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Case No: HT-2020-000300

Neutral Citation Number: [2021] EWHC 2063 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 22 July 2021

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

(1) LSREF 3 Tiger Falkirk Limited I S.a.r.l.
(2) LSREF 3 Tiger Falkirk Limited II S.a.r.l.
Claimants

- and –

Paragon Building Consultancy Limited

Defendant

James Howells QC and Lauren Adams
(instructed by **Shepherd & Wedderburn LLP**)
for the Claimants
Simon Hale (instructed by **Clyde & Co LLP**)
for the Defendant

Hearing date: 8 July 2021

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Mr Justice Fraser:

1. This judgment is in relation to two applications, which are effectively two sides of the same coin. The first in time was made by the Defendant (to whom I shall refer as Paragon), and is in relation to what is said to be ineffective service by the Claimants' solicitors of both the Claim Form and the Particulars of Claim. These were served by email upon the Defendant's solicitors at 1846 hours on 23 April 2021, the last day upon which the Claim Form was valid for service. Its validity expired at midnight on that day. The issue on this application is that the Defendant was not properly served, as the Defendant's solicitors were not authorised to accept service on the Defendant's behalf, and had never represented that they were. Accordingly, the Defendant maintains that CPR Part 6.7 has not been complied with, and neither has Practice Direction 6A. The second application is by the Claimants, and is, in the event that the Defendant's interpretation of the rules and the facts is accepted by the court, an application to extend time and/or permit alternative service and/or grant relief from sanctions. The Claimants rely upon CPR Parts 6.15 and 6.16, as well as relief from sanctions under CPR Part 3.9.

2. The underlying substantive claim against Paragon is in relation to a defective structure in Falkirk in Scotland. Paragon provided what is called a Vendor's Survey report in respect of a shopping centre, and the car park associated with it, which is said by the Claimants to be structurally defective. The reasons for that are not relevant for present purposes. Accordingly, the Claimants (essentially the purchasers, although each of them are special purpose vehicles and have slightly different property interests) bring a claim in respect of negligence/breach of warranty by Paragon in respect of the report, which the Claimants say they relied upon. This latter claim is supported by a letter written by Paragon which the parties refer to as "the Reliance letter", which the Claimants had issued to them dated 27 January 2015, stating that they could rely upon the contents of the Vendor's Survey report. The value of the claim is in the region of £10 million. The bulk of that claim is the value of remedial works, in the region of £8.6 million for repair costs. The report by Paragon is dated September 2014, and so the precise date in September 2020 when six years from the date of the report would have expired is, as yet, unclear. There might have proved, in different circumstances, to have been complicated arguments on limitation, but for present purposes, it is agreed by the parties that the limitation period has by now expired. Accordingly, were resolution of the issues concerning service on these applications to be in the Defendant's favour, then the parties are agreed that any action by the Claimants would be time-barred.

3. Before I turn to the way in which the parties put their respective cases, although these applications raise issues of general importance concerning service, or purported service, by email upon solicitors, there is considerable authority on this subject already. The applications also concern (although only tangentially) the impact of the Covid-19 pandemic upon ways of working, although service by electronic means is not exactly new, and there is detailed provision in CPR Part 6 itself in the form of Practice Direction 6A. The Claimants are both based in Luxembourg, and the Defendant's registered office is in London.

4. I have before me five witness statements, the content of which it is not necessary to reproduce in great detail, as a summary will be sufficient. Stripped back to its bare bones, the factual background to these applications is that there was an extensive

period of investigation into the problems with the car park over a number of years. The Claimants, through their solicitors, embarked upon a lengthy process of dialogue in respect of this. Initially a letter was sent by the Claimants' solicitors to Paragon itself at its registered office. This letter was dated 20 December 2016, and invited Paragon to meet on a Without Prejudice basis to discuss the claim; the letter also requested the name and address of Paragon's insurers. That letter was sent over two years after the date of the report, so limitation would not exactly have been seen, at that time, by anyone involved as a pressing issue. This letter was responded to by the Defendant's solicitors, Clyde & Co ("Clydes"), and thereafter Paragon was represented throughout by its solicitors. After Paragon had been notified of the potential claim, either Paragon itself or its insurers instructed Clydes, who sent a letter to the Claimants' solicitors dated 10 January 2017 that stated, inter alia:

"We are instructed to act on behalf of Paragon Building Consultancy Limited in relation to the matters set out in your letter dated 20 December 2016."

5. Thereafter, investigation and discussion about defects took place, and a pre-action protocol letter dated 22 January 2019 was sent by the Claimants' solicitors to Clydes. There was different contact between the two firms over the years.

6. The parties agreed some facts for these two applications, which are as follows. The Claimants' solicitors are referred to in the Agreed Facts as "S+W" and I will therefore adopt that in this judgment. I reproduce those facts exactly as they appear in a document placed before me by the parties headed "Agreed Facts":

"1. Clyde & Co requested from S+W copies of the Claim Form and Particulars of Claim on 7 October 2020. A sealed copy of the Claim form was provided to Clyde & Co on 13 October 2020. The Particulars of Claim were not provided as it was not yet finalised at this point.

2. The parties' appointed solicitors, Clyde & Co and S+W, conducted all pre-action correspondence on their client's behalves. The solicitors also conducted the negotiations over the terms of Extension Agreement (and its variations) on behalf of the parties.

3. Clyde & Co and S+W agreed that an agreement would be drafted and agreed for the extension to the date by which the Claimant must serve its Claim Form and Particulars of Claim.

