

# Ideal Shopping Direct Ltd v Mastercard Inc



No Substantial Judicial Treatment

## Court

Court of Appeal (Civil Division)

2022 WL 00118372

Neutral Citation Number: [2022] EWCA Civ 14

Case Nos: A3/2021/0138 and A3/0138A

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

CHANCERY DIVISION

MR JUSTICE MORGAN

[2020] EWHC 3399 & 3464 (Ch)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 13 January 2022

Before :

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT

LADY JUSTICE ELISABETH LAING

and

LORD JUSTICE BIRSS

-----

Between :

IDEAL SHOPPING DIRECT LIMITED AND OTHERS

Appellants

- and -

MASTERCARD INCORPORATED AND OTHERS

Respondents

And between:

IDEAL SHOPPING DIRECT LIMITED AND OTHERS

Appellants

- and -

VISA EUROPE LIMITED AND OTHERS

Respondents

Kassie Smith QC, Fiona Banks & Alexandra Littlewood (instructed by Scott+Scott UK LLP) for the Appellants

Mark Hoskins QC and Hugo Leith (instructed by Jones Day) for the Mastercard Respondents

Brian Kennelly QC and Isabel Buchanan (instructed by Linklaters LLP and Millbank LLP) for the Visa Respondents

Hearing dates: 16 & 17 November 2021

-----  
Approved Judgment

Sir Julian Flaux C:

Introduction

1. This appeal, with the permission of the judge, concerns whether service of an unsealed amended claim form is good service and, if it is not, whether the failure to serve a sealed claim form is an error of procedure capable of rectification under CPR 3.10. By his judgment dated 11 December 2020, Morgan J held that, since the documents served on 17 July 2020 were not sealed, they were not claim forms so that no claim form was served within the time permitted for service under CPR 7.5 as extended by agreement of the parties. He went on to hold, following the decision of the Court of Appeal in *Vinos v Marks & Spencer plc* [2001] 3 All ER 784, followed in subsequent decisions of this Court, that the defect in service could not be remedied under CPR 3.10.

2. In the case of the Visa respondents, there is a cross-appeal, for which permission to appeal was granted by Lewison LJ, as to the meaning of an undertaking given by the appellants to those respondents as a condition of the latter agreeing to extensions of time for service. The judge held that on the correct construction of the undertaking, it did not preclude the appellants from issuing fresh proceedings seeking substantially the same relief as in the original proceedings.

Factual background

3. The appellants issued at least 16 claims against Visa and Mastercard on various dates between February 2017 and January 2020 alleging breaches of competition law, including of Article 101 of the Treaty on the Functioning of the European Union (“TFEU”). These claims are broadly similar to those in the three pieces of litigation concerning the lawfulness of multi-lateral interchange fees (“MIFs”) which were the subject of a combined appeal to the Court of Appeal and then a combined appeal to the Supreme Court, culminating in a judgment given on 17 June 2020: *Sainsbury’s Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24, holding that the matters of which complaint was made were restrictive of competition under Article 101 of the TFEU.

4. The 16 claims were all issued at a time when that earlier litigation was in process, in order to recover damages for losses suffered in the six years before the issue of the claim form in each case. It was recognised by the appellants and the respondents that it was in everyone’s interest for these claims to await the outcome of the Sainsbury’s litigation. Accordingly, the appellants’ solicitors sent copies of the issued claim forms to the respondents’ respective solicitors for information and not by way of service, inviting them to agree an extension of time for service of the claim forms. Extensions of time were agreed and when those extensions were due to expire, further extensions were agreed, the last of which ran until 17 July 2020.

5. The extensions of time agreed by the Visa respondents were expressed to be in consideration of an undertaking given by the appellants' solicitors in these terms:

"Our client hereby undertakes to each of the Defendants and to the Court not, at any point in the future, to discontinue, withdraw or otherwise bring to an end the Proceedings and issue a further claim (or claims) in substantially the same or equivalent form, whether to seek some form of perceived advantage under Directive 2014/104/EU, as implemented by Member States in due course, or otherwise."

6. As the judge explained at [99] of his judgment, the relevant provision of that Directive is Article 10, which required Member States to lay down rules applicable to limitation periods for bringing actions for damages for breach of competition law, whether under Articles 101 and 102 of the TFEU or national competition law.

7. In the period of a month between the Supreme Court judgment being handed down on 17 June 2020 and the deadline for service of 17 July 2020, the appellants' solicitors made preparations for service, including amending original claim forms which had made an alternative claim under Article 102 of the TFEU to delete that alternative claim which was unnecessary in the light of the Supreme Court judgment. In some claims, parties were removed or new parties were added. Particulars of Claim were also prepared. Ms Hollway, the partner at the appellants' solicitors with responsibility for that work, has provided several witness statements. In paragraph 24 of her first Visa statement and paragraph 23 of her first Mastercard statement, she says in terms that she is not suggesting that the tasks to be accomplished in that period were too onerous to be completed in the time available.

8. During that period, arrangements were also agreed with the respondents' respective solicitors as to service of the amended claim forms by email. The same solicitors were also acting for other claimants on whose behalf further extensions of time beyond 17 July 2020 were agreed with Visa's solicitors to various dates in August and September 2020.

9. On 16 July 2020, the appellants' solicitors filed electronically via CE File two other claim forms not included in the 16 with which the appeal is concerned. It would appear that at 18.15 and 18.47 the appellants' solicitors received the automatic notification referred to in paragraph 5.3 of PD51O, the Electronic Working Pilot Scheme (as to which see further below) acknowledging that the documents had been submitted and were being reviewed by the Court prior to Acceptance. Those two claim forms achieved Acceptance and were thus sealed by the Court at 14.34 and 14.39 on 17 July 2020. It seems that the sealed claim forms were served on Mastercard's solicitors before midnight on 17 July 2020.

10. The appellants' solicitors continued the process of filing other claim forms electronically on 17 July 2020 (which was a Friday). In relation to the 14 Mastercard amended claim forms the subject of the appeal, the notification under paragraph 5.3 of PD51O was received at various times that day between 09.58 and 16.38. The claim form for which notification was received at 09.58 achieved Acceptance at 15.52 that day so that the appellants' solicitors could have served the sealed claim form before midnight on 17 July 2020, though they did not do so, apparently because at 15.20 they had already sent Mastercard's solicitors by email the unsealed amended claim form. Of the other Mastercard amended claim forms, 12 of them achieved Acceptance on Monday 20 July 2020 and one on 22 July 2020 because initially the Court raised a query and rejected the amended claim form before later accepting it. All 13 of these amended claim forms were treated in accordance with paragraph 5.4 of PD51O as having been issued on 17 July 2020.

11. In relation to the two Visa amended claim forms with which the appeal is concerned, the notification under paragraph 5.3 of PD51O in the claim by Ideal was at 12.43 on 17 July 2020 and Acceptance was at 09.38 on 20 July 2020. In the case of the claim by Vodafone, notification was at 15.23 on 17 July 2020 and Acceptance at 11.45 on 20 July 2020.

12. The evidence of Ms Hollway as to her firm's understanding of the time taken between filing of a claim form by CE File and receipt of Acceptance together with the issued and sealed claim form, was that it could take anything from one hour to one business day or more. Although in her evidence she referred to the Rolls Building Courts Charter which gave an indication of no more than 90 minutes between filing of an originating document and issue, she confirmed that she was not aware of that statement at the time on 17 July 2020. She also referred to the CE file log-in page which referred to the pandemic and stated that the most urgent filings were being given priority but that users might experience a delay in the processing of routine filings.

13. On 17 July 2020, after the appellants' solicitors had sent the amended claim forms and the Particulars of Claim to the Court electronically for filing, they did not immediately send the unsealed documents to the respondents' solicitors. Ms Hollway said that they wanted to allow time for the sealed amended claim forms to be available for service but when, at about 15.00, they

had not been issued, the decision was taken to serve the unsealed amended claim forms and accompanying documents. This was done by email to the respective respondents' solicitors between then and about 16.32 that day.

14. Ms Hollway gave evidence as to her state of mind that day about what was needed to serve the amended claim forms. She said that she believed the amended claim form had to have been filed electronically before it was served but it did not occur to her or any member of her team that it was necessary to have sealed amended claim forms in order to effect valid service. If it had occurred to her that her method would not be good service, she would either have contacted the court to ask for sealing of the amended claim forms to be expedited or, if this was not possible, she would have served the original unamended claim forms which were sealed.

15. The sealed amended claim forms were served on 24 July 2020 (in the case of Mastercard) and 29 July 2020 in the case of Visa. On 5 August 2020, Visa made an application for orders that the appellants had not served the claim forms by 17 July 2020 and were now out of time to do so and accordingly the Court had no jurisdiction to hear those claims. On 10 August 2020, Mastercard applied for essentially the same relief. On 14 August 2020, the appellants made applications for declarations that they had validly effected service of the amended claim forms on 17 July 2020, alternatively for relief under CPR Parts 6.15, 6.16, or 3.10 to produce the result that there was no need to take further steps towards service.

16. It was these applications which all came before the judge. Before considering his judgment in more detail, it seems sensible to consider the procedural framework under the CPR and PD51O.

