.6(3), as they could not have shown that they had taken all reasonable steps to comply with rule 7.5 or that they had been unable to do so, they cannot be permitted to use rule 3.10 to bypass the requirements of rule 7.6 (3)*".
85. The claimant has been keen to distinguish other cases in the authorities bundle too where the courts have ruled against the applicability of CPR 3.10, as the means to perfect service, based on their factual context, which was highlighted as so important to the exercise of the discretion to grant relief by Lord Sumption in *Barton*. I have 2 chief difficulties with this approach. The first is that I find it extremely hard to identify any significant difference in the factual matrix underlying the applications in both *Barton* and *Piepenbrock* with the situation before me. Both cases concerned wrongful use of e-mail to serve proceedings on nominated solicitors for the defendant. The fact that the claimant was a litigant in person in *Barton* and still the relief was not given, underlines for me the importance which the courts place on both the need to demonstrate reasonable steps being taken to effect service of originating process, and the very great care which the senior courts have taken not to deprive a defendant of an accrued limitation defence. I have previously referenced both Carr LJ (as she then was), in the *Good Law* case, and Flaux C in *Ideal Shopping*, ruling that the consequences of carelessness by a solicitor in attempting to effect good service of a claim, may well lead to harsh results for their client.
86. My second difficulty is that the three authorities relied upon by the claimant where CPR 3.10 was successfully relied upon to remedy defects in service had totally different factual matrices to the circumstances being considered in this application. In *Steele* a correct, and in-time application for an extension to serve particulars of claim had omitted to reference that an extension was also required for the claim form. That situation contrasts with the one before me where no application for relief was made until after the validity of the claim form had expired. Furthermore, it was not a situation where a permitted method of service had been used in the wrong circumstances, unlike

Barton and *Piepenbrock* where that was the precise factual scenario and the court found against the claimant. Whilst it may have been a mistake not governed by a rule that is simply not enough to displace my conclusion that the facts are too dissimilar to warrant the case as one that I should follow to grant relief, when the other authorities all point in a different direction on similar facts.

87. In *Phillips* the problem corrected under rule 3.10 related to an error by Swiss authorities to serve the correct claim form supplied to it by the Foreign Process section of the High Court. They had served only the local language translated copy of the claim form and not the original sealed claim form in English. The defendant did not submit they had suffered any prejudice as a result, unlike in the dispute before me. Thus, the lack of relevance of this authority is plain and, furthermore, the practice direction with which I am concerned relates solely to method of service of the claim form, not what was actually served.
88. Whilst nominally seeking to rely on the High Court decision in *Integral*, the claimant acknowledged that it was not concerned with service of a claim form for which more stringent measures apply.
89. Reviewing other authorities in the bundle I also do not find any assistance in the decision of the Deputy High Court Judge in the *Bank of Baroda* or consider it appropriate as a basis for me to exercise my discretion as that judgment made plain that CPR 3.10 was of less use to correct a step where the step taken was not permitted by the rules at all. The claimant's application before me is based on the fact they have taken a permitted step in the wrong circumstances. In any event, Nicklin J in the more recent 2020 decision in *Piepenbrock*, held at [81] that it was appropriate not to follow that authority when considering a similar dilemma to the one I face, as the remarks regarding use of CPR 3.10 were obiter, preceding the more authoritative decision in *Barton*.
90. Likewise, the 2020 decision in *Dory*, only sanctioned the use of rule 3.10 to perfect service of an unsealed claim form, because it was determined that there was no prejudice to the defendant, such as loss of a limitation defence, which is not the position in the dispute before me.
91. Whilst the claimant may be correct that there is no actual rule governing the validation of service ostensibly by a permitted route but in contravention of the practice direction, nor a rule prohibiting the validation of service in such circumstances, there does not need to be given the wealth of case law authority directing how matters should be dealt with in those circumstances. Having taken account of all the preceding points, there is no usefulness in considering a higher threshold for the relief sought, as contended for by the claimant, when the suitability of CPR 3.10 on the facts of this case itself is not established.

Under CPR 6.15(2)

92. I note that there was no formal application before me to consider relief using the court's powers under this rule; it was a last-ditch attempt by the claimant to save their existing claim, if their primary and secondary arguments failed. Nonetheless, the case law is clear as to how I should approach my determination, with 2 judgments from the Supreme Court amply specifying the considerations that I should have in mind. There

is no disagreement between the parties as to the relevant factors, nor that the claimant could not satisfy the court they had taken reasonable steps to effect service. The main battleground between them is an argument about the impact of the second defendant's undisputed awareness of the claim and whether it would be just to deprive the second defendant of a limitation defence. I find it surprising that the claimant submitted that the second defendant had not complained of any prejudice as that is not borne out by the submissions which were made. In addition, the numerous courts that have examined the issue of what to do where service has not been perfected prior to expiry of the limitation period, have been keen to express the view that rule 6.15 should not be used to override a statutory limitation period, and that the defendant is under no obligation whatsoever to assist the claimant who has, for whatever reason, missed the deadline.