4. S+W provided a draft of the Extension Agreement on 8 December 2020. Ms. Gregory of Clyde & Co. proposed amendments to the Extension Agreement in a telephone call with Mr. Reynolds on 9 December 2020. All of the proposed amendments were accepted and the draft was executed on 9 December 2020 by Clyde & Co and S+W.

5. This agreement was the subsequently varied twice - both variations were negotiated and agreed in discussions between Clyde & Co and S+W and then formalised in writing and again signed by Clyde & Co and S+W.

6. On 18 February 2021 the Claimants suggested a further extension to the Extension Agreement to 14 May 2021. The Defendants declined to agree such an extension at that stage. On 24 March 2021 the Claimants again suggested an extension to the Extension Agreement on 24 May 2021. On 1 April the Defendant indicated that a

further extension would be considered. On 7 April a further extension from 16 April to 23 April was agreed and executed by Clyde & Co and S+W.

7. Ms. Gregory of Clyde & Co and Mr. Reynolds of S+W spoke on Friday 23 April 2021 at 14.40. Part of that discussion concerned a privileged communication.

8. Mr. Reynolds of S+W made two further calls to Ms. Gregory on Friday 23 April at approximately 17:39 and 18:38 which were not answered or returned by Ms. Gregory. Mr Reynolds did not leave any voice message for Ms. Gregory."

7. As is commonplace generally (and this was the case even before the pandemic) the vast majority of communication between solicitors in this case was performed by way of email. Here, the Claim Form was issued on 14 August 2020 and the life of that Claim Form would have ended four months later, on 14 December 2020. However, on 9 December 2020 the parties agreed that this deadline would be extended to midnight on 29 January 2021. This was in a document called the Extension Agreement which is referred to in the Agreed Facts and which I explain further at [10] below.

8. Although there was some contact and correspondence between the two firms over time, it is common ground that nowhere in that correspondence did S+W ask if the Defendant's solicitors were instructed to accept service, nor did Clydes volunteer that they were so instructed or authorised. The subject was simply never raised. It therefore is clearly the case that the provisions of CPR Part 6.7(1)(b) were not complied with. Clydes did not "notify the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within the jurisdiction", or indeed, that it was instructed to accept service at all. What seems to have happened is that the solicitors involved at S+W simply appear to have assumed that Clydes either were so authorised, or would become so authorised (or potentially, would not take the point that they were not). Insofar as the person dealing with the matter on 23 April 2021 is concerned, he may have come to the matter years after this initial contact started, and so might have just assumed that someone dealing with the file earlier in time had dealt with this point. Alternatively, it may never have been considered. It does not much matter, in my judgment, why this happened, and there is no need to speculate. It was not done.

9. Mr Hale for Paragon invites me to conclude from the evidence served by Clydes that they were not authorised to accept service for Paragon. However, the passages upon which he relies do not say that; they deal with the contents of the Extension Agreements, and what Clydes would have done had S+W asked them to include a specific provision within the Extension Agreements dealing with service. The evidence does not go as far as Mr Hale submits that it does. The point is potentially somewhat vague. However, what is important is the rules for service and whether (and/or how) they were complied with. Supposition or assumption about instructions between Paragon, its insurers and Clydes (which are, in any event, privileged) are less important. CPR Part 6.7(1)(b) was not complied with, and that is that.

10. There were then two further Extension Agreements in addition to the one I have referred to at [7] above. Each was on the same terms as the first, and each extended the life of the Claim Form by agreement (and therefore also the limitation period) up to, eventually, midnight on 23 April 2021 (the time and date agreed in the third of the Extension Agreements). In the afternoon on that day, with the deadline agreed in that

third Extension Agreement due to expire at midnight on that day, the assistant solicitor at S+W telephoned his opposite number at Clydes, who took the call on her mobile phone. Two privileged letters had been sent to Clydes by the assistant solicitor at S+W marked Without Prejudice Save as to Costs, and that was done at 1430 hours. I have not seen these letters, but recount that they were sent, as this is part of what happened that day. There is no real dispute of fact about what happened. Each of these solicitors has exhibited their attendance notes and they also deal with the events of that afternoon in their witness statements. The call from S+W took place at about 1440, which is the middle of the afternoon. The S+W assistant solicitor told the Clydes solicitor that service of the Claim Form "was due that day such that if a further extension were to be agreed it would need to be done so urgently". The latter said she would take instructions.

11. That was the only phone call between them that day. The S+W assistant solicitor had not heard back from Clydes by 1739 and phoned her again on her mobile, leaving a message. He did so again at 1838. Neither call was answered or returned, and he therefore realised that he had to serve the Claim Form. Service had to be accomplished that day, and before midnight. Accordingly, at 1846, he sent both the Claim Form and the Particulars of Claim to Clydes by email. The Claim Form itself included reference to, and the address of, the Defendant's registered office, so there is no question of there having been any confusion, in the sense that Clydes was the only place it could be served. S+W chose to effect service upon Clydes, and not Paragon.

12. The assumption at S+W seems to have been that Clydes were either specifically authorised to accept service, or would be prepared to do so; alternatively the point may just have been missed. As it happens, if such an assumption was made, S+W were wrong, in that Clydes (and Paragon) were not prepared to accept service in this way. After a few days, Clydes enquired of S+W whether or how service had, or was supposed to have been, effected upon Paragon, because the documents (including the Response Pack) had not arrived at Paragon's registered office. It was this exchange that led, firstly, to the realisation that email service was intended (or was the most that had occurred, depending upon the subjective points of view of the parties to these applications). It also led to the realisation that the parties were of somewhat opposite points of view on this important point. Until the hearing of these applications, both sides concentrated on whether email could be used as the medium of service.

