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Summary

Hilary Term
[2018] UKSC 12
On appeals from: [2016] EWCA Civ 177

JUDGMENT

Barton (Appellant) *v* Wright Hassall LLP (Respondent)

before

Lady Hale, President
Lord Wilson
Lord Sumption
Lord Carnwath
Lord Briggs

JUDGMENT GIVEN ON

21 February 2018

Heard on 22 November 2017

Appellant
Howard Elgot
Abigail Telford
(Instructed by Direct Access)

Respondent
Michael Pooles QC
Henry Bankes-Jones
(Instructed by Berrymans Lace Mawer LLP (Manchester))

LORD SUMPTION: (with whom Lord Wilson and Lord Carnwath agree)

1. The appellant, a litigant in person, purported to serve the claim form in these proceedings on the defendant's solicitors by email, without obtaining any prior indication that they were prepared to accept service by that means. It is common ground that this was not good service. As a result, the claim form expired unserved on the following day. The question at issue on this appeal is whether the Court should exercise its power retrospectively to validate service. To date, the District Judge, the County Court judge and the Court of Appeal have declined to do so. If their order stands, the result will be that Mr Barton can proceed with his claim only by a fresh action. The present appeal has been conducted on the assumption that such an action would be statute-barred.

The facts

2. Mr Barton has been locked in litigation for the past 12 years with two firms of solicitors who have successively acted for him. In October 2005, he brought an action in the Coventry County Court against a firm called Bowen Johnsons, which had acted for him in 1999 in proceedings for ancillary relief following his divorce. He alleged that they had failed properly to protect his interests in the drawing of the consent order by which those proceedings were terminated. The respondent, Wright Hassall LLP, acted for him in the litigation against Bowen Johnsons until 17 May 2007, when they were taken off the record on their own application by order of the District Judge, after an acrimonious dispute about fees. Mr Barton had resisted that application, and costs were awarded against him. His appeal to the County Court judge against the costs order was dismissed, also with costs, on 14 December 2007. In the meantime, acting in person, he had settled the proceedings against Bowen Johnsons on terms which were embodied in a consent order.

3. There followed two actions between Mr Barton and Wright Hassall. In the first, Wright Hassall claimed their costs of acting for him before they came off the record, and obtained summary judgment. The second was the present action for professional negligence against the firm, which Mr Barton, acting in person, began by a claim form issued on 25 February 2013. In it, he alleged that Wright Hassall were in breach of their duties to him in their conduct of the action against Bowen Johnsons and in coming off the record at the time that they did. He claimed damages consisting in the difference between the value of the settlement and what he alleged to be the full value of his claim, together with the

costs of unsuccessfully resisting Wright Hassall's application to come off the record and appealing against the costs order.

4. In the ordinary course, the claim form would have been served on the defendant by the Court: CPR rule 6.4(1). But Mr Barton elected to serve it himself pursuant to the exception at (b). He had four months in which to do so, expiring on 25 June 2013: CPR rule 7.5. His first step, after correspondence in accordance with the Pre-Action Protocol, was to ask for an extension of time to serve the claim form and particulars of claim, which was refused. On 26 March 2013, Wright Hassall instructed solicitors, Berrymans Lace Mawer. They sent an email on the same day to Mr Barton asking him to address all future correspondence to them. On 17 April 2013, Berrymans emailed Mr Barton to tell him that they had now been instructed in addition by Wright Hassall's liability insurers. They referred to a request which Mr Barton had apparently made for clarification of Wright Hassall's position on the costs of the earlier proceedings, which they said had already been made clear by Wright Hassall themselves. The email concluded "I will await service of the Claim Form and Particulars of Claim." So far as the material before us shows, that was the full extent of the communications between Mr Barton and Berrymans until 24 June 2013, the last day before the expiry of the claim form. At 10.50 am on that day Mr Barton emailed them as follows:

> "Please find attached by means of service upon you.
>
> 1. Claim Form and Response Pack
>
> 2. Particulars of Claim
>
> 3. Duplicated first and last pages of the Particulars of Claim showing the court seal and the signature on the statement of truth.
>
> The Particulars of Claim were filed into Chesterfield County Court this morning.
>
> I would appreciate if you could acknowledge receipt of this email by return."

Mr Barton received an automatic reply, with a number to contact if the case was urgent, which he did not use. There was no substantive reply until 4 July. On that

day, Berrymans wrote to Mr Barton saying that they had not confirmed that they would accept service by email. In the absence of that confirmation, email was not a permitted mode of service. In those circumstances, they said that they did not propose to acknowledge service or to take any other step. They added that the claim form had therefore expired unserved and that the claim was statute-barred. On the same date they wrote in similar terms to the Court. The stage was set for the present issue.