93. The only case before me where rule 6.15 had come to the aid of a claimant after the expiry of limitation was *Abela*, the factual circumstances of which could not have been more different to those of the claimant. By way of brief recap of the background which I set out at [18], the defendant had been obstructive when the claimant had sought to engage them about an address for service, and there was no evidence before the court that the claimant could have discovered the true address of the defendant. In those circumstances, described by the court as necessarily “*exceptional*” to trigger the relief, it was ruled that there was good reason to grant it. In *Barton*, Lord Sumption had made it plain that there did not need to be exceptional circumstances, but that there still needed to be a good reason why service had not been effected in accordance with the rules, on the facts of the case, to permit alternative service under rule 6.15.
94. In this case there is certainly nothing exceptional about the reasons why service was not perfected. Furthermore, I cannot find that there was a “*good reason*” either; the claimant's solicitor's witness statement does not assist me in this regard. There was an error in failing to check the permissible method of service, right at the end of the period of validity of the claim form. There was no apparent good reason for not checking properly and it is unclear why service had not been attempted rather sooner, which would have allowed a margin for any error to be corrected. I accept the submissions of the second defendant as recorded above, as to why it would be inappropriate to grant the relief. I repeat and adopt the observations of Underhill LJ in *Good Law*, as set out at [32], namely, “*it is important to keep in mind the real issue in an application under CPR 6.15(2). A claimant is asking for a retrospective validation of non-compliant service in order to circumvent a limitation defence. Quite trivial errors can sometimes lead to limitation deadlines being missed. That can be harsh, and may be characterised as technical; but it is recognised as a necessary consequence of a limitation regime*”.

Overall conclusions

95. Having carefully considered the rules and copious judicial authority examining what should happen when the rules on service of originating process are not fully complied with, I conclude that I must dismiss the claimant's applications, both as made formally under rule 3.9, and as contended for orally under 3.10 and 6.15. The rules themselves cannot possibly provide for every eventuality in litigation but any so-called gap in them has been amply filled by case law. I agree with the second defendant that seeking to distinguish the situation the claimant finds themselves in under the rules, of having used a permitted method of service but in the wrong circumstances, was, in the end, an exercise in semantics rather than one of substance, albeit that I recognise the effort put into the ingenuity of the approach.

96. I am plainly not the first judge to have some disquiet about the operation of the current rules, as now interpreted judicially, for a claimant facing this particular predicament, where a defendant has been fully aware of the claim before the expiry of the validity of the claim form, and where service has been attempted prior to expiry, but there are not many “*bright line rules*”, and as such they must be observed with great care, both by litigants in person and legal representatives.
97. Without in any way seeking to disturb a “*bright line rule*”, I do question whether the time may be right, subject to other demands on the agenda, for a narrow review of practice direction 6A, by the Civil Procedure Rules Committee, focussed on the use of email for service of originating process on solicitors’ firms. I mention this quite simply due to the significant changes in law firm practice management since the current rules were drafted and the Supreme Court considered them. The Covid pandemic has accelerated the evolution of electronic systems and dramatically changed working practices. Furthermore, civil litigation policy is developing an increasing emphasis on digitisation which is altering how parties conduct litigation. It is well understood that when Lord Sumption discussed the risks associated with monitoring e-mail addresses in a busy law firm in *Barton*, there was a clear rationale for the practice direction to mandate that service of a claim form by e-mail was invalid, absent express consent of the defendant’s solicitor. Since the pandemic, and the rise in remote working, most if not all law firms have had to consider new risk management procedures, out of necessity, for dealing with receipt of post, including email, when no fee earners are physically present in the office. In the very narrow circumstances where a prospective party has already been corresponding with their opponent’s nominated solicitor by e-mail on a particular claim and pursuant to a pre-action protocol, it is not hard to imagine that there will now be, or should be, a procedure for ensuring that *all* communications relating to that matter, served to the same e-mail address will be monitored. In such specific circumstances, where service is attempted prior to expiry of the validity of the claim form, the practice direction could be considered ripe for review. These comments about the potential for refreshing the practice direction naturally cannot impact my decision in this case which has to be based on both my factual evaluation and the existing rules and practice direction (the correct interpretation of the latter not having been in issue) and as interpreted by higher authority that binds me.
98. Finally, I express my gratitude to counsel for their assistance with this matter and invite them to submit draft consequential directions for my consideration.