13. The Claimants rely upon the fact, as expressed in their witness statements for the two applications, that all of the communications from the Defendant's solicitors were sent by email, save for one, dated 23 August 2019, which was sent "By Email and DX". The parties corresponded through their solicitors by both "open" letters, what are said to be "closed" letters (by which it is meant, letters marked "without prejudice" or "without prejudice save as to costs" and hence privileged) and emails. The focus initially in the evidence served for the applications was whether service by email was permitted or justified.

14. When the Covid-19 pandemic struck, as is well known, a great many businesses changed their working practices generally. In the case of Clydes, the following wording appeared on the emails sent by that firm:

"Covid-19 outbreak: During the ongoing disruption to working arrangements and until further notice, service of claim forms, application notices and all other court documents and contractual notices should be made only by email: all other correspondence should likewise be sent via email (using the email address of the

above sender). Should service of documents or contractual notices be attempted by post, courier, DX, or fax, we cannot, in the current circumstances, give any assurance that they will be received or dealt with. Many thanks for your co-operation and understanding."

15. This text is coloured red and in bold in the original emails that were sent to S+W. The Claimants rely upon it as being what is called "a unilateral statement prescribing the method of service that Clyde & Co would accept on behalf of their clients."

16. Another fact which the parties both rely upon, although to different ends, is that the Defendant's solicitors were provided with a copy of the sealed Claim Form for the purposes of commercial settlement discussions which took place "between principals" on 23 October 2020. The Particulars of Claim were not provided, because these had not been finalised. This is contained in the Agreed Facts. The Claimants in particular contend that this is important because it means (or could be understood to mean) that the Defendant's solicitors, and indeed the Defendant, "had a copy of the sealed Claim Form in their possession". However, the Claimants do not contend that this provision of a copy of the Claim Form constituted service within the meaning of CPR Part 6. It plainly could not, because and in any event, it was provided without prejudice.

17. The evidence of the parties concentrated to a substantial extent on the fact that email was used. It dealt with, but not in any great detail, a point of equal (if not greater) importance, namely authority on the part of Clydes to accept service on behalf of Paragon. By the time of the hearing of the applications, the focus of counsel arguing the case was more on the issue of authorisation to accept service. Counsel for both sides appreciated that this was an important point on both applications. This is justifiable. On these facts, it is by far the more important (or difficult, looked at from the point of view of the Claimants in terms of justifying what was done) issue or point of argument.

18. Service is governed by CPR Part 6. This includes the following provisions. In the CPR Glossary, "Service" is defined as "Steps required by rules of court to bring documents used in court proceedings to a person's attention." Ordinarily, legal documents such as claim forms cannot be served by email. This is clear from the terms of CPR Part 6.

19. By CPR Part 6.4 (1), the Court will ordinarily serve the claim form. An exception to this default position is where "the claimant notifies the Court that the claimant wishes to serve it". Although providing that notification, and taking responsibility for service, means the claimant assumes what Mr Hale for Paragon characterises as "the burden and risk of serving the claim form correctly", there are some advantages to a claimant in doing so. It means a claimant maintains control over the timing of the service, and as well as demonstrating to a defendant the intention to start legal proceedings with all that entails, having issued a claim form (which requires paying a fee), and it shows that every step has been taken to commence proceedings, other than the crucial (and final) one of actually serving the claim form. It is service that initiates the court's involvement in, and jurisdiction over, the dispute. Accordingly, a claimant that issues, but does not serve, a claim form has demonstrated that all the steps required to be taken to start legal proceedings have been taken. The very final one, which is the last one in the chain, has not.

20. By CPR Part 6.5(1), personal service must be used where it is required by law, by the CPR, a practice direction or a court order. In other cases, by CPR 6.5 (2), personal

service may be used. However, personal service may not be used "where rule 6.7 applies": this is stated in CPR Part 6.5(1)(a).

21. CPR Part 6.7(1) governs when service upon a solicitor within the jurisdiction of England & Wales is a permissible method of service of a claim form, and stipulates when that method must be used in the following terms:

"Subject to CPR 6.5(1)……., the claim form must be served at the business address of a solicitor where:

(a) the defendant has given in writing the business address within the jurisdiction of a solicitor as an address at which the defendant may be served with the claim form, or

(b) a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within the jurisdiction."

22. Neither of (a) or (b) apply in this case. Paragon did not give the address of its solicitor as an address at which service could be effected upon it; nor did Clydes notify "the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within the jurisdiction." This just did not happen, and the point regarding whether Clydes was authorised to accept service was not addressed.

23. Further, Mr Hale for Paragon points out that Practice Direction 6A paragraphs 4.1 and 4.2 specify the requirements necessary for service by email in any event. This is set out in CPR Part 6.3(1)(d), which states that a claim form may be served by electronic means provided this is done "*in accordance with Practice Direction 6A*." Accordingly, he maintains that where Practice Direction 6A is not complied with, a claim form may not be served by electronic means.

24. The relevant part of PD 6A is paragraph 4. This materially provides (in relation to email):

"4.1 Subject to the provisions of rule 6.23(5) and (6), where a document is to be served by fax or other electronic means—

(1) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving—

(a) that the party to be served or the solicitor is willing to accept service by fax or other electronic means; and

(b) the fax number, e-mail address or other electronic identification to which it must be sent; and

(2) the following are to be taken as sufficient written indications for the purposes of paragraph 4.1(1)—

…

4.1(1)(b) an e-mail address set out on the writing paper of the solicitor acting for the party to be served but only where it is stated that the e-mail address may be used for service; or

…

4.2 Where a party intends to serve a document by electronic means (other than by fax) that party must first ask the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means (for example, the format in which documents are to be sent and the maximum size of attachments that may be received)."