The rules

5. Part 6 of the Civil Procedure Rules deals with the service of documents. Service of a claim form is governed by section II. CPR rule 6.3 provides for the permitted modes of service of a claim form. These include, at (1)(d), "fax or other means of electronic communication in accordance with Practice Direction 6A". CPR 6APD contains directions supplementary to CPR 6. CPR 6APD.4 provides as follows:

> "**4.1**
>
> Subject to the provisions of rule 6.23(5) and (6), where a document is to be served by fax or other electronic means -
>
> (1) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving -
>
> (a) that the party to be served or the solicitor is willing to accept service by fax or other electronic means; and
>
> (b) the fax number, email address or other electronic identification to which it must be sent; and
>
> (2) the following are to be taken as sufficient written indications for the purposes of paragraph 4.1(1) -

> (a) a fax number set out on the writing paper of the solicitor acting for the party to be served;
>
> (b) an email 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 email address may be used for service; or
>
> (c) a fax number, email address or electronic identification set out on a statement of case or a response to a claim filed with the court.
>
> **4.2**
>
> Where a party intends to serve a document by electronic means (other than by fax) that party must first ask the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means (for example, the format in which documents are to be sent and the maximum size of attachments that may be received)."

6. A claimant who is unable to serve the claim form in accordance with the rules within the four month period allowed by CPR rule 7.5 has two courses open to him. He may apply for an extension of the four month period, under CPR rule 7.6. If he makes the application after the expiry of that period (or any extension of it), then rule 7.6(3) provides that

> "… the court may make such an order only if -
>
> (a) the court has failed to serve the claim form; or
>
> (b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and

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

His other course is to apply under CPR rule 6.15 for an order that some step that he has taken or proposes to take is to stand as good service notwithstanding that it would not otherwise comply with the rules. CPR rule 6.15 provides:

> **6.15.- Service of the claim form by an alternative method or at an alternative place**
>
> "(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."

7. Before the District Judge, Mr Barton's primary case was that his service complied with the rules, because Berrymans' correspondence with him before 24 June 2013 amounted to an "indication" that they would accept service by email. Alternatively, he asked for service to be validated under CPR rule 6.15(2). In the further alternative, he asked for the validity of the claim form to be extended under CPR rule 7.6. He failed in all three contentions, and was given leave to appeal on the second one only. Accordingly, all subsequent hearings have been conducted on the footing that service by email was not valid, and that the sole question was whether it should be validated.

Exercising the discretion under CPR 6.15(2)

8. The Civil Procedure Rules contain a number of provisions empowering the court to waive compliance with procedural conditions or the ordinary consequences of non-compliance. The most significant is to be found in CPR 3.9, which confers a power to relieve a litigant from any "sanctions" imposed for failure to comply with a rule, practice direction or court order. These powers are conferred in wholly general terms, although there is a substantial body of case law on the manner in which they should be exercised: see, in particular, *Denton v TH White Ltd (De Laval Ltd, Part 20 defendant) (Practice Note)* [2014] 1

WLR 3926 (CA), esp at para 40 (Lord Dyson MR and Vos LJ), *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] 1 WLR 4495 (SC(E)). The short point to be made about them is that there is a disciplinary factor in the decision whether to impose or relieve from sanctions for non-compliance with rules or orders of the court, which has become increasingly significant in recent years with the growing pressure of business in the courts. CPR rule 6.15 is rather different. It is directed specifically to the rules governing service of a claim form. They give rise to special considerations which do not necessarily apply to other formal documents or to other rules or orders of the court. The main difference is that the disciplinary factor is less important. The rules governing service of a claim form do not impose duties, in the sense in which, say, the rules governing the time for the service of evidence, impose a duty. They are simply conditions on which the court will take cognisance of the matter at all. Although the court may dispense with service altogether or make interlocutory orders before it has happened if necessary, as a general rule service of originating process is the act by which the defendant is subjected to the court's jurisdiction.

9. 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. This court recently considered the question in *Abela v Baadarani* [2013] 1 WLR 2043. That case was very different from the present one. The defendant, who was outside the jurisdiction, had deliberately obstructed service by declining to disclose an address at which service could be effected in accordance with the rules. But the judgment of Lord Clarke of Stone-cum-Ebony JSC, with which the rest of the court agreed, is authority for the following principles of more general application:

> (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" (para 33).
>
> (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 (para 37). 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)" (para 36).
>
> (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) Endorsing the view of the editors of *Civil Procedure* (2013), vol i, para 6.15.5, Lord Clarke pointed out that the introduction of a power retrospectively to validate the non-compliant service of a claim form was a response to the decision of the Court of Appeal in *Elmes v Hygrade Food Products plc* [2001] EWCA Civ 121; (2001) CP Rep 71 that no such power existed under the rules as they then stood. The object was to open up the possibility that in appropriate cases a claimant may be enabled to escape the consequences for limitation when a claim form expires without having been validly served.