The procedural framework

17. CPR Part 7 is headed "How to start proceedings - the claim form". Rule 7.2 provides:

"7.2—(1) Proceedings are started when the court issues a claim form at the request of the claimant.

(2) A claim form is issued on the date entered on the form by the court."

18. Rule 2.6 is headed "Court documents to be sealed" and provides that the Court must seal the claim form on issue and that the seal may be placed on the document by hand or by printing a facsimile of the seal on the document electronically or otherwise. When claim forms were issued by a party or its legal adviser attending the court office, issue and sealing were simultaneous in the sense that, if the court office accepted the claim form as being regular, they would seal the claim form at the same time as it was issued and accepted.

19. CPR Part 6 deals with service of claim forms and other documents. Rule 6.3 and PD6A provide for the circumstances in which a claim form may be served by electronic communication, such as e-mail. Rule 6.7 sets out the circumstances in which a claim form may be served on the solicitor for a defendant.

20. Rule 6.15 deals with service of the claim form by an alternative method and provides:

"6.15 (1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.

(2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."

21. Rule 6.16 is headed: "Power of court to dispense with service of the claim form" and provides:

"6.16 (1) The court may dispense with service of a claim form in exceptional circumstances."

22. Rule 7.5 provides the time for service of the claim form. Where, as here, the claim form is to be served within the jurisdiction, this is before midnight on the calendar day four months after the date of issue of the claim form. Rule 7.6 is headed "Extension of time for serving a claim form" and provides:

"7.6

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

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

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

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

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

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

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

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

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

(a) must be supported by evidence; and

(b) may be made without notice.”

23. Rule 7.12 provides that a practice direction may be made providing for a claimant to start a claim by requesting the issue of a claim form electronically. PD51O is such a practice direction, made under rule 7.12 and rules 5.5 and 51.2, and provides for the Electronic Working Pilot Scheme for electronic working (so-called CE File), in so far as presently relevant in the Rolls Building jurisdictions, to operate from 16 November 2015 to 6 April 2022.

24. Importantly so far as the present appeal is concerned, paragraph 1.2 of PD51O provides:

“1.2

(1) Electronic Working works within and is subject to all statutory provisions and rules together with all procedural rules and practice directions applicable to the proceedings concerned, subject to any exclusion or revision within this Practice Direction.”

There is no exclusion or revision in the practice direction so far as the Civil Procedure Rules with which this case is concerned.

25. Paragraph 2.1 provides that: “Electronic Working enables parties to issue proceedings and file documents online 24 hours a day every day all year round, including during out of normal Court office opening hours and on weekends and bank holidays...”. Since the appellants were legally represented, paragraph 2.2A applies. It provides that Electronic Working must be used by a legally represented party in the Rolls Building jurisdictions from 1 October 2017 to start or continue claims.

26. Paragraph 5 of PD51O lays down general rules as to the issue and filing of documents using Electronic Working. Paragraph 5.4 contains detailed rules as to the issue of claim forms:

“5.4

(1) Where payment of a court fee is required to accompany the filing of a document, the date and time of filing on Electronic Working will be deemed to be the date and time at which payment of the Court fee is made using Electronic Working.

(2) The date and time of payment will also be the date and time of issue for all claim forms and other originating processes submitted using Electronic Working.

(3) For all other document filings, the date and time of filing will be the submission date and time for the purposes of any direction under the appropriate rules or for the purposes of complying with an order of the Court, unless expressly provided otherwise by the Court.

(4) Once a document filing is accepted, a notification will appear on the Electronic Working online account registered to the filing party to confirm that the document has been accepted and to confirm the date and time of issue or the date and time of filing in accordance with paragraphs 5.4(1) to 5.4(3).

(5) The date and time of issue or the date and time of filing of a document submitted using Electronic Working will not be delayed by Acceptance, unless the submission fails Acceptance because the filing error is more serious than an error of procedure, or the Court orders that it has failed Acceptance for some other reason.

(6) If the submission fails Acceptance, notice of the reasons for failure will be given to the party on that party's Electronic Working online account and if the submission was of a claim form, appeal notice or other document requiring to be issued, it will be deemed not to have been issued.

(7) In cases where payment of the Court fee has already been made and a claim form or other originating application fails Acceptance, the fee will be refunded and a corrected claim form or originating application will have to be submitted and the Court fee paid again in order for proceedings to be issued. In such cases, the new submission will generate a new date and time of issue or date and time of filing in accordance with paragraphs 5.4(1) to 5.4(3)."

27. PD51O paragraph 7 is headed "Electronic sealing" and provides:

"7.1 When the Court issues a claim form, appeal notice or other originating application which has been submitted using Electronic Working and accepted by the Court, the Court will electronically seal the claim form, appeal notice or originating application with the date on which the relevant Court fee was paid and this shall be the issue date, as per the provisions of paragraph 5.4.

7. 2 The electronic seal may differ in appearance to the seal used on paper."

28. PD51O paragraph 8 is headed "Service" and 8.1 provides:

"The Court will electronically return the sealed and issued claim form, appeal notice or originating application to the party's Electronic Working online account and notify the party that it is ready for service."

29. Finally, rule 3.10 of the CPR is headed: "General power of the court to rectify matters when there has been an error of procedure." It provides:

"3.10 Where there has been an error of procedure such as a failure to comply with a rule or practice direction—

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

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

The judgment below

30. After setting out the factual background and the relevant rules and practice direction, the judge turned at [48] to the issue whether the claimants had served "claim forms" on 17 July 2020. At [49] he referred to Hills Contractors and Construction Ltd v Struth [2014] 1 WLR 1 and Cranfield v Bridgegrove Ltd [2003] 1 WLR 2441 as cases which show that a document which is in the form of a claim form is only a claim form for the purposes of the Rules if it bears an original court seal. Thus, a photocopy of a sealed claim form is not a claim form because what is shown is only a photocopy of the seal and not the original seal. That being so, the judge considered it all the more clear that a draft prepared by a solicitor and taken to the court for sealing is not a claim form until it is sealed.

31. The judge went on to reject the appellants' argument that this general rule was displaced by the special provisions of PD51O. He noted that in the case of a filing which proceeds to Acceptance on a later date, the date of issue is the date of filing not the later date of Acceptance. This important provision allows a party to know that if a filing does proceed to Acceptance the party will not be adversely affected by the gap in time between filing and Acceptance. The judge considered none of this bears on the question as to the form of a claim form and as to whether one can have a claim form without a seal.

32. He considered paragraphs 7.1 and 8.1 of PD51O do bear on that question. Paragraph 7.1 provides that when the court issues a claim form it will electronically seal it and paragraph 8.1 provides that the court will electronically return the sealed and issued claim form to the party's online account and notify the party that it is ready for service. He found that those provisions are entirely in accordance with the general law, so PD51O does not displace the general law. The judge considered Ms Hollway's belief and the appellants' submission not well-founded. A draft claim form without a seal is not a claim form even if it is subsequently sealed and even if sealing and issue is retrospective to the date of filing under PD51O.

33. At [54] the judge noted that the principal argument of Ms Kassie Smith QC for the appellants was that where the original claim form had been issued and sealed, it was possible to amend the claim form so that the amended claim form did not need to be sealed. Rule 17.1 allows a claimant to amend the claim form before it is served without requiring permission. The judge noted that this was not a case where the claimant had taken an original sealed claim form and made amendments to that document, possibly in manuscript, also adding words to indicate that it had been amended under Rule 17.1 and endorsing a fresh statement of truth. In such a case there might be room for argument that this was a claim form in an amended form, although the judge noted that this method of proceeding did not accord with the note at 17.1.2 in the White Book which states that an amended claim form should be filed and served. If it were filed, it would be sealed by the court.

34. In the present case, the document referred to as the amended claim form had been prepared by solicitors for filing under PD51O and did not bear a court seal. The judge did not see how, consistently with the general rule, such a document could be regarded as a claim form. Nothing in rule 17.1 or rule 19.4(1) (concerned with the addition, removal or substitution of a party without permission before a claim form is served) displaces the general rule. The judge concluded at [58] that no claim form was served on the respondents within the time permitted by rule 7.5 as extended by agreement to 17 July 2020.

35. The judge then turned to the claimants' various applications. He noted that no application was being made for an extension of time under rule 7.6 from which it was perhaps implicit that the appellants recognised that they could not show that they had taken all reasonable steps to comply with rule 7.5 or that they had been unable to comply. Although it was reasonable and in both sides' interests to wait until the decision of the Supreme Court on 17 June 2020, there was still ample time between then and 17 July 2020 to serve a claim form. The appellants could have served the original claim forms without any difficulty particularly where the respondents' solicitors had agreed to accept service by email. If the appellants had wanted to amend the original claim forms before service, they had time in which to do so. They could have filed the amended claim forms by Electronic Working without leaving it until the last day and in some cases the afternoon of the last day, when it must have been obvious that the sealed amended claim forms would not have been available for service before midnight on the last day.