25. I consider that the standard footer in the Clydes emails which I have set out at [14] above is sufficient to satisfy the requirements of paragraph 4.1 of PD 6A. Indeed, at the hearing of the applications, Mr Hale found himself effectively conceding this point. He was right to do so, as the contrary is not reasonably arguable. Clydes itself had specified that it would only accept service electronically.

26. However, paragraph 4.2 of the Practice Direction was not complied with. That passage uses mandatory wording. "That party must first ask the party who is to be served whether there are any limitations….". Mr Howells QC for the Claimants relies upon the fact that this provision is, he submits, really aimed at sizeable attachments or Excel spreadsheets which might not be properly transmitted by email, and there is no question in this case that the Claim Form and the Particulars of Claim were both received. Whether he is correct about the rationale for the rule being in existence, and whether the failure to comply with paragraph 4.2 of PD6A is sufficient to invalidate service that would otherwise be entirely technically unobjectionable, there is a fundamental issue that must be addressed in terms of service upon Clydes in any event. This next point is far more important, in my judgment, than whether S+W had asked Clydes whether there was a limitation upon the size or format of attachments that could be sent. Absent the next point, I doubt that a failure to ask a party to be served about format and size of attachment would be considered sufficiently fundamental to represent an obstacle to effective service. However, it is not necessary to decide that point in any event, because the next issue is by far the most important.

27. This is the issue of authority. CPR Part 6.7(1)(b) requires "a solicitor acting for the defendant" to have "notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant". There was no such notification here.

28. The reason for express notification is very clear. As stated by Lord Sumption at [17] of ***Barton v Wright Hassall LLP*** [2018] UKSC 12, "A solicitor must have his client's authority to accept service of originating process". Any solicitor acting for a client generally does not such authority as a matter of course, or as a function of being that client's solicitor generally, or being involved on that client's behalf in the dispute. As a Supreme Court case, the decision in ***Barton v Wright Hassall*** is of the highest authority and I will refer to it further at [48] below.

29. The need for specific authority by solicitors to accept service for a defendant is explained further in other cases, including in ***Higgins v ERC Accountants and others*** [2017] EWHC 2190 (Ch) by HHJ Pelling QC, quoting at [23] Arnold J (as he then

was) in ***Personal Management Solutions Ltd v Gee 7 Group Ltd*** [2016] EWHC 891 (Ch) at [26]. The passage from the judgment in ***Higgins*** says:

"[23] In addition, Cs had not asked any of the defendants or their respective solicitors either in the pre-action protocol letters or by any subsequent communication down to 20 July whether they were able to serve proceedings on the defendants' solicitors. That only came much later in the following year. CPR r.6.7 is entirely clear as to what is required if service is to be effected on a solicitor. A solicitor does not generally have implied authority to accept service and if a solicitor accepts service without express authority he or she is in breach of his professional duty to his client – see ***Personal Management Solutions Limited v. Gee 7 Group Limited*** [2016] EWHC 891 (Ch) *per* Arnold J at [27]. As Arnold J pointed out, this is not a technical point. It is an important matter as between clients and solicitors since holding a solicitor to have accepted service on behalf of a client notwithstanding that the solicitor had not said he was authorised to accept service or even been asked whether he was authorised to accept service could expose a solicitor without actual authority to accept service to regulatory action or a claim."

(emphasis added)

30. The dicta in ***Personal Management*** of Arnold J (as he then was) relied upon by HHJ Pelling QC states:

"[26] …..As I said at the outset of this judgment, there is no dispute that at that point in time there had been no explicit statement by RPC that they were authorised to accept service. For the reasons that I have given, in my judgment no such statement was implicitly made on the true construction of any of the correspondence upon which PG relies.

[27] In his judgment the Deputy Master reached the opposite conclusion. In doing so, he seems to have been influenced by the fact that, as he stated no less than three times in his judgment, he considered that the point being taken by G7 was "a highly technical point". It may be that it is a technical point, but it is not simply a technical point, as counsel for G7 rightly submitted. The question of whether an originating process has been properly served is not simply a technical question; it goes to the root of the court's jurisdiction. Moreover, it is also an important matter as between clients and solicitors because it is well established that, even a solicitor is acting for his client in all respects relating to intended claim, he does not have implied authority to accept service of originating process."

(emphasis added)

31. It is for the Claimants to construct or establish authority on the part of Clydes, which Mr Howells sought to do by construing the dealings of the parties' solicitors from 2017 to 2021, but also specifically based on the terms of the Extension Agreement. It is therefore convenient to turn to the terms of that latter document. I shall reproduce only some terms.

32. After identifying the parties, who are the same as the parties to this litigation, under "Background" the following is stated:

"A. [The Claimants] issued proceedings in the High Court against Paragon on 14 August 2020 Claim Number HT-2020-000300.

B. The Parties enter into this agreement ("Agreement") to extend the time for service of the claim form and the particulars of claim by [the Claimants] on Paragon according to the terms of this Agreement."

33. Under clause 2, headed "Agreement to extend time", the following appears:

"2.1 The parties hereby agree to extend the deadline for service of the claim form and the particulars of claim in the proceedings with Claim Number HT-2020-000300 from 12.00 midnight on 14 December 2020 to 12.00 midnight on 29 January 2021 ("the Agreed Date").