10. This is not a complete statement of the principles on which the power under CPR rule 6.15(2) will be exercised. The facts are too varied to permit such a thing, and attempts to codify this jurisdiction are liable to ossify it in a way that is probably undesirable. But so far as they go, I see no reason to modify the view that this court took on any of these points in *Abela v Baadarani*. Nor have we been invited by the parties to do so. In the generality of cases, the main relevant factors are likely to be (i) whether the claimant has taken reasonable steps to effect service in accordance with the rules and (ii) whether the defendant or his solicitor was aware of the contents of the claim form at the time when it expired, and, I would add, (iii) what if any prejudice the defendant would suffer by the retrospective validation of a non-compliant service of the claim form, bearing in mind what he knew about its contents. None of these factors can be regarded as decisive in themselves. The weight to be attached to them will vary with all the circumstances.

Mr Barton's case

11. Mr Barton's case on CPR 6.15(2) was argued with considerable skill by Mr Elgot, who also appeared for him in the Court of Appeal. It rested essentially on three points. The first was that the premise of the power to validate a service under CPR rule 6.15(2) was that service had purportedly been effected by some non-compliant means. That was, so to speak, a given. It followed that the dominant consideration when deciding to exercise that power was whether the mode of service chosen had been effective to achieve the main purpose of service, namely to bring the contents of the claim form to the defendant's attention. Mr Elgot's second point was that, so far as it mattered what the reasons were for Mr Barton's failure to serve in accordance with the rules, he was entitled to assume that Berrymans would accept service by email. This was because (i) although he was aware that some solicitors did not accept service of documents by email, he did not know about CPR rule 6.3 or, presumably, Practice Direction 6A, which were relatively inaccessible to a litigant in person such as him; and (ii) he was entitled to assume that Berrymans were prepared to accept service of documents by email, because they had corresponded with him by email without saying that they were not prepared to do so. Third, he

submitted that their failure to accept service of his claim form by email and their failure to respond before the expiry of the limitation period to his attempt to serve them, amounted to "playing technical games", from which they should not be allowed to derive any advantage.

12. The District Judge directed himself that there was a two stage test. The first stage was whether CPR rule 6.15(2) was engaged at all, which depended on whether there was "good reason" to make the order. The second was whether, if there was "good reason", the court should exercise its discretion to do so. This was in accord with the literal language of the rule. But the parties were, I think, right to accept that it was unsatisfactory. If there is "good reason" to make the order, it would be irrational for a court to decline to make it as a matter of discretion. There is in reality only one stage to the inquiry, namely whether there is "good reason" to make the order. However, this error did not vitiate the District Judge's reasoning, because he concluded that there was no "good reason" to make the order, and on that footing Mr Barton had to fail whether there be one stage or two. He reached that conclusion on the simple ground that the only reason why Mr Barton did not comply with the rules for service was that he did not know what those rules were, and that was not a good reason to make the order. The District Judge was not referred to *Abela v Baadarani*, but it is difficult to point to any respect in which his reasoning would have been different if he had directed himself in accordance with it.

13. His Honour Judge Godsmark QC approached the matter on the basis that, the District Judge not having been referred to the relevant authorities, including *Abela v Baadarani*, he should deal with it afresh. He regarded the whole issue as turning, in the circumstances of Mr Barton's case, on the question posed at para 48 of Lord Clarke's judgment in *Abela*, namely whether there was any reason why the claim form could not be served within the period of its validity. He rejected Mr Barton's application on the ground that there was a number of ways in which service could have been properly effected, and his only reason for not adopting one of them was his ignorance of the rules. He rejected the suggestion that Mr Barton had been in some way "lulled into a false sense of the position" by the fact that Berrymans had been corresponding with him by email, and declined to accept that Mr Barton was entitled to greater indulgence because he had been unrepresented. His conclusion was that "CPR 6.15 is not there to protect litigants in person or those who do not know the rules. It is there to protect those who for some reason have been unable to effect service satisfactorily within the rules."