36. In relation to the application under rule 6.15, the judge noted that the rule allows the court to permit service by a method not otherwise permitted by Part 6. In this case the method of service used was permitted by Part 6 and further could not have been more convenient: service on the respondents' solicitors by email. He found that the appellants were not seeking an alternative method of service to that but rather a change in the thing which has to be served. Although the appellants relied more on rule 6.15(2) than (1), it only applies to "an application under this rule" that is an application which asks the court to permit service by an alternative method or at an alternative place. The judge considered that there was considerable force in the submission of Mr Hoskins QC for Mastercard that rule 6.15(2) did not apply because the court was not able under this rule to permit service of something which was not a claim form and then say that there had been service of a claim form.

37. However the judge was prepared to approach rule 6.15 on the somewhat liberal assumption that Mr Hoskins QC's submission was not a complete answer. The question then was whether there was "good reason" for the court to exercise the power conferred by the rule. The judge referred to the decisions of the Supreme Court in *Abela v Baadarani* [2013] 1 WLR 2043 and *Barton v Wright Hassall LLP* [2018] 1 WLR 1119. In the latter case, Lord Sumption summarised the general approach the court should adopt at [10] of his judgment. The judge then applied that general approach going through the questions which Lord Sumption identified. At [83] the judge said the answers were that the appellants did not take reasonable steps to effect service in accordance with the rules and the respondents would suffer prejudice if an order were made in the appellants' favour but, conversely, the respondents' solicitors were aware of the contents of the claim form before the time for service expired. Standing back, the judge concluded there was no good reason to treat service of an unsealed claim form as good service. The reason the appellants were in this position is the mistake made by their solicitors, which was not a good, but a bad, reason for making an order under rule 6.15. There is no appeal from the judge's decision dismissing the application under rule 6.15.

38. In relation to the application under rule 6.16 to dispense with service altogether, the judge pointed out that the court could make such an order "in exceptional circumstances". He had considered all the circumstances of the case in considering whether there was a good reason to make an order under rule 6.15. In view of his conclusion that there was not, he did not consider that this was a case where he should find there were exceptional circumstances justifying the making of an order under rule

6.16. This was the approach taken by the Court of Appeal in *Bethell Construction v Deloitte and Touche* [2011] EWCA Civ 1321 at [28] followed in *Piepenbrock v Associated Newspapers Ltd* [2020] EWHC 1708 (QB) at [69]. Again, there is no appeal from that part of the judge's decision.

39. The judge then turned to the appellants' application under rule 3.10. He noted at [86] that the appellants' submission was that what happened here was an "error of procedure" within that rule so that its effect was that the error of procedure does not invalidate the step taken in the proceedings, namely the service of an unsealed claim form. The appellants accepted that the court could make an order under rule 3.10(a) invalidating that step, but if the court did not make such an order, then the step taken was valid. The appellants submitted that it would be open to the court to make an order under rule 3.10(b) to remedy the error.

40. At [87] the judge held that there was clear Court of Appeal authority for the proposition that rule 3.10 does not have the effect contended for by the appellants: *Vinos* at [27], followed in a number of cases including *Elmes v Hygrade Food Products plc* [2001] CP Rep 71 at [13]-[14] and *Steele v Mooney* [2005] 1 WLR 2819 at [18]-[19] and [24]. On the basis of those authorities, rule 3.10 is to be regarded as a general provision which does not prevail over the specific rules as to the time for, and the manner of, service of a claim form.

41. He noted that notwithstanding those decisions, the appellants referred to what Lord Brown said in *Phillips v Symes* (No. 3) [2008] UKHL 1; [2008] 1 WLR 180. That was a case involving service out of the jurisdiction where the defendant was served with a translation of the claim form but not the original claim form. In the course of his judgment Lord Brown considered whether this was an error of procedure within rule 3.10 or whether the court could dispense with service under the former rule 6.9 (now 6.16) on the ground of exceptional circumstances. In the event he held that the court should dispense with service under rule 6.9. Before considering that rule, he commented that it seemed to him to be "at least arguable" that the court could simply order under rule 3.10(b) that the defendant was to be regarded as properly served.

42. The appellants argued that although what Lord Brown said was obiter it should be regarded as strongly persuasive on that point. The respondents submitted that *Vinos* and the other cases were not cited to the House of Lords in *Phillips*. The judge noted that, in the Court of Appeal in that case, *Neuberger LJ* had cited and applied *Vinos* and *Elmes* as to the scope of rule 3.10. Accordingly, the judge concluded that Lord Brown's comments must be seen as having been made in the knowledge of the earlier decisions of the Court of Appeal. The judge's view was that the obiter comments could not overrule the ratio of earlier decisions of the Court of Appeal.

43. At [90], he noted that Lord Brown's obiter comments had been applied at first instance. The judge was referred to *Integral Petroleum SA v SCU-Finanz AG* [2014] EWHC 702 (Comm), *Bank of Baroda, GCC Operations v Nawany Marine Shipping FZE* [2016] EWHC 3089 (Comm); [2017] 2 All ER (Comm) 763 and *Dory Acquisitions Designated Activity Co v Frangos* [2020] EWHC 240 (Comm). He said that the respondents submitted each of those was distinguishable from the present case but that, if the authorities had stopped there, he might have felt that he had to follow a line of first instance authority on the scope of rule 3.10, whatever doubts he had. However, the line of authority had moved on. The scope of rule 3.10 was considered again in *Piepenbrock v Associated Newspapers Ltd*. The judge noted that the judge there had referred to all the earlier authorities (other than *Dory*). He had applied the earlier decisions of the Court of Appeal and distinguished *Integral Petroleum* and *Bank of Baroda*.

44. At [92], the judge said that having considered the authorities he thought he should follow the approach in *Piepenbrock* and hold that rule 3.10 did not enable him to find (under 3.10(a)) that there had been, after all, valid service on the respondents or that he should make an order (under 3.10(b)) remedying the appellants' error as to service. If it was not possible to distinguish *Integral Petroleum* and *Bank of Baroda*, he would have to choose between those decisions and *Piepenbrock*. He found the reasoning in *Piepenbrock* to be more persuasive and he would follow it. It may be that, applying *Colchester Estates plc v Carlton* [1986] Ch 80, it was his duty to follow *Piepenbrock* unless he considered that it was wrong, which he did not.

45. The overall result was that he held the claim forms had not been served and declined to grant relief under rules 6.15, 6.16 or 3.10.

46. He then went on to consider whether, in the case of the Visa claims, the undertaking precluded the appellants from starting fresh proceedings. I have already set out the terms of the undertaking and referred to Article 10 of Directive 2014/104/EU. At [100] the judge noted that the United Kingdom had complied with that Article by introducing schedule 8A into the Competition Act 1998 on 8 March 2017. Paragraphs 18 and 19 of that schedule introduced a limitation period which complied with Article 10, but by paragraphs 42 to 44 of schedule 8A, it was provided that the new limitation period should only apply to the extent that a claim related to loss and damage suffered on or after 9 March 2017, as a result of an infringement of competition law which



took place on or after 9 March 2017. The judge said that if the appellants were now to bring fresh proceedings against Visa, they would be restricted to claiming for damage suffered in relation to the six years before the issue of the fresh proceedings, which meant that they would not gain any advantage in terms of the limitation period by taking action to bring the original claims to an end and starting new proceedings.

47. At [101], the judge referred to the evidence of Mr Cassels, the solicitor for Visa, as to why Visa had requested the undertakings. Undertakings had originally been sought from a number of claimants before the United Kingdom had implemented Article 10, at a time when it was not known whether the change in the limitation period would have retrospective effect. Although the appellants had issued their proceedings after schedule 8A was introduced into the Competition Act 1998, Visa had still required the undertakings out of an abundance of caution. It was accepted by Ms Smith QC that the judge could proceed on the basis that this explanation was part of the background against which the undertakings were to be construed.

48. Having summarised the parties' rival submissions as to the effect of the undertakings, at [106] the judge considered first whether the appellants brought to an end the earlier proceedings. He said that although the point was not wholly clear, he agreed that they would commit a breach of the undertaking if they deliberately failed to serve the claim forms in time in order to produce the result that the proceedings were at an end so that they could then achieve an advantage by bringing fresh proceedings. It was more arguable whether they brought to an end the proceedings when their omission to serve the claim forms was a mistake and where they had applied to the court under rules 6.15, 6.16 and 3.10 in order to avoid the proceedings coming to an end and where that result was opposed successfully by Visa. The judge inclined to the view that the appellants did not bring the proceedings to an end in those circumstances.

49. However, he assumed in favour of Visa that the omission to serve the claim forms means the appellants did bring the proceedings to an end. The question then was, if they commenced fresh proceedings in substantially the same form, would that come within the phrase: "whether to seek some form of perceived advantage under [the Directive] ... or otherwise"? He said at [108] that it was clear that the appellants did not bring the proceedings to an end to seek some form of perceived advantage under the Directive. So the issue was whether the issue of fresh proceedings came within "or otherwise".