2.2 Pursuant to CPR 2.11, the parties acknowledge and affirm that this Agreement varies the deadline for the service of a claim form which is contained at CPR 7.5.

2.3 In consequence of this agreement the parties acknowledge and affirm that the particulars of claim must:

(a) be contained in or served with the claim form; or

(b) be served on Paragon within 14 days after the service of the claim form save that the particulars of claim must be served no later than the Agreed Date".

34. The other part which it is useful to reproduce is clause 3, headed "Warranties and Authority". At 3.2 the following is stated:

"3.2 The signatories to this Agreement are duly authorised by the respective party on whose behalf they sign to sign this Agreement and bind the respective party to the terms of it."

The document was signed by each firm of solicitors on behalf of their clients, with the phrase "signed for and on behalf of" followed by the party's name, and then the respective solicitor's name and signature.

35. The agreement must be construed as a whole and the fact that I have reproduced only some of its terms should not be taken as meaning that I have not done that. There is no dispute between the parties as to the principles of construction, nor could there be. The background facts known to the parties included the pre-action process over a lengthy period, as well as the fact that the Claim Form had been provided to Clydes in October 2020 for the purposes of the commercial meeting (which in this case means a without prejudice meeting, whether for the purposes of seeking a settlement or otherwise).

36. However, the express words of the agreement – which are the starting point to construe it, given the terms of ***Woods v Capita Insurance Services Ltd*** [2017] UKSC 24, including the explanation at [8] to [14] of the effect of ***Arnold v Britton*** [2015] UKSC 36 – are, to my mind, clear and unambiguous. Recital B of the Extension Agreement summarises it well. The purpose and intention of the parties, recorded in the agreement, was "to extend the time for service of the claim form and the

particulars of claim." The parts of the CPR specifically identified within the Extension Agreement reinforce this, if reinforcement were necessary.

37. No part of the Extension Agreement can be construed, in my judgment, as either providing any information necessary to comply with CPR Part 6.7, or as changing the effect of CPR Part 6.7 by agreement, or waiving any part thereof. Nothing in that document, however it is construed, can be interpreted as a statement or representation by Clydes that it had authority to accept service of the Claim Form on behalf of Paragon. It deals purely with extending the deadline for service. Further, the fact that the deadline is extended to one delineated by a precise time, midnight, on the relevant day does not implicitly require or permit service by email in any event, as contended for by Mr Howells. However, even if I were wrong about that and it did, that does not mean of itself that the service by email would be required upon Clydes, rather than upon Paragon. Most companies have emails accounts of their own. Even if Mr Howells were right and the use of midnight on a given day meant, implicitly, service had to be effected by email, this could be achieved by serving upon Paragon itself.

38. Although the use of the words "on Paragon" in clause 2.3(b) was relied upon by Mr Howells as suggesting that there was a different method of service intended for the particulars of claim rather than the claim form (referred to in clause 2.3(a) without stating "on Paragon"), Mr Hale readily demonstrated that the wording of clause 2.3 generally followed that used in CPR Part 7.4(1)(b), which deals entirely with timing. CPR Part 7.4(1)(b) says "served on the defendant" and 7.4(1)(a) does not. Both parts follow the introductory wording of the rule and start with "the particulars of claim must:" and this is then followed by (a) (which does not have the words "upon the defendant") and (b) (which does have these words). Similarly, in clause 2.3 of the Extension Agreement, the words "the particulars of claim must:" appear as introductory wording followed by each of (a) (which does not have the words "on Paragon") and (b) (which does). If Mr Howells was right, then his point of construction would mean that either CPR Part 7.4(1) would need construing differently in effect to CPR Part 6.7, or it would mean the Extension Agreement words would have a different construction to the same words in CPR Part 7.4(1). Either result would, in my judgment, be wholly artificial, if not absurd. But even without that assistance, the words of the Extension Agreement clearly deal with the timing of service, and not method or whether Clydes had authority to accept service. The wording itself of the agreement considered alone does not justify accepting Mr Howells' construction. When one considers the different background circumstances in which the Extension Agreement alone is construed (compared to the CPR itself), there is no rationale for such a different meaning of what is, to all intents and purposes, practically identical wording in the rules dealing with the same subject matter. That assists me in concluding my construction of the words is correct, but that is only in terms of a "sense check" after I have construed the words in the agreement itself.

39. Taken and construed as a whole, in my judgment the Extension Agreement deals solely with timing. No part of it assists the Claimants in their argument that service was permitted on Clydes, or that Clydes were authorised to accept service, rather than service being required upon Paragon. Nor is there anything in the dealings between the solicitors, or the correspondence between them, that could constitute the necessary statement of authority. In my judgment no such statement was implicitly made on the

true construction of any of the correspondence between S+W and Clydes, or the agreements, or both taken together.

40. Indeed, the longer that these points were the subject of submissions, the more convinced I became that all of these myriad issues are precisely why the Rules Committee themselves have, very clearly, set out exactly what is required for service of proceedings upon solicitors; and for service by electronic means. If the requirements of the relevant parts of CPR Part 6, and the Practice Direction 6A, had been followed, there would have been no difficulty.