14. In the Court of Appeal, the main thrust of the argument, at least as they understood it, was that Judge Godsmark had concentrated too much on the reasons why the claim form had not been served in accordance with the rule, and not enough on the fact that Berrymans were aware of the claim and had received

the claim form. A claimant could, it was submitted, succeed in an application under CPR rule 6.15(2) even if he had not taken all reasonable steps to serve the claim form in accordance with the rules. The only reasoned judgment was that of Floyd LJ, with whom Black LJ and Moylan J agreed. He dealt with the issue less summarily than Judge Godsmark, but reached substantially the same conclusion. He pointed out that the judge had accepted that the claim form had been successfully drawn to Berrymans' attention, but had proceeded in accordance with Lord Clarke's analysis in *Abela v Baadarani* on the footing that that was not enough. The essential point was that although the question whether the claim form could have been served in accordance with the rules was not the totality of the legal test, it was the decisive consideration on the particular facts of Mr Barton's case. Floyd LJ accepted that a claimant who had failed to take all reasonable steps to serve in accordance with the rules might nevertheless succeed in obtaining an order under CPR rule 6.15(2). But he agreed with the judge that in circumstances where the claimant had done nothing at all other than attempt service in breach of the rules, and that through ignorance of what they were, there was no "good reason" to make the order. This ignorance was not excused by the fact that Mr Barton was unrepresented. He was no more impressed than the circuit judge had been by the argument that Berrymans had lulled Mr Barton into a false position.

The present appeal

15. Mr Barton is appealing against a discretionary order, based on an evaluative judgment of the relevant facts. In the ordinary course, this court would not disturb such an order unless the court making it had erred in principle or reached a conclusion that was plainly wrong. In my opinion both Judge Godsmark and the Court of Appeal identified the critical features of the facts of this case and reached a conclusion which they were entitled to reach. Indeed, save for one minor misdirection, which I have pointed out, I think that the same was true of the District Judge.

16. The first point to be made is that it cannot be enough that Mr Barton's mode of service successfully brought the claim form to the attention of Berrymans. As Lord Clarke pointed out in *Abela v Baadarani*, this is likely to be a necessary condition for an order under CPR rule 6.15, but it is not a sufficient one. Although the purpose of service is to bring the contents of the claim form to the attention of the defendant, the manner in which this is done is also important. Rules of court must identify some formal step which can be treated as making him aware of it. This is because a bright line rule is necessary in order to determine the exact point from which time runs for the taking of further steps or the entry of judgment in default of them. Service of the claim form within its period of validity may have significant implications for the operation of any relevant limitation period, as they do in this case. Time stops running for

limitation purposes when the claim form is issued. The period of validity of the claim form is therefore equivalent to an extension of the limitation period before the proceedings can effectively begin. It is important that there should be a finite limit on that extension. An order under CPR rule 6.15 necessarily has the effect of further extending it. For these reasons it has never been enough that the defendant should be aware of the contents of an originating document such as a claim form. Otherwise any unauthorised mode of service would be acceptable, notwithstanding that it fulfilled none of the other purposes of serving originating process.

17. There are, moreover, particular problems associated with electronic service, especially where it is sought to be effected on a solicitor. A solicitor must have his client's authority to accept service of originating process. If he has that authority, it will in practice normally cover any mode of service. But a solicitor's office must be properly set up to receive formal electronic communications such as claim forms. As the Law Society's Practice Guidance on electronic mail (May 2005) points out, "email presents new problems, because it can arrive unperceived by other members of staff." The volume of emails and other electronic communications received by even a small firm may be very great. They will be of unequal importance. There must be arrangements in place to ensure that the arrival of electronic communications is monitored, that communications constituting formal steps in current litigation are identified, and their contents distributed to appropriate people within the firm, including those standing in for the person primarily responsible for the matter when he is unable to attend to such communications as they arrive.

18. Turning to the reasons for Mr Barton's failure to serve in accordance with the rules, I start with Mr Barton's status as a litigant in person. In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR rule 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him: *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472, para 44 (Moore-Bick LJ); *Nata Lee Ltd v Abid* [2015] 2 P & CR 3, [2014] EWCA Civ 1652. At best, it may affect the issue "at the margin", as Briggs LJ observed (para 53) in the latter case, which I take to mean that it may increase the weight to be given to some other, more directly relevant

factor. It is fair to say that in applications for relief from sanctions, this is mainly because of what I have called the disciplinary factor, which is less significant in the case of applications to validate defective service of a claim form. There are, however, good reasons for applying the same policy to applications under CPR rule 6.15(2) simply as a matter of basic fairness. The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take.