50. At [109], the judge noted "otherwise" could mean "in a different way" or "in different circumstances". If the latter then fresh proceedings would be a breach of the undertaking, if the former they would not, because in the present circumstances, the appellants are not seeking a perceived advantage in any way. He held at [110] that to construe the undertaking so that it only applies where the appellants act or fail to act in order to seek some perceived advantage gives a reasonable commercial meaning to the undertaking, whereas Visa's construction made no commercial sense, particularly if, as Visa contended, the appellants would be in breach of the undertaking where they were trying not to bring the proceedings to an end, but that attempt was opposed by Visa. In the circumstances, the judge preferred the construction which meant that the appellants were not in breach of the undertaking if they issued fresh proceedings, a construction which was readily available as a matter of the ordinary meaning of the words and which produces a sensible commercial result.

#### The grounds of appeal and cross-appeal

51. The two grounds of appeal are:

(1) That the judge erred in holding that a claim form is not issued until it is sealed and did not become a claim form until it was sealed. If there was such a general rule prior to the introduction of the compulsory CE File system, the judge erred in holding that the general rule was not displaced by PD51O. That conclusion is inconsistent with the provisions of PD51O and gives rise to unacceptable levels of uncertainty on the part of claimants required to use Electronic Working.

(2) The judge erred in his approach to rule 3.10. He was wrong to follow the Vinos and Piepenbrock line of authority in preference to the authoritative obiter dictum of the House of Lords in Phillips. Alternatively, he erred in his application of Vinos to the present case.

52. The cross-appeal by Visa in its Respondents Notice contends that the judge erred in holding (i) that the appellants did not bring proceedings to an end by failing to serve their claim forms by mistake and (ii) that the undertaking only applies where proceedings are brought to an end in order to seek some perceived advantage.

53. By their respective Respondents Notices both respondents seek to uphold the judgment on the different or alternative grounds that the judge should have determined, as they had invited him to do, that even if rule 3.10 could apply in principle, it did not apply on the facts of this case.

The parties' submissions

54. I turn to consider counsel's submissions to this Court on the appeal and cross-appeal. Where counsel referred the Court to passages in the authorities, I will set them out at this stage of the judgment to avoid repetition later.

55. On behalf of the appellants, Ms Smith QC's overriding submission, both in opening and in reply, was that there was a lacuna in the Electronic Pilot which the court ought to correct and a mismatch with the old law, in that unlike under the old system where there was physical attendance at a court office and issue and sealing of a claim form were simultaneous, under PD51O there was a gap between issue (which occurred when the court fee was paid or the claim form was filed electronically) and sealing which occurred on Acceptance, which might be hours or days later. This led to uncertainty and meant that a claimant who filed a claim form electronically in time, so that under the practice direction it was issued in time, could not serve it because not in possession of a sealed claim form.

56. In relation to the first ground of appeal, Ms Smith QC submitted that there was no requirement under the Civil Procedure Rules that a claim form, let alone an amended claim form, had to be sealed before service. Hills Contractors, the decision of Ramsey J upon which the judge relied, was a case where the claimant sent a photocopy of the sealed claim form to the defendant, but did not then serve the particulars of claim within 14 days as required by the Rules. The defendant obtained an order striking out the claim under rule 7.4(1)(b) and the claimant then applied to set aside that order, arguing that time had not started to run because it had not effected valid service of the claim form. Therefore, unusually, it was the claimant which was arguing that there had not been good service and that had undoubtedly influenced the judge's decision. At [38] to [40] of his judgment Ramsey J said:

"38. The first question raised on the claimant's application is whether the photocopy of the sealed claim form enclosed with Prettys' letter of 23 January 2013 was a "claim form" within the meaning of the CPR.

39. Under CPR7.2 (1) "Proceedings are started when the court issues a claim form at the request of the Claimant" and under CPR 2.6(1) "the Court must seal the following documents on issue- the claim form ...."

40. In my judgment the effect of those two rules is that, as a general rule, a claim form is the document issued by the court on which the court seal is placed. When therefore CPR 6.3(1) states that "A claim form may... be served by any of the following methods...", I consider that, again as a general rule, it is the document issued and sealed by the court which is the relevant claim form."

57. The judge then referred to the decision of Tugendhat J in *Weston v Bates* [2013] 1 WLR 189, another case concerned with whether service of a copy of a sealed claim form was good service, and to the decision of the Court of Appeal in *Murphy* (one of the cases reported as *Cranfield v Bridgegrove*). At [45] he said:

"In my judgment the statement in *Murphy* within the judgment in *Cranfield v Bridgegrove* must be given great weight in the context of this case which concerns the question of what is properly required for service of a claim form within the jurisdiction. In my judgment under the CPR what is required, as a general rule, is service of a hard copy document as issued and sealed by the court and a photocopy of that document is not sufficient. When a claim form is issued there is an original sealed claim form retained by the court and original sealed claim forms provided so that one can be retained by the claimant and one or more can be served on the defendants. As stated in *Cranfield v Bridgegrove* at [87] the only flaw in the process was that "a copy of the issued claim form" rather than "the original document itself" was received. In that case the copy was a faxed copy of the original claim form."

58. Ms Smith QC submitted that, as those paragraphs demonstrate, culminating in [48] where Ramsey J found that sending a photocopy was not good service, the judge there was not concerned with the difference between a sealed and unsealed claim form, but with the difference between a copy and an original of a sealed claim form. She submitted that Hills should be confined to its facts and was a limited decision that the Rules before the Electronic Pilot required service of an original document and that a copy would not suffice.

59. She submitted that, even if, as the respondents submitted, [40] and [45] of Hills should be read more broadly so as to be authority for the proposition that the reference to "claim form" in rules 7.2, 2.6 and 6.3 was to be read as reference to a sealed document, the factual basis upon which the judge was proceeding was that there was no distinction between issuing and sealing.

He did not have in mind and was not dealing with the position under PD51O where there is a time lag between filing and issuing and sealing.

60. In relation to the passage from Cranfield at [87] on which Ramsey J relied, Ms Smith QC submitted that the only defect identified in that case was that a copy of the claim form was served rather than the original. There was no reference one way or another as to whether it was sealed although the assumption would be that it was sealed because it would have been issued under the old regime. Both Hills and Cranfield predate the introduction of the Electronic Working Pilot, but the respondents rely on the decision of Bryan J in Dory Acquisitions, a case decided under the Pilot, as authority for the proposition that under the Pilot a claim form has to be sealed before service. The respondents rely on [70] where Bryan J says:

“CPR Part 6 Part II sets out the rules on the service of claim forms. In order for service to be valid, an original claim form sealed by the court must be served (White Book commentary 6.2.3 relying upon Hills Contractors & Construction Limited v Struth [2013] EWHC 1693 (TCC)).”

61. However, Ms Smith QC submitted that it was apparent from the first sentence of [71]: “It is clear (and accepted) that the attempted service on 14 November 2019 was not valid service in that the claim form served was unsealed and lacked a claim number”, that the point was conceded and not argued in that case, so that it is not authority for the proposition that under PD51O a claim form must be sealed before it can be validly served. She submitted that the amended claim forms served on 17 July 2020 were claim forms within the Rules even though they were not sealed.

62. In relation to the point made by the respondents that paragraph 8.1 of PD51O meant that the unsealed amended claim forms were not “ready for service”, Ms Smith QC referred the court to a number of documents to show how the Pilot had developed. She referred to Practice Direction 5C-Electronic Working Scheme made under rules 5.5 and 7.12, which operated from 1 April 2010, under which there was automatic validation and sealing where appropriate with no Acceptance stage. Prior to that coming into force, there was a Background Paper on Electronic Working dated 17 November 2009 prepared by District Judge Gailey. Under the heading “Service of Process” that document stated: “One of the key advantages of the electronic issue of claims is that it is a fully automated process which can validate a claim form, allocate it a number, seal it and return it to the claimant for service, without any interaction with court staff. Average time for completing this process is just under 6 minutes.” Ms Smith QC submitted that that scheme sought to replicate the in-person process by making issue and sealing pretty much simultaneous and did not have the gap under the present Electronic Working Pilot.

63. As Birss LJ and I pointed out during the course of argument, that document and PD5C relate to the ill-fated system of E-Working which was briefly used in the Commercial Court in 2010 and abandoned because it did not work. CE File, introduced in 2015, is a completely different electronic filing system from E-Working and nothing is to be gained by a comparison between the two schemes. As Birss LJ also pointed out, there are electronic systems, for example for small money claims, where under PD51R a litigant in person can automatically issue and seal a claim form, but they too are completely different from CE File.

64. Ms Smith QC submitted that paragraph 8.1 of PD51O was to be read in the context that, under the old system, all the amended claim forms in this case would have been issued and sealed on 17 July 2020 when a solicitor attended the court office. None of them would have been rejected since they all received Acceptance. They would also have been issued and sealed on that day under PD5C. Accordingly, the claimants suffered an unfairness under the present Pilot which they would not have suffered previously. She submitted that paragraph 8.1 was simply stating that the court will notify the claimant’s representatives once the sealed version is ready. It is not a directive which says that you cannot serve an unsealed claim form if that is all you have. A reasonable reading of the paragraph in context was that, if a sealed version of the claim form is not yet available for whatever reason, the claimants should serve the unsealed version and then, once the sealed version has been returned, serve that sealed version. Ms Smith QC submitted that this was exactly what the Civil Appeals Registry had told the appellants to do in relation to the Appellant’s Notice, that is, to serve the unsealed version and then serve the sealed version later when it was available. She referred the court to an email exchange to that effect with the Registry. As Birss LJ and I pointed out in the course of argument, that exchange was not the interpretation of the Court of Appeal Master of the rules as to service but the Master giving the appellants some leeway in the particular circumstances. It is of no assistance in the interpretation of PD51O.