41. The Claimants also advanced an argument that by Clydes signing the Extension Agreement on Paragon's behalf, this in some way led to creation of the necessary authority for the purposes of service of the Claim Form. This was based partly on the fact that the word "*Solicitor*" is defined in CPR Part 6.2 (d) to include any person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the conduct of litigation (within the meaning of that Act). I reject that argument. The cases make clear that even if a solicitor is acting in all respects for a party in potential litigation, more is required in terms of authority. I can do no better than merely to repeat the dicta of Arnold J (as he then was) from the case quoted at [30] above when he said:

"Moreover, it is also an important matter as between clients and solicitors because it is well established that, even a solicitor is acting for his client in all respects relating to an intended claim, he does not have implied authority to accept service of originating process."

42. In summary therefore, the following points are decided as follows on the issue of whether service by email upon Clydes on the evening of 23 April 2021 was effective. The result is in favour of Paragon:

1. Was Clydes prepared to accept service by email generally as a result of its communications on this specific subject? The answer to this is yes, as shown by the email footer on all the Clydes' emails.

2. Was Clydes instructed or authorised to accept service of this Claim Form in these proceedings on behalf of the Defendant, Paragon? The answer to this is no.

3. Were the requirements of CPR Part 6.7 and Practice Direction 6A paragraph 4.1 and 4.2 complied with by the Claimants' solicitors? The answer to this is, with the exception of paragraph 4.1 of PD6A, no.

43. It is clear, in my judgment, from the generic wording of the Clydes email footer, which I have quoted at [14] above, that for reasons associated with the changes to working practices adopted at that firm as a result of the pandemic, Clyde & Co was not only prepared to accept service by email, but positively required those with whom it was dealing, to serve documents including claim forms only by email. Accordingly, that issue is the only one that is answered in the Claimants' favour. That does not assist the Claimants with the point concerning lack of notification of authority on the part of Clydes to accept service of proceedings on behalf of Paragon. Clydes were never asked by S+W whether they had such authority; Clydes never said that they had such authority; and nothing in the documents (including the Extension Agreement) can be construed as amounting to implied authority.

44. Paragon therefore succeeds on its application. It is therefore necessary to turn to the Claimants' application. This is advanced under a number of different routes, and all of them are designed to the same end, essentially to cure the defective service. One only reaches consideration of the Claimants' application if a finding has been made in Paragon's favour on its application, which it has. Given that I have found that service was not effective, it is necessary to consider whether the situation in which the Claimants and S+W find themselves can be remedied. The Claimants rely on the following provisions.

45. CPR Part 6.15, service of the claim form by an alternative method or at an alternative place, which provides:

"(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…"

46. The Claimants also rely upon CPR Part 6.16, the power of court to dispense with service of the claim form, which provides:

"(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."

47. As well as the Court's discretion to award relief from sanctions under CPR 3.9 (which I deal with further below at [60] below), the Claimants also seek to achieve the same end through CPR Part 3.10, the general power of the court to rectify matters where there has been an error of procedure. However, in my judgment it is not necessary, or permissible, to consider that. This is because the relevant route for curing defective service in the circumstances of this case are, in my judgment, contained in CPR Part 6.15 and 6.16. If the Claimants cannot succeed through those parts of the CPR, in my judgment they cannot succeed through Part 3.10.

48. The Supreme Court in ***Barton v Wright Hassall LLP*** [2018] UKSC 12 stated that:

> "*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*."

49. In that case, the Supreme Court considered and clarified its earlier decision in ***Abela v Baadarani*** [2013] 1 WLR 2043. ***Barton*** confirmed the principles of "more general application". The case concerned a litigant in person who had some experience of court proceedings. He wished to commence proceedings in professional negligence against his former solicitors who had acted for him in earlier litigation against his former solicitors. He elected to serve the proceedings himself, and although there had been correspondence by email with solicitors acting for the intended defendant (which was described as "desultory correspondence") he emailed the claim form and

particulars of claim on the last day for service, but did not comply with either CPR Part 6.3 or Practice Direction 6A. He sought relief under CPR Part 6.15. He failed to obtain this relief before the District Judge, failed to overturn this on appeal before the judge, failed in his appeal before the Court of Appeal and failed on the appeal to the Supreme Court.

50. In the leading judgment of the Supreme Court, the following can be taken from [9] in the speech of Lord Sumption:

> 1. The test is whether, "in all the circumstances, there is good reason to order that steps taken to bring the claim form to the attention of the defendant is good service".
>
> 2. Service has a number of purposes, but the most important is to ensure that the contents of the document are brought to the attention of the person to be served. This is therefore a "critical factor". However, "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)".
>
> 3. The question is whether there is good reason for the Court to validate the mode of service used, not whether the claimant had good reason to choose that mode.
>
> 4. The object (of the introduction of a power retrospectively to validate non-compliant service of a claim form) was to open up the possibility that in appropriate cases a claimant may be enabled to escape the consequences of limitation when a claim form expired without having been validly served.

51. The Supreme Court also stated at [10] that this was not a complete statement of the principles on which the power under CPR Part 6.15(2) will be exercised. "The facts are too varied to permit such a thing, and attempts to codify this jurisdiction are likely to ossify it in an way that is probably undesirable". The main relevant factors in deciding whether to exercise the power under CPR Part 6.15(2) are likely to be: (i) whether the claimant has taken reasonable steps to effect service in accordance with the rules; (ii) whether the defendant or his solicitor was aware of the contents of the claim form at the time when it expired; and (iii) what, if any, prejudice the defendant would suffer. None of these factors is decisive, and the weight to be attached to each will vary with all the circumstances.