19. Mr Barton contends that CPR rule 6.3 and Practice Direction 6A are inaccessible and obscure. I do not accept this. They are accessible on the internet. Part 6 is clearly headed "Service of Documents". Electronic service under rule 6.3 is expressly required to be in accordance with Practice Direction 6A, which is prominently flagged in the table of contents. Furthermore, when the claim form was issued, the Courts Service sent Mr Barton in the usual way on 26 February 2013 a blank certificate of service for him to complete when he had served it. This included the statement: "Rules relating to the service of documents are contained in Part 6 of the Civil Procedure Rules (www.justice.gov.uk) and you should refer to the rules for information." Since he did not in fact refer to them, their alleged obscurity is perhaps immaterial. But they are not in my view obscure. They do not justify Mr Barton's assumption that Berrymans would accept service in that way unless they said otherwise. On the contrary, the paragraph 4.1(2)(b) of the Practice Direction clearly states that even where a solicitor's writing paper includes an email address, service by that means was permissible "only where it is stated that the email address may be used for service." It is fair to say that others have made the same mistake as Mr Barton, including the authors of *A Handbook for Litigants in Person*, ed HHJ Edward Bailey (2013), at p 157. But this is not for want of clarity in the rules. As it happens, Mr Barton never saw the *Handbook*, which was published after his abortive attempt at service. The salient facts in his case are that he was by June 2013 an experienced litigant. He knew, as he accepts, about limitation. He knew that not all solicitors accepted service by email. Yet, apart from looking at the legal notices on Berrymans' website (which said nothing about email service), he took no steps to check whether Berrymans did so, or to ascertain what the rules regarding service by email were, but simply relied on his own assumption.

20. Nor would I accept that that assumption was in itself reasonable. Berrymans had initially contacted Mr Barton by email and they engaged in brief

and desultory email correspondence with him between the initial contact and the attempted service of the claim form. In rejecting Mr Barton's case that he had complied with the Practice Direction, the District Judge held his email correspondence with Berrymans did not amount to an "indication" that he could serve the claim form upon them in that way. I think that that was right. But in any event the point is not before us because of the limited basis on which Mr Barton received leave to appeal from the District Judge. If the correspondence did not amount to an indication for the purpose of the CPR 6APD.4 that Berrymans would accept service of the claim form by email, I find it difficult to see how Mr Barton could be entitled to assume they would.

21. Like the Court of Appeal, I would readily accept Mr Elgot's submission that the claimant need not necessarily demonstrate that there was no way in which he could have effected service according to the rules within the period of validity of the claim form. The Court of Appeal rejected this suggestion in *Power v Meloy Whittle Robinson* [2014] EWCA Civ 898. That, however, was a case in which the problem was that the court itself had failed to effect proper service because of an administrative error. The submission that the Court of Appeal rejected was that this did not justify relief under CPR rule 6.15 because it had been open to the claimant's solicitor to effect personal service. However, 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. All that he did was employ a mode of service which he should have appreciated was not in accordance with the rules. I note in passing that if Mr Barton had made no attempt whatever to serve the claim form, but simply allowed it to expire, an application to extend its life under CPR rule 7.6(3) would have failed because it could not have been said that he had "taken all reasonable steps to comply with rule 7.5 but has been unable to do so." It is not easy to see why the result should be any different when he made no attempt to serve it by any method permitted by the rules.

22. Mr Elgot repeated before us the submission that he made in the Court of Appeal that Berrymans had been "playing technical games", with his client. However, the sole basis for that submission was that they had taken the point that service was invalid. Since they did nothing before the purported service by email to suggest that they would not take the point, this does nothing to advance his case. After the purported service by email, there is nothing that they could reasonably have been expected to do which could have rectified the position. The claim form expired the next day. Even on the assumption that they realised that service was invalid in time to warn him to re-serve properly or begin a fresh claim within the limitation period, they were under no duty to give him advice of

this kind. Nor could they properly have done so without taking their client's instructions and advising them that the result might be to deprive them of a limitation defence. It is hardly conceivable that in those circumstances the client would have authorised it.

23. Naturally, none of this would have mattered if Mr Barton had allowed himself time to rectify any mishap. 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. If Mr Barton had been more diligent, or Berrymans had been in any way responsible for his difficulty, this might not have counted for much. As it is, there is no reason why Mr Barton should be absolved from his errors at Wright Hassall's expense.

Article 6 of the European Convention on Human Rights

24. It is submitted that the result arrived at by the courts below is incompatible with Mr Barton's right to a fair trial under article 6 of the Convention. This point does not appear to have been taken below. I deal with it for completeness, and briefly since in my view it is without merit. The rules governing the period of validity of a claim form and the mode of service are sufficiently accessible and clear, and serve a legitimate purpose in the procedure of the Court. Moreover, it is not the rules that have deprived Mr Barton of the ability to press his claim. It is the Limitation Act which has produced that result. A reasonable limitation period does not contravene article 6 even where (as in England and Wales) it operates procedurally. Perhaps because of these difficulties, the argument seems to have mutated into an allegation of bias, said to be implicit in the manner in which Mr Barton's arguments were addressed in the judgment of the Court of Appeal. The point was only faintly pressed, and in my opinion does not even have sufficient coherence to warrant reasoned refutation.