65. In relation to the aim or objective of having to serve a sealed claim form if, contrary to her primary argument, the Court concluded that it was necessary to do so, Ms Smith QC referred to the note in paragraph 6.3.2 of the White Book, which states: “The seal is intended to give a clear message to the defendant that he or she is being served with originating process by authority of the court, and not being sent some informal demand.” She submitted that, on the facts of this case, the respondents had already received, on a “for information” basis, copies of the original claim forms which were sealed and with claim numbers. Their solicitors had sent correspondence to the court bearing those claim numbers in relation to extensions of time for service and

the amended claim forms served, although unsealed, bore the same claim numbers, enabling easy comparison with the original claim forms sent for information. The respondents were also served, at the same time as the amended claim forms with detailed particulars of claim, so that they knew the case against them in detail.

66. Ms Smith QC also made a submission based on a statement by Bryan J in *Dory*, at [26]-[27] of his judgment, that the respondents' solicitors could have accessed CE File at any time to see that a claim form had been filed and issued even before it was sealed. As was discussed during the course of the hearing, if Bryan J was suggesting that a defendant's solicitor could see from CE File that a claim form had been filed before Acceptance and sealing (and it is not clear that he was saying that because at [72] he refers to accessing the sealed claim form) that is wrong. The CE File system does not allocate a claim number until Acceptance (and consequent sealing) which Bryan J himself seems to accept in the first sentence of [71] to which I have already referred: "It is clear (and accepted) that the attempted service on 14 November 2019 was not valid service in that the claim form served was unsealed and lacked a claim number." From an examination of the CE File record for each of these cases, it appears that the position is that CE File did not record the filing of the amended claim forms until they were accepted and sealed. The only reference to and record of the amended claim forms shows them as submitted on 17 July 2020 and accepted on 20 July 2020 (or in one case 22 July 2020). The amended claim form with the sealed date 17 July 2020 is attached in each case.

67. In relation to the respondents' submission that Morgan J's interpretation of the rules did not cause practical problems and even if it did, the appellants had brought this on themselves by waiting until the last day to file the amended claim forms, Ms Smith QC submitted that real practical problems would be caused by the time lag between filing and Acceptance and sealing. This might be less so where the claimant had four months to serve a claim form as in this case, but could cause problems where shorter time limits apply. She referred to the recent decision of Fraser J in *Citysprint UK Limited v Barts Health NHS Trust* [2021] EWHC 2618 (TCC). That was a procurement case where the economic operator has to serve the claim form on the defendant authority within seven days of issue. Such cases, being in the Technology and Construction Court, are subject to CE File. The detailed facts of that case do not matter for present purposes, but Ms Smith QC relied upon the gap between the date of issue and the date of Acceptance when a sealed claim form becomes available for service as causing potential problems in such a case if Morgan J was right that only a sealed claim form can be served.

68. On the appellants' alternative second ground of appeal, Ms Smith QC submitted that the judge had been wrong to hold that rule 3.10 was not available in principle. She submitted that the case law drew a distinction between, on the one hand, taking a procedural step defectively and, on the other, omitting to take that step at all or performing a step in proceedings which is directly contrary to the rules. Rule 3.10 can be used in the former situation, but not the latter. She submitted that this case fell into the former category.

69. *Vinos* was a case where the claimant served the claim form nine days after the four month period for service under rule 7.5 due to an oversight. An application for an extension of time under rule 7.6(3) failed and the Court of Appeal held rule 3.10 was not available. Accordingly, Ms Smith QC submitted that the case fell into her latter category, being one where the claimant failed to take the relevant procedural step in time. She referred the court to part of [20] in the judgment of May LJ:

"The meaning of rule 7.6(3) is plain. The court has power to extend the time for serving the claim form after the period for its service has run out "only if" the stipulated conditions are fulfilled. That means that the court does not have power to do so otherwise. The discretionary power in the rules to extend time periods – rule 3.1(2)(a) - does not apply because of the introductory words. The general words of Rule 3.10 cannot extend to enable the court to do what rule 7.6(3) specifically forbids, nor to extend time when the specific provision of the rules which enables extensions of time specifically does not extend to making this extension of time. What Mr Vinos in substance needs is an extension of time – calling it correcting an error does not change its substance. Interpretation to achieve the overriding objective does not enable the court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored. It would be erroneous to say that, because Mr Vinos' case is a deserving case, the rules must be interpreted to accommodate his particular case. The first question for this court is, not whether Mr Vinos should have a discretionary extension of time, but whether there is power under the Civil Procedure Rules to extend the period for service of a claim form if the application is made after the period has run out and the conditions of rule 7.6(3) do not apply. The merits of Mr Vinos' particular case are not relevant to that question. Rule 3.10 concerns correcting errors which the parties have made, but it does not by itself contribute to the interpretation of other explicit rules."

70. Ms Smith QC submitted that all that *Vinos* shows is that, where a claimant omits to take or fails to take a procedural step at all, for example in that case service in time, or performs a step which is directly contrary to the rules, it cannot avail itself of rule 3.10. That was not the present case: the appellants were not asking the court to extend time for service under rule 7.6 but to validate defective service.

71. The second Court of Appeal case was *Elmes*. In that case, the claimant had served the claim form in time but incorrectly on the defendant's insurers rather than on the defendant and the question was whether this error could be remedied under rule 3.10. The claimant's argument, as recorded in [10] of the judgment of Simon Brown LJ, was therefore that the claimant did not need to escape the consequences of being unable to obtain an extension of time under rule 7.6, but only to have the defective service on the defendant's insurers deemed good service under 3.10 or 6.8 (what is now 6.15). This argument was rejected. At [13] Simon Brown LJ said that the fatal flaw in the argument was that 6.8 which provides for service by an alternative method cannot be applied retrospectively. He continued:

"If one asks what order the court is to make to rectify the mistake made here by the claimant's solicitors, it can only be an order under 3.10 that an order for alternative service, not in fact made under 6.8, shall be deemed to have been made. But the plain fact is that no rule 6.8 order here was made and, of course, there was never an application for alternative service, let alone for an order dispensing with service. Nor, it seems to me worth observing, would it ever have been proper to make any such order in this case. Mr. Porter acknowledges as much. As he observes, but for the mistake there would never have been any necessity for such an order."

72. Ms Smith QC submitted that that was therefore another case where rule 3.10 could not be used to sanction something which was expressly forbidden or not permitted under the rules, there retrospective application of what was then 6.8. That problem was overcome by what is now 6.15(2), permitting a retrospective application; see 6.15.5 in the White Book referring to *Elmes*.

73. The final Court of Appeal authority on which the judge relied was *Steele v Mooney*. That was a personal injury case where the claim form was issued on 6 May 2003, three days before the relevant limitation period expired. The claimant's solicitor was unable to find an expert within the four month period for service and therefore sent a draft consent order to the defendants giving a two months' extension of time for service of the claim form and particulars of claim. On learning that the time for service of the claim form could not be extended by agreement of the parties, but only by court order, she made an application to the court for an extension of four months for service "of the particulars of claim and supporting documentation". The court granted an order in the terms of the application notice. An order granting a further extension of time in the same terms until 29 January 2004 was made. The solicitor subsequently realised that she had made an error in the application in omitting reference to the claim form and, on 18 February 2004, she applied under rule 3.10 for rectification of the two court orders granting extensions of time. The Court of Appeal allowed the appeal and made the order sought.

74. Ms Smith QC referred the Court to the judgment of the Court of Appeal given by Dyson LJ (the other members of the Court being May and Tuckey LJJ) at [18]-[19] discussing what is a procedural error:

"18. A procedural error may take many forms. Rule 3.10 gives a non-exhaustive definition of a procedural error as including a failure to comply with a rule or practice direction. This is not surprising since the rules provide a detailed code of the procedural steps that parties to litigation may and/or must take and the procedural decisions that the court can make. These steps and decisions will sometimes affect the parties' substantive rights, but that does not alter the fact that they are procedural in character.

19. In our judgment, it is clear that a failure to serve a claim form within the period specified by rule 7.5(2) is a procedural error (unless the claimant obtains an extension of time under rule 7.6(2) or (3)). This was implicitly accepted to be the position in *Vinos*, where the argument proceeded on the basis that the failure to serve the claim form in accordance with rule 7.5(2) would have been a procedural error capable of being remedied under rule 3.10 but for the prohibition in rule 7.6(3)."

75. At [21]-[24], the Court went on to say there were three reasons why it was not necessary to give the phrase "error of procedure" in rule 3.10 an artificially restrictive meaning:

"22. First, if the phrase "error of procedure" is given a narrow meaning, difficult questions of classification will arise. This will inevitably lead to uncertainty and sophisticated arguments as to how to characterise an error. This would be highly undesirable. It seems to us that a broad common sense approach is what is required.