52. Here, therefore, whether there is "good reason" must be considered against all the facts. I have considered all the facts, but the ones that I consider most important are that the Claimants had solicitors acting for it throughout, and S+W had been involved over a period measured in years (not weeks or months) acting for them in relation to this dispute. This included both negotiating and signing the Extension Agreement on its behalf. This agreement – or these agreements – extended time for service consensually, in order to permit discussions. However, that alone does not change the method or place of proper service, which remained as required under the rules. S+W were entitled to rely upon the express terms of the email footer from Clydes positively discouraging service by any means other than email, but that merely went to the fact of using email to effect service, and certainly not to the issue of authority on the part of Clydes to accept service of proceedings on its client's behalf. The general situation in the country during the pandemic where a great majority of offices were not occupied due to the measures imposed (and adopted or maintained voluntarily, even when not strictly legally required) for remote working were relevant to the use of email, but do not have any impact in terms of satisfaction of the important

requirement that CPR Part 6.7 must be complied with. That rule did not cease to have effect because of the pandemic.

53. Mr Hale urged me not to criticise the conduct of the solicitor at Clydes on the late afternoon of 23 April 2021 who was called on her mobile phone and told (or asked) to enter into another Extension Agreement, and I do not criticise her. There was no reason why she should have been able to accomplish this within the few hours remaining that day, even if she could obtain instructions to do so. There was no obligation upon Paragon to enter into such a further agreement; there had been three such agreements already in any event. She was, in any case, simply acting for a defendant who may, or who may not, be about to have proceedings formally served upon it. Everything that unfolded that afternoon was somewhat last minute. Nor was there any obligation upon her, after working hours, to answer or return phone calls made on the same subject. The solicitors at S+W had brought this situation upon themselves, and ought not to attempt in some way to transfer the obligation to achieve proper service onto the solicitors acting for Paragon. The rules very clearly set out what is required by a party seeking to serve proceedings.

54. There is one way in which Clydes can be criticised, in my judgment, and that relates to one part of the evidence served on this application. In the second witness statement by the partner at Clydes acting for Paragon, he referred (at paragraph 17) to the fact that on 14 May 2021, S+W sent a letter direct to Paragon enclosing a copy of the Claim Form and Particulars of Claim. He stated "this correspondence is irregular given that Shepherd + Wedderburn were fully aware of Clyde & Co's instruction. Shepherd + Wedderburn have failed to explain why they considered that they were entitled to write to the Defendant direct when they knew the Defendant had retained solicitors."

55. This suggests an equal ignorance on his part, as on the part of S+W, of the requirements of CPR Part 6.7. If a party does not have the necessary statement of authority in terms of service upon a defendant's solicitors, it can only serve upon the defendant itself. Paragraph 17 of the partner's second witness statement is unjustified. Mr Hale, who argued the case with commendable realism and skill, accepted that the criticism contained within that passage was misplaced. What that letter of 14 May 2021 demonstrates is that after three weeks S+W cured the defective service upon Clydes, by serving the proceedings correctly on Paragon at its registered office. However, that proper service was three weeks after the date the claim form expired, which means it was after the limitation period had expired.

56. Turning therefore to consider the necessary exercise of discretion, and the three questions posed by Lord Sumption, the following analysis is relevant. Paragon did know of the existence and content of the Claim Form. This "critical factor" is in favour of the Claimants, but that is not sufficient of itself to constitute a good reason under CPR Part 6.15. The other questions posed are not answered in favour of the Claimants. In my judgment the Claimants did not take reasonable steps to effect service in accordance with the rules. The rules were broadly ignored (at least until 14 May 2021), in particular the very important point concerning the party upon whom the Claim Form had to be served, and whether Clydes had authority to accept service on Paragon's behalf. I also do not consider, taken together, that what took place on the afternoon of 23 April 2021 could be described as "taking reasonable steps". It was

very last minute and simply did not address a crucial and important question, which Clydes do not appear to have been asked at any point over the preceding period of years, namely whether Clydes was authorised to accept service of proceedings. So far as prejudice is concerned, Paragon will, absent relief, be protected from the substantial proceedings against it, by virtue of the procedural bar available under the Limitation Acts. The prejudice to Paragon, if relief is granted to the Claimants, would be substantial.

57. Mr Howells submitted that the prejudice to Paragon of permitting the Claimants relief (and hence losing its limitation defence) ought to be balanced against the prejudice to the Claimants of losing their entitlement to pursue a claim for approximately £10 million. That is not one of Lord Sumption's factors, but even if that argument were right, the Claimants have lost their ability to proceed with the claim without it being time-barred purely and simply because, on the last day for service of the Claim Form (and after that date had been extended three times) it was not served in accordance with the rules. It was not served in accordance with the rules until three weeks had elapsed, namely on 14 May 2021. There is nothing in the facts of the matter to justify any balancing exercise being resolved in the Claimant's favour as a matter of discretion.

58. The Claimants' solicitors left the important act of serving the claim form to the last minute, and could therefore be said to have brought this situation upon themselves. As Lord Sumption stated at [23] in ***Barton v Wright Hassall***, acting in this way is not something that the court will indulge lightly:

> "[23] But having issued the claim form at the very end of the limitation period and opted not to have it served by the Court, he then made no attempt to serve it himself until the very end of its period of validity. A person who courts disaster in this way can have only a very limited claim on the court's indulgence in an application under CPR rule 6.15(2). By comparison, the prejudice to Wright Hassall is palpable. They will retrospectively be deprived of an accrued limitation defence if service is validated."
>
> (emphasis added)

59. Courting disaster is an apt description for what S+W did in the final few weeks of life of the claim form, even with the Extension Agreements in place. It is certainly an apt description for what occurred on 23 April 2021. In my judgment therefore, there is no good reason on the facts of this case to grant the Claimants' applications under CPR Part 6.15 and 6.16. There are no exceptional circumstances and there is no good reason to grant the Claimants relief under this mechanism. These rules are there to provide relief in an appropriate case, but in my judgment this is not such a case. This part of the Claimants' application therefore fails.