Disposal

25. I agree with the observations of Lord Briggs in his final paragraph that it is desirable that the Rules Committee should look at the issues dealt with on this appeal, if only because litigants in person are more likely to read the rules than the judgments of this court. In the meantime, however, I would dismiss this appeal.

LORD BRIGGS: (dissenting) (with whom Lady Hale agrees)

26. I would have allowed this appeal.

The Applicable Principles

27. The court's task on the hearing of an application to validate service under CPR rule 6.15 is to decide whether there is "good reason" to do so. The question only arises where (i) there has been an attempt at service which (ii) was not in accordance with the rules as to service. The question is not expressed to be, and is not, "was there good reason for failing to comply with the rules as to service" although, as part of its review of all relevant circumstances, the court will generally wish to be appraised of the full reasons, good and bad, why the rules were not complied with.

28. While I would not wish in any way to depart from Lord Clarke's dictum in the *Abela* case that the most important purpose of service is to ensure that the contents of the claim form (or other originating document) are brought to the attention of the person to be served, there is a second important general purpose. That is to notify the recipient that the claim has not merely been formulated but actually commenced as against the relevant defendant, and upon a particular day. In other words it is important that the communication of the contents of the document is by way of service, rather than, for example, just for information. This is because service is that which engages the court's jurisdiction over the recipient, and because important time consequences flow from the date of service, such as the stopping of the running of limitation periods and the starting of the running of time for the recipient's response, failing which the claimant may in appropriate cases obtain default judgment.

29. There is (or at least was when promulgated), as Lord Sumption observes, a third particular purpose behind the specific provisions in Part 6APD regulating service by email, namely to ensure that recipients or their solicitors have the opportunity to put in place administrative arrangements for monitoring and dealing with what was then a new mode of service before being exposed to its consequences. Para 4.1(2)(b) permits service by email on the recipient's solicitors once they advertise their readiness on their headed paper. Para 4.2 requires a prior inquiry of the intended recipient whether there are any relevant technical constraints. Now that issue and filing is required to be carried out online, by legally represented parties in the Business and Property Courts in London, as the first stage in eventually extending this as the mandatory method for all civil proceedings, it may be questioned for how long these constraints upon service upon solicitors by email will continue to serve a useful purpose,

but any relaxation of them is of course a matter for the Civil Procedure Rule Committee.

30. In a case where not merely the first, but all those three purposes of the rules about service by email have been achieved, that is in my judgment capable of being, at least *prima facie*, a good reason for validating service under rule 6.15. By *prima facie* I mean a sufficiently good reason provided that there are not, on a full review of the circumstances, adverse factors pointing against validation sufficient to outweigh the full achievement of those purposes. A non-exhaustive list of such adverse factors might include a deliberate failure to comply by someone cognisant of the relevant rules, failure due to negligence (in particular by a trained professional who is expected to know the rules), or failure due to sheer neglect of the requirement for due service until the very last moment.

31. That the presence of one or more of these adverse factors may frequently outweigh the full achievement of the purposes behind the rules as to service so as to lead the court to refuse validation is necessitated by the following matters. First, compliance with the rules is now part of the Overriding Objective, although I agree with Lord Sumption that the maintenance of good discipline may be of less importance in this context than in the context of relief from sanctions. Secondly, service of a claim form (or other originating process) is an important stage in civil procedure, with potentially serious consequences, as summarised above. Thirdly, if the identification of good reason were limited to the question whether all the underlying purposes of service had been achieved, claimants could choose to ignore the rules so long as they achieved those purposes by another route of their own devising. That would be a step on the road to procedural anarchy.

32. I consider that both the judge and the Court of Appeal treated it as an essential aspect of an application for validation that there needed to be identified some additional "good reason" for validation beyond the complete achievement of the three underlying purposes of the rules as to service by email. In substance this led, and will always lead, to a search for a good reason for not having served in time in accordance with the rules. Sometimes that search will bear fruit, for example where the intended recipient is shown to be playing games, as in the *Abela* case. Sometimes there will be real and protracted difficulty in identifying an intended recipient's last known residence or place of business. Sometimes service through diplomatic channels proves impossible to achieve in time. But it would be wrong in my judgment to confine the power to validate to such cases, where all the underlying purposes of service have been achieved. There are bound to be cases where the purposes have been fully achieved but there are no other good reasons for validation, where the failure to comply with the rules, though not excusable by a good reason for failure, is nonetheless only a minor or

technical breach, or one readily understandable either because the relevant rule is obscure, or less accessible to a litigant in person than to an experienced and skilled lawyer. In such cases there should not be a vain search for an additional good reason beyond full achievement of the purposes of the rules as to service, but rather a weighing of all the circumstances leading to defective service, to see whether the inevitable element of culpability of the claimant is or is not sufficiently large to displace the *prima facie* good reason constituted by the full achievement of those purposes.