23. Secondly, rule 3.10 gives the court a discretion. This must be exercised in accordance with the overriding objective of dealing with cases justly: rule 1.1(1). If remedying one party's error will cause injustice to the other party, then the court is unlikely to grant relief under the rule. This gives the court the necessary control to ensure that the apparently wide scope of rule 3.10 does not cause unfairness.

24. Thirdly, the general language of rule 3.10 cannot be used to achieve something that is prohibited under another rule. This is the principle established by *Vinos*."

76. Ms Smith QC submitted that the third point was consistent with her argument about the two different types of procedural error. The Court of Appeal returned to that point at [27], on which she also relied:

“There is a difference between (a) making an application which contains an error, and (b) erroneously not making an application at all. It is important for a proper application of the Vinos principle to bear this distinction in mind.”

77. In other words, what the Court was being asked to do there was not to use rule 3.10 to extend time for service otherwise than under rule 7.6, but to correct an error in the application and the orders made. Ms Smith QC submitted that the present case was on all fours: on the basis that the amended claim forms served on 17 July 2020 should have borne a seal, that was a failure to comply with paragraph 8.1 of PD51O which was the “error of procedure”, akin to the making of an application which contained an error in Steele.

78. Ms Smith QC then referred the Court to the decision of the House of Lords in *Phillips v Symes* (No 3). In that case the Swiss court served a package of documents on the defendant which did not include the English language claim form which the Swiss court official had removed from the package because it had erroneously been stamped by the English court: “Not for service out of the jurisdiction”. The package did however include the German translation of the claim form. Having learnt of this omission of the claim form the defendant sought to take advantage of the situation by issuing proceedings in the Swiss court and arguing that it was the court first seised. The claimant issued an application for an order under rule 6.9 (the predecessor of 6.16) dispensing with service of the claim form. This was granted by the judge but his decision was reversed by the Court of Appeal. The only relevance of the Court of Appeal decision (sub nom *Phillips v Nussberger* [2006] EWCA Civ 654; [2006] 1 WLR 2598) for present purposes is that, as Ms Smith QC pointed out, it is clear from [63] of the leading judgment of Neuberger LJ that both *Vinos* and *Elmes* were cited to the Court of Appeal, so that, even though Lord Brown does not refer to them expressly in his judgment in the House of Lords, he must have had them in mind.

79. The House of Lords reversed the decision of the Court of Appeal and made an order under what was then rule 6.9 dispensing with service of the claim form, so that the English court was first seised. Ms Smith QC relied upon what Lord Brown said at [30] to [34] of his judgment, which it is necessary to set out in full:

“30. In these circumstances essentially two questions fall for your Lordships' consideration: first, is there power in the court by virtue of CPR rr.3.10 and 6.9 to determine that the service of documents actually effected on 19 January 2005 constituted sufficient service for the court then to be seised of the proceedings as definitively pending before it under the *Dresser* rule? Secondly, if so, ought the court in its discretion to exercise that power?

31. I have already set out the relevant rules. It seems to me at least arguable that even without resort to r.6.9 the court could simply order under paragraph (b) of r.3.10 that the respondents are to be regarded as properly served, certainly for the purposes of seisin. The “error of procedure” here was, of course, the omission of the English language claim form from the package of documents served: there was in this regard “a failure to comply with the rule (r.7.5).” But that, says paragraph (a) of r.3.10, “does not invalidate any step taken in the proceedings unless the court so orders”. The relevant “step” taken here was service of the proceedings out of the jurisdiction.

32. It seems to me that this was essentially the view taken by the majority of the Court of Appeal (McCowan LJ and Sir John Megaw, Lloyd LJ dissenting) in *Golden Ocean Assurance Ltd v Martin* (The *Goldean Mariner*) [1990] 2 Lloyd's Rep. 215. Several defendants were there served out of the jurisdiction with copies of the writ, but in each case the wrong copy, addressed not to him but to a different defendant. Another defendant, by an oversight, was served with no writ at all, only a form of acknowledgment of service. The court's procedure at that time was governed by the RSC and the rule in point was O.2. r.1. For present purposes I can see no material differences between that rule and CPR r.3.10. All three members of the court accepted that O.2. r.1 was a most beneficial provision, to be given wide effect. The majority held that service, the step in the proceedings which had plainly been attempted, was to be regarded as valid in the case of all of the above defendants. In the case of the defendants served with the wrong copy writs, Lloyd LJ accepted that the court had a discretion: “The service was grossly defective. But service, or purported service, it remained.” Unlike the majority, however, he would not have exercised that discretion in the claimant's favour. As to the defendant served only with an acknowledgment of service, Lloyd LJ thought it “an omission which is so serious that...[i]t cannot be described as a failure to comply with the requirements of the Rules by reason of something left undone....The service of the form of acknowledgment cannot make up for the absence of the writ.” The majority thought otherwise. There was, be it noted, no rule at that time akin to r.6.9. For my part I regard the errors and omissions committed in the process of effecting service there as if anything more, rather than less, serious than the error here (given the documents that were served here).

33. The Court of Appeal thought *The Goldean Mariner* "simply not in point" because "there was no question in that case of the retrospective validation of an ineffective attempt to serve the writ operating to affect, let alone to alter, the priority between English and foreign proceedings under an international Convention". With respect, I cannot accept this reasoning. The question in *The Goldean Mariner*, just as the question here, is whether the "attempt to serve the writ" was or was not "ineffective". It was held there to have been, not ineffective, but effective. That was not a "retrospective validation". Why should service not similarly be declared to have been effective here? The question is purely one for our domestic law, just as the question of when an English court is seised of proceedings is purely one for domestic law (and, indeed, the question of precisely what documents have to be served to achieve effective service out of the jurisdiction under the Hague Convention is purely one for domestic law).

34. As I have said, therefore, it may not be necessary to invoke r.6.9 at all in order to declare the service of documents effected on 19 January 2005 to have been valid and effective. But assume, as both courts below clearly thought, that it is necessary for the court actually to dispense with service of the claim form under r.6.9 before the service in fact effected can be declared valid. Is that within the court's power? The court below concluded not, on the basis that an order under r.6.9 would by its very nature involve the retrospective validation of what *ex hypothesi* would otherwise fall to be regarded as ineffective service. And this essentially is the argument by which the respondents now seek to uphold the Court of Appeal's judgment."

80. Lord Brown went on to decide the appeal in the claimants' favour on the basis that the Court should make an order under rule 6.9 dispensing with service, which is why what he said about rule 3.10 was strictly obiter, as Ms Smith QC accepts. However, what he said was fully reasoned. He had concluded that rule 3.10 is a most beneficial provision to be given wide effect.

81. Ms Smith QC submitted that the fact that another provision might be available, there rule 6.9, is no answer to the application of rule 3.10. It was clear from [34] that Lord Brown thought that it might not be necessary to invoke rule 6.9 because rule 3.10 was available. In all the first instance decisions before the judge, *Integral*, *Bank of Baroda*, *Dory* and *Piepenbrock*, alternatives to rule 3.10 had been considered. She submitted that rule 3.10 was available in principle in the present case to remedy the error in procedure, which was the failure to serve the sealed amended claim forms in accordance with paragraph 8.1 of PD51O. Remedying that error would not be endorsing something prohibited by rule 7.6 or any other rule.

82. She submitted that, given that rule 3.10 was available in principle, the Court should grant the relief sought. She disputed the respondents' case that the Court should exercise its discretion to refuse relief because to do so would deprive the respondents of a limitation defence. The first instance authorities on which the respondents relied said no more than that the loss of a limitation defence was a factor to be weighed in the balance with other factors, including, importantly, whether the error in procedure itself has caused any prejudice to the defendant. Here even though there may have been an error in procedure in service it caused no prejudice to the respondents because they not only knew that a claim had been made against them, but knew the nature of the claim. Of importance here was that if relief were not granted, substantial parts of the claims would be time-barred.

83. Ms Smith QC then went through the first instance authorities starting with *Integral Petroleum*, a decision of Popplewell J (as he then was). In that case, the particulars of claim were served five days late by email, when there was no agreement for that method of service. Judgment in default was entered against the defendant on the basis that a defence was not served and the defendant applied to set it aside on the ground that sending the particulars of claim by email did not amount to good service so as to start time running for the service of the defence.

84. The claimants argued that serving the particulars of claim by email five days late, whilst a failure to comply with the rules or a practice direction, did not prevent the particulars of claim from having been served, relying on rule 3.10. At [22] of his judgment, the judge referred to the "authoritative guidance on the scope of this provision" in the decision of the House of Lords in *Phillips v Symes* (No 3). Having set out the passage from Lord Brown's judgment which I cited above, the judge noted at [24] that what he had said about 3.10 was obiter and had said no more than it was "at least arguable" that it applied. The judge continued, in a comment relied on by the appellants: "Nevertheless these were considered statements and the language in which they were expressed suggests more than mere arguability."