60. Turning to relief from sanctions, this is governed by a different part of the CPR. CPR Part 3.8 states:
"(1) Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction."

61. CPR Part 3.9 states:

"(1) 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, so as to enable it to deal justly with the application, including the need—
(a) for litigation to be conducted efficiently and at proportionate cost; and
(b) to enforce compliance with rules, practice directions and orders."

62. No sanction has been imposed on the Claimants by the court, nor have the Claimants failed to comply with a court order. There has been a failure to effect service, which is the originating process by which the court's jurisdiction over the dispute is commenced. Relief from sanctions under CPR Part 3.9 is not the appropriate route for the Claimants to remedy the situation in which they find themselves. It is doubtless for this reason that this line of attack (or defence) was not advanced for the Claimants to any appreciable degree in oral submissions by Mr Howells. I can understand why one might, out of an abundance of caution, include it in an application of this nature to adopt a "belt and braces" approach, but it adds nothing.

63. Due to the nature of what serving legal proceedings constitutes, namely commencement of the action itself, I do not consider that any failure properly to serve proceedings (or the consequences of failing properly to serve a claim form) represents a sanction at all, properly so called. The Defendant maintains that this part of the attempt by the Claimants to remedy the situation that has arisen is misconceived in law, and I accept that characterisation of it. Lord Sumption at [8] in ***Barton v Wright Hassall*** essentially says the same. Lord Briggs (who dissented in that case) also stated at [31] that he agreed with Lord Sumption on this point.

64. I am supported in my conclusion that relief from sanctions is not appropriate relief for a party in the Claimants' position on these facts by the statements of Nicklin J in ***Piepenbrock v Associated Newspapers Ltd and others*** [2020] EWHC 1708 (QB) at [72], where he observed in a similar situation:

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

65. I do not consider that the power available to the court under the relief from sanctions regime can, or should, give the Claimants a further string to their bow, if they fail to achieve the remedy they seek under the powers available to the court under CPR Parts 6.15 and 6.16. I have found that they have so failed; the application for relief from sanctions must also therefore be dismissed.

66. The instant case is slightly different – but in my judgment only slightly – from the case of ***Barton v Wright Hassall*** itself. That is not to say I have slavishly followed the result in that case, because I have not. Rather, I have applied the approach explained by the Supreme Court in that case, to the particular facts of this one, and considered the exercise of discretion on the facts of this case. It just so happens to have led to the same result. The reason this case is slightly different is because the claim form was

issued about 2 weeks or so before the end of the limitation period, and also because Extension Agreements were subsequently entered into. However, the Claim Form in this case was issued *3 years and 8 months* after the original letter of claim dated 20 December 2016 was sent to Paragon. This is a very lengthy period. The third Extension Agreement only amended the deadline for service by one week, namely from 16 April 2021 to 23 April 21, but even so, the Claimants (or their solicitors) had a total period of over 8 months in which to serve that important originating process. The assistant at the Claimants' solicitors only contacted Ms Gregory at 1440 on a Friday, the same day when this deadline for service expired, and by telephone. There is no guarantee that anyone at Clydes connected with the case would have even been available to take a phone call on that afternoon, although Ms Gregory happened to be. She took the call on her mobile phone, and said she would seek instructions. This was only about 2½ hours before the close of business on that day. Obviously, the aim or intention at the Claimants' solicitors was to obtain yet another extension. Failing another such further agreement (which would have been the fourth extension to the deadline by agreement, and which S+W had no right to expect would necessarily be agreed) service was required before midnight that same day, and this was attempted at 1846. This is just over 5 hours before the deadline, and occurred over 8 months after the claim form had been issued. Approaching this matter in this way, at these times on the final day, seems to me, as I have explained, to be courting disaster. The situation was entirely avoidable.

67. Finally, I would simply add this. The Civil Procedure Rules are there for everyone to observe, both litigants in person, as well as solicitors. They are widely available. Sympathy has no place in the court's decision making, but it is difficult not to have some with the solicitor who made this mistake. However, the mistake made by the assistant solicitor at S+W in this case cannot be laid solely at his door. He was assisting a partner who had overall conduct of the proceedings. The matter had been underway for some years. In addition, the court has no knowledge at all (and cannot, as these are privileged) of the instructions between the Claimants and their solicitors. It could be that the Claimants were similarly last minute in instructing their own solicitors to execute service. It could be that they were reluctant to do so. It is impossible to know. Mr Hale characterised the mistake at S+W in somewhat pejorative terms, but I do not consider that it is necessary for me to do so. The basic facts speak for themselves. The rules give a period of four months for service of a claim form, and in this case that was extended by another four months in total, by agreement. Eight months is a generous time period. That period is ample time for the claim form to have been properly served. Had this been done in good time prior to the expiry of the period, then the difficulties that occurred would have been discovered in time for the defective service to have been rectified. Three weeks later on 14 May 2021 was far too late.

68. In all the circumstances therefore, the Claimants' applications are dismissed, which means that the Defendant is successful in overall terms on these two applications. The Claim Form was not validly served within the time available, and there is no relief which the court, in the exercise of its discretion, is willing to grant the Claimants to remedy this state of affairs. If there are any consequential matters that cannot be dealt with by agreement, the matter will be listed for a short hearing to do so.