33. I acknowledge that, at para 36 in the *Abela* case, Lord Clarke said:

> "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)."

I agree. First, that is not the end of the matter, for the reasons given above. The circumstances in which the failure to serve in accordance with the rules will need to be explained and considered. Secondly, mere knowledge of the existence and content of the claim form does not achieve the second general purpose, namely to bring home to the recipient that he is being served with, rather than just informed about, the claim form, with the important procedural consequences that flow. Thirdly, in the context of service by email, the absence of, or limitations upon, the recipient's email handling facilities may have proved a real hindrance to a prompt response.

34. I do not however consider that Lord Clarke was intending to lay down a requirement that there be identified in every case a separate good reason for validation beyond the complete fulfilment of the purposes of the relevant rules as to service. It was not necessary for him to do so in that case, because there was an independently good reason, in the form of the game playing by the intended recipient. But I do not read that as an invariable condition built into what Lord Clarke was at pains to point out was a single test, based upon a weighing of all relevant circumstances. He noted, as the editors of the White Book also acknowledged, that the new power retrospectively to validate otherwise deficient service was introduced to remedy a lack of jurisdiction to deal with mistakes as to service of the type addressed in *Elmes v Hygrade Food Products plc* [2001] EWCA Civ 121; (2001) CP Rep 71, where the claimants' solicitors served the defendant's insurers (who were by then handling the case) rather than the defendant, incidentally by fax. It appears to have been a case where no good reason other than the achievement of the purposes of service on the case handler was relied upon, and where the claimant's solicitors should have known better than to serve upon the insurers.

35. Similarly I do not read Lord Clarke's observation, at para 48 of the *Abela* case, that "the relevant focus is on the reason why the claim form cannot or could not be served within the period of its validity" as erecting the finding of a good reason for having failed to serve in accordance with the rules as an independent obstacle to validation, still less as confining validation so as to exclude cases where the claim form could have been validly served in time. Read in context he was merely explaining why, in the necessary analysis of the reasons for that failure, the focus is on the period after, rather than before, the issue of the claim form.

The Judge's Analysis

36. Having embarked, by consent, upon a fresh decision making process, for reasons about the District Judge's approach which do not matter, HHJ Godsmark decided that the central question for him to decide was whether there was a good reason why service had not been effected in accordance with the rules, and that ignorance of the relevant rule about service by email was not a good reason: see paras 10 and 15 to 16 of his concise and lucid *ex tempore* judgment.

37. In the Court of Appeal Floyd LJ acknowledged (at para 45) that the judge could be said to have imposed upon himself an illegitimate threshold test, namely whether there was a good reason why service was not achieved in accordance with the rules, but in the end exonerated the judge from any error of principle, having regard to his judgment read as a whole. The Court of Appeal did not therefore conduct its own independent appraisal, being content with a conclusion that the outcome was one which the judge was entitled to reach; (see eg para 48). It is however fair comment that, had it conducted its own appraisal, the Court of Appeal would probably have reached the same conclusion as did the judge.

38. In my view the judge did err in principle, for the reasons already given, so that the question whether service should be validated should be addressed afresh by this court, applying the principles which I have sought to identify. The starting point is that Mr Barton's attempt to serve both the claim form and the particulars of claim by email did fully achieve the three purposes underlying the rules about service by email. As to the first, it is and always has been common ground that the defendant firm was, through its agent solicitors, fully appraised by the email of the contents of the claim form. As to the second, the claim form was sent expressly "by means of service upon you". The recipient solicitors could have been in no doubt that Mr Barton was seeking to achieve service, with its important consequences, rather than just sending the claim form by way of information. As to the third, it has not been suggested that, by comparison with postal service, the recipient firm was in any way hampered by not having

appropriate monitoring procedures in place, or that its email systems were insufficient to permit prompt receipt of the whole of the documentation actually sent, although the particulars of claim were voluminous. There was therefore a *prima facie* good reason to validate service, unless the circumstances of Mr Barton's failure to comply with the rules were such as to swing the balance against validation.