85. Ms Smith QC relied, in particular, on [35] of the judgment:

"*Phillips v Nussberger* establishes that CPR 3.10 is to be construed as of wide effect so as to be available to be used beneficially wherever the defect has had no prejudicial effect on the other party. The instant case is a good example where such beneficial use is called for. Service by e-mail on Maitre Cohen was sufficient to bring the Particulars of Claim to his attention. He was SCU-Finanz's chosen lawyer appointed for the purpose of receiving the document. The document reached the appropriate destination in just the same way as if it had been sent by post to the Paris address given in the acknowledgement of service which would

have constituted good service. He ought reasonably to have known, as a European accepting the burden of acting for a client in English High Court proceedings, that particulars of claim required to be answered by a defence, and that in default judgment might be entered. What was effected was purported service, not merely transmission for information only...”

She submitted that the paragraph recognised that there was no prejudice to the defendant in that case. It did not touch on limitation defences and it certainly did not go as far as to say that the discretion under rule 3.10 cannot be exercised if it causes prejudice to the defendant.

86. Bank of Baroda is a decision of Sara Cockerill QC (as she then was) sitting as Deputy Judge of the High Court. The defendants brought a challenge to the jurisdiction under CPR Part 11 on the basis, inter alia, that there had been defective service as only one copy of the claim form and four response packs were served on the four defendants’ agent for service, when four separate copies of the claim form should have been served. One of the grounds on which the claimant opposed the jurisdiction challenge was that any defect in the service could be cured under rule 3.10. The judge referred to the unreported judgment of HHJ Graham Wood QC in *United Utilities v Hart* (2015) as a useful summary of the principles and authorities, highlighting Lord Brown’s obiter dictum in *Phillips v Symes*.

87. Ms Smith QC relied on [18]-[19] of the judgment in *Bank of Baroda*, particularly the latter paragraph where the judge draws the same distinction as the appellants rely upon between cases where a procedural step is taken defectively and cases where no step is taken at all or what is performed is contrary to another rule:

“18. Is this therefore a case where CPR 3.10 can operate? There is no suggestion that the defect in service has had a prejudicial effect. The Defendants were effectively informed by the defective attempt at service that proceedings had been commenced against them. Nor was it argued that there was any limitation issue. If I were to accede to the Defendants’ application, even though the validity of the Claim Form has now expired there would be nothing preventing the Claimants from issuing another Claim Form and serving it properly. This would, therefore, be a triumph of form over substance.

19. Further, while the error relates to originating process (which Popplewell J at [37] indicated should attract a more cautious approach) this is a case where a procedural step was taken defectively rather than omitted or performed directly contrary to a rule. So although on one analysis one might say that service on some of the Defendants was omitted in the absence of sufficient Claim Forms, the covering letter makes clear that service was being attempted to be effected against all the Defendants. Effectively some of the procedural boxes were ticked, but others were not. This therefore seems to me to be a case where the power under CPR 3.10 can and should be exercised. Given the fact that no limitation point arises, and the effect of the order will be to validate the steps taken before the Claim Form expired, I do not consider that the expiry of the Claim Form stands in the way of this order being made.”

88. Ms Smith QC submitted that there was no suggestion in that case that rule 3.10 could not be relied upon where it deprived the defendant of a limitation defence. The judge simply made the point that, on the facts, there was no limitation issue, so the discretion under rule 3.10 should be exercised.

89. Finally in this line of first instance authorities, Ms Smith QC referred to the decision of Nicklin J in *Piepenbrock*. That was a libel claim where, having issued the claim form, the claimant chose to serve it himself and then served the defendants’ solicitors at the end of the four-month period in circumstances where there was no agreement that proceedings could be served on the solicitors. The claimant sought to argue, inter alia, that this was an error of procedure which could be remedied under rule 3.10. At [82] of his judgment, the judge set out the reasons why rule 3.10 could not assist the claimant. Ms Smith QC referred the Court to (v) of that paragraph on which the respondents particularly rely:

“(v) *Integral Petroleum SA* was not a case involving service of originating process (as Popplewell J made clear in [37]). *Bank of Baroda* was a case where there was no prejudice to the defendant by validating the defective service (see [18]) and the Deputy Judge acknowledged that CPR 3.10 might not apply where what was sought to be corrected was service directly contrary to a rule ([19]). Here, in contrast, (1) the expiry of the limitation period means that there is significant prejudice to the Defendants if CPR 3.10 validates the “error of procedure”; and (2) the Claimant’s service of the Claim Form on the Defendants’ solicitors was directly contrary to (or at least not permitted by) CPR 6.7 and service by email (whether on the Defendants or their solicitors) was, without compliance with the relevant paragraphs of Practice Direction 6A, directly contrary to (or at least not permitted by) CPR 6.3. Finally, as I have noted, both cases were decided before the Supreme Court decision in *Barton*.”

90. Ms Smith QC submitted that this was simply saying that the limitation defence was one of the factors to be taken into consideration. It was not the only factor and the case certainly did not decide that it would defeat all others.



91. She submitted that there were a number of matters which should lead the Court to exercise its discretion to remedy the error in procedure under rule 3.10. First, she pointed out that the limitation defence here was not about knocking the claims out entirely. Subject to the cross-appeal by Visa on the undertaking, the appellants could commence fresh proceedings against both respondents (and had done so against Mastercard in August 2020) making claims for damages caused by the unlawful implementation of MIFs dating back six years prior to the date of issue of the new claim forms. Extensions of time had been agreed with the respondents until after the hand down of the Supreme Court judgment in Sainsbury's in the knowledge of the periods of loss that would be covered and Visa at least had indicated that, if asked, they would have agreed a further extension beyond 17 July 2020.

92. The error here had consisted of serving the amended claim forms without a seal on them but, as Morgan J had noted in [76]-[77] of his judgment, the respondents were aware of the claims against them and the nature of those claims. They were served with detailed particulars of claim on 17 July 2020. Accordingly, the error in procedure itself had not caused any prejudice to the respondents.

93. Finally on the exercise of discretion, Ms Smith QC referred the Court to the judgment of Fraser J in the Citysprint case which she said was the only other case to which PD51O applied where rule 3.10 had been considered. At [43], the judge set out what he regarded as important points in deciding to grant relief under rule 3.10:

“1. The unsealed claim form was sent by FGS to BB LLP on 27 July 2021 at 1727. The sealed version was not at that stage available, and could not be downloaded from the CE-file system. This is because of the fee issue to which I have already referred. The sealed version was not available for FGS to serve by any means until 29 July 2021, which is the date it was made available on CE-file. This was the date of the conversation referred to at [5] regarding the sum of £528 that was outstanding.

2. There was no difference at all between the unsealed version provided on 27 July 2021 and the sealed version sent on 5 August 2021. They were identical.

3. The claim form was given an "Approved" date on the CE-file portal of 29 July 2021. The date of 27 July 2021 is only visible if one clicks on the document itself and looks at the seal. Therefore the court system itself, in one place, gives a date of the document which could, on one view, understandably lead a solicitor to conclude that was the date of issue.

4. Both versions of the claim form (unsealed on 27 July 2021, and sealed which was sent on 5 August 2021) which were sent by FGS to BB LLP included Brief Details of Claim that ran to 18 paragraphs and clearly set out the basis of the claim. They were identical, and relatively comprehensive.

5. BB LLP acknowledged receipt of the unsealed version on 28 July 2021 and there is no doubt it was received. The Defendant therefore was fully aware of the claim, and the details of it, from then onwards.

6. BB LLP were instructed to accept service of proceedings, had been specifically asked this, and had communicated it. FGS therefore "served" upon the correct party, the Defendant's solicitors.”

94. Ms Smith QC submitted that all these points other than 3 were equally applicable in the present case. Point 1 makes clear that in that case, as here, the unsealed claim form was sent to the defendant in time. Point 2 also applies as the sealed amended claim forms were identical to the unsealed ones. As for point 4, that the claim forms included brief details of the claim running to 18 paragraphs, here the appellants had served a 30 page particulars of claim at the same time as the unsealed amended claim forms. As for point 5, the respondents undoubtedly received the unsealed amended claim forms and so were aware of the claims. As for point 6, in this case, as there, the respondents' solicitors were instructed to accept service so the correct “party” was served.

95. Fraser J went on to consider the issue of prejudice to the defendant at [59], on which Ms Smith QC also relied:

“The only possible prejudice here to the Defendant is having to face a claim, which is reasonably arguable on its face, where the unsealed claim form was sent on 27 July 2021, the sealed claim form sent 7 days after the date on the CE-file system (but not 7 days after the date of the seal), and because email was used rather than other methods of service. That is not prejudice as a result of the procedural error. I do not consider that sufficient in the Defendant's favour to justify refusing to make an order under CPR Part 3.10. In my judgment, the Defendant is attempting to take opportunistic advantage of limited errors of procedure to achieve a technical knock-out. Rather ironically, the Defendant would be content if post had been used (which

takes longer, but entitles the Claimant to use deemed service provisions) but not, as was used, email. That is a curious position in all the circumstances of this case.”