39. There are aspects of those circumstances which may be said to point both ways. Against validation may be said to be the following:

i) Mr Barton does not appear to have taken the trouble to work through the relevant rules sufficiently to alight upon the key provisions about service by email in 6APD para 4. His fault was not therefore one of misinterpretation.

ii) He elected to effect service himself, rather than leave it to the court. But he gave a reason for this, namely a desire first to complete his lengthy particulars of claim, rather than serve early and then have to seek an extension of time for the pleading. That may not have been a good reason for delaying service of the claim form, but it is at least understandable.

iii) He left it until a very late stage to serve, after the expiry of the limitation period and in the last two days of the validity of the claim form, even though he says he still had time to achieve personal service by driving to the solicitors' address if the email was not received.

iv) He probably knew broadly of the very serious consequences of failure to serve validly within time.

v) The rules about service by email are not expressed in lawyerish language, nor are they difficult to understand.

vi) Mr Barton was by this time, although unrepresented, a reasonably experienced litigant, quite capable of criticising his former solicitors for wasting his money by serving documents personally rather than by post.

40. In respectful disagreement with Lord Sumption, I do not regard the fact that validation would deprive the defendant of an accrued limitation defence as a factor militating against validation (or for that matter in favour of it). The

defendant's solicitors were aware of Mr Barton's attempt to serve them before the expiry of the claim form. The acquisition of a limitation defence would have been, in the words of Simon Brown LJ in the *Elmes* case (at para 13), a windfall.

41. In mitigation of those aspects of Mr Barton's conduct are the following factors (although none of them add up to an independent good reason for validation):

i) Mr Barton made an innocent mistake, rather than committed a deliberate breach of the rules.

ii) His reasoning, that solicitors with authority to accept service who had communicated with him by email were impliedly content to be served by email, was understandable, even though wrong.

iii) The "rules" about service by email are tucked away in a Practice Direction rather than in a rule. It may not be obvious to a lay litigant that non-compliance with a PD attracts the same dire consequences as breach of a rule. Although Mr Barton did not read the PD, this has some mitigating effect upon the seriousness of the breach.

iv) He was in extremely good company in thinking that solicitors with authority to accept service who have an email address on their headed paper are willing to accept service by email. This is what is (wrongly) stated in terms in the *Handbook* for litigants in person to which Lord Sumption refers. Again this did not actually mislead Mr Barton, since it had yet to be published, but it does seem to me to mitigate his offence that the distinguished judicial editors of that guide should have made the same mistake, even after (I do not doubt) reading the relevant rules.

v) As an unrepresented litigant, Mr Barton has no recourse to solicitors' insurers of the type which would be available to a represented litigant whose solicitor made the same mistake as he did.

42. Although a number of the mitigating factors listed above are in a sense characteristics of Mr Barton being a litigant in person, that comes nowhere near saying that being a litigant in person constitutes a free-standing good reason why his botched attempt at service should be validated. In that respect I adhere to what I said in *Nata Lee Ltd v Abid* [2015] 2 P & CR 3, [2014] EWCA Civ 1652, at para 53, to which Lord Sumption refers. Save to the very limited extent to

which the CPR now provides otherwise, there cannot fairly be one attitude to compliance with rules for represented parties and another for litigants in person, still less a general dispensation for the latter from the need to observe them. If, as many believe, because they have been designed by lawyers for use by lawyers, the CPR do present an impediment to access to justice for unrepresented parties, the answer is to make very different new rules (as is now being planned) rather than to treat litigants in person as immune from their consequences. The good reason in the present case is not that he is a litigant in person, but rather the fact that Mr Barton's attempted service by email achieved all the underlying purposes of the relevant rules. His being a litigant in person, with the particular consequences described above merely mitigates, at the margin, the gravity of non-compliant conduct which, had it been done by a legal representative, would have been more serious as an impediment to validation.

43. Taking all the relevant considerations into account, I consider that Mr Barton's attempt at service by email should be validated. He may fairly be criticised for having failed to read the relevant part of the rules, and making an incorrect assumption instead, but this does not on balance detract from the good reason constituted by his having, albeit in a modestly non-compliant way, achieved all that which the rules as to service by email are designed to achieve.

44. It troubles me that the meaning and effect of CPR 6.15 has now been considered by this court, which does not lightly embark upon procedural questions, twice in recent years and that, on this occasion, its meaning has divided the court. While recognising the pressures upon its time during a period of major procedural reform, I hope that the Rule Committee might be able to find time to satisfy itself that this rule, and the provisions in the PD about service by email, still satisfy current requirements, in the context of giving effect to the Overriding Objective, and do so with sufficient clarity.

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