96. Ms Smith QC submitted that the respondents in the present case were likewise seeking to achieve a technical knock-out in circumstances where both respondents say they would have accepted service of the original claim forms and Visa at least would have agreed a further extension of time for service beyond 17 July 2020. The respondents were effectively saying that they were going to take advantage of the fact that the appellants served unsealed amended claim forms to achieve a limitation defence.

97. Ms Smith QC also relied on what the judge said at [60] that the effect of his making an order under rule 3.10 was not to extend time. As he put it: “I am simply making an order that service of unsealed claim form on 27 July 2021 should count as though it was service of sealed version of the exact same document.” She submitted that the appellants were only asking the Court to do the same and the balance was clearly in favour of the Court exercising its discretion under rule 3.10 to rectify the error.

98. Mr Mark Hoskins QC for Mastercard made submissions for both respondents on the first ground of appeal. His starting point was that the general rule under the CPR was clear. The whole system of the CPR is premised on the service of a sealed claim form. Rule 2.6(1) provides that the court must seal a claim form on issue. In the case of service within the jurisdiction, under rule 7.5 the claim form must be served within four months of the date of issue, that is issue of the sealed claim form.

99. Mr Hoskins QC submitted that, as the notes to the White Book make clear, the court practice is that what must be served is the original sealed claim form. 6.2.3 states as follows:

“When a claim form is issued there is (1) an original sealed claim form retained by the court, and (2) original sealed claim forms so that one can be retained by the claimant and one or more can be served on the defendants. For explanations of court practice, see Hills... at para 45; United Utilities...at para 5... The general rule is that, if service is to be properly effected on a defendant, a claim form in the second category must be served [i.e. an original sealed claim form]. See further para 6.3.2.” [6.3.2 then refers to the same practice and those two authorities.]

100. Mr Hoskins QC submitted that the need for service to be of a sealed claim form is confirmed by the case law. He relied on one of the cases decided by the Court of Appeal reported as *Cranfield v Bridgegrove*, *McManus v Sharif*. As appears from the judgment of the Court (Ward, Waller and Dyson LJ) at [53] in that case the claimant’s solicitors served an unsealed copy of the claim form together with particulars of claim on the defendant’s insurers even though the defendant had asked to be served personally. At [57] the Court stated (albeit under the previous version of the CPR):

“...what was purportedly served was not the claim form issued by the court or a photocopy of that document, but a draft claim form. Thus, unlike the document issued by the court, it was not stamped with the court seal, and it did not contain a statement of truth. CPR 7.5 provides that, after a claim form has been issued, “it must be served on the defendant” (emphasis added).”

101. Mr Hoskins QC submitted that this was Court of Appeal authority that what has to be served is a sealed claim form. Although that case was decided when the previous version of the CPR was in force, it remains good law under the current Rules. This is clear from the judgment of Ramsey J in *Hills*. He submitted that [40] and [41] of that judgment make clear that what has to be served under the current CPR is a sealed claim form. This is so whether what was to be served was an original claim form or an amended claim form.

102. He submitted that PD51O did not provide an exception to the general rule. Paragraph 1.2(1) made clear that Electronic Working works within and is subject to the Rules of the CPR unless an exclusion or revision was provided by the practice direction, which it was not. If the authors of the practice direction had intended to depart from the general rule requiring service of a sealed claim form, they would have said so expressly. Far from providing for such a departure, the practice direction confirms the requirement that a claim form is sealed before service, in particular by the terms of paragraphs 7.1 and 8.1.

103. Mr Hoskins QC submitted that reliance by the appellants on paragraph 5.4 was misplaced. This section of the practice direction was headed: “General rules regarding issue and filing” and was not dealing with either sealing (paragraph 7) or service (paragraph 8). In any event, the provision in paragraph 5.4(6) that where a submission failed Acceptance the claim form is deemed not to have been issued is inconsistent with any entitlement to serve a claim form when filed when it is not yet accepted and sealed.

104. Mr Brian Kennelly QC for Visa made submissions on the second ground of appeal on behalf of both respondents. His starting point, in a case where the appellants’ applications under rules 6.15 and 6.16 had been dismissed (and there was no

appeal from that decision), and where they had not made an application for an extension of time under rule 7.6, was that the court could not use the general power under rule 3.10 in circumstances where the appellants could not rely on the specific powers in rules 6.15, 6.16 or 7.6. That had been determined by this Court in Vinos.

105. He emphasised the sentence in [20] of the judgment of May LJ in that case (quoted at [69] above):

“The general words of Rule 3.10 cannot extend to enable the court to do what rule 7.6(3) specifically forbids, nor to extend time when the specific provision of the rules which enables extensions of time specifically does not extend to making this extension of time.”

106. He submitted that the second part of that sentence was of general application, not limited to rule 7.6(3) and that, contrary to Ms Smith QC’s submission, the principle being enunciated by the Court of Appeal as to when the power under rule 3.10 could not be exercised was not limited to when a party was asking the court to exercise the power to do something expressly prohibited by another specific provision of the CPR. In other words, the general power in rule 3.10 cannot be used not just where there is an express prohibition but also, where the provisions in the rules do not extend to something or permit it.

107. Mr Kennelly QC also relied upon the judgment of Peter Gibson LJ in that case. At [26] he said:

“The construction of the Civil Procedure Rules, like the construction of any legislation, primary or delegated, requires the application of ordinary canons of construction, though the Civil Procedure Rules, unlike their predecessors, spell out in Part 1 the overriding objective of the new procedural code... in that context it should not be forgotten that the principal mischiefs which the Civil Procedure Rules were intended to counter were excessive costs and delays. Justice to the defendant and to the interests of other litigants may require that a claimant who ignores time limits prescribed by the rules forfeits the right to have his claim tried.”

108. Mr Kennelly QC placed particular emphasis on what Peter Gibson LJ said at [27]:

“A principle of construction is that general words do not derogate from specific words. Where there is an unqualified specific provision, a general provision is not to be taken to override that specific provision. Rule 7.6 is a specific sub-code dealing with the extension of time in all cases where the time limits in rule 7.5 have not been or are likely not to be met. The sub-code sets out in some detail what the claimant must do if he wants an extension of time and the circumstances in which the court may exercise the discretion conferred on it to extend the time: rule 7.6(3). That the circumstances specified in sub-paragraphs (a), (b) and (c) of rule 7.6(3) are the sole relevant conditions for the discretion to be exercisable seems to me to be made crystal clear by the words “only if”. It is plain that the general power in paragraph 3.1(2)(a) to extend time cannot override rule 7.6. Nor, in my judgment, could the general power in rule 3.10 to remedy a failure to comply with a rule be pressed into service to perform the like function of, in effect, extending time. Even though rule 3.10 differs from rule 3.1(2) in not having wording to the effect of “except where the rules provide otherwise”, that is too slight an indication to make rule 3.10 override the unambiguous and restrictive conditions of rule 7.6(3).”

109. He submitted that this made clear that rule 7.6 is a specific code dealing with extensions of time and that rule 3.10 could not be used, in effect, to extend time where the applicable rule, here rule 7.5, had not been met.

110. Mr Kennelly QC relied upon [13] in the judgment of Simon Brown LJ in *Elmes* which held that rule 3.10 could not be used to do something which as the rules then stood could not be done under rule 6.8 (now 6.15). He made the point that rule 6.8 was not a prohibitive provision but a facultative one, with conditions which, if satisfied, allowed the court to make the relevant order.

111. As for *Steele v Mooney*, there was no question in that case of the problem identified in *Vinos* occurring, since the remedy sought under rule 3.10 in that case was not an extension of time but the remedy of a defect in the consent order, so that there was no other rule being bypassed. Mr Kennelly QC submitted that, in contrast, in the present case what was sought via rule 3.10 was in substance to treat service of the unsealed claim form as a step towards service of the sealed claim form, in other words service by an alternative method which is governed specifically by rule 6.15. The *Vinos* line of cases made clear that rule 3.10 could not be used in that way and, accordingly, Morgan J had been correct in concluding that rule 3.10 was not applicable here in principle.

112. He submitted that this case law of this Court bound the judge and this Court unless it had somehow been overruled by the authoritative obiter dictum in *Phillips v Symes* (No 3). As I pointed out, Ms Smith QC had not pressed that point about *Vinos* (and the cases in this Court following it) having been impliedly overruled by the House of Lords. In any event, in the light of what was said by the Criminal Division of this Court in *R v Barton* [2020] EWCA Crim 575 at [97] to [104], it is difficult to

see how this point about the Vinos line of cases no longer being good law would get off the ground. Barton makes clear that, if the House of Lords or Supreme Court has directed that an otherwise binding decision of the Court of Appeal should no longer be followed, then this Court must follow the direction even if it is strictly obiter, but only if all the judges in the Supreme Court agree that to be the effect of the decision. To that extent only, the doctrine of precedent is modified.

113. In the case of the dictum of Lord Brown in *Phillips v Symes* (No 3), there is no question of any direction from the House of Lords, let alone by of all their Lordships, that the Vinos line of cases should not be followed. Whilst the line of cases were cited to the Court of Appeal and referred to in Neuberger LJ's judgment, they do not seem to have been cited to the House of Lords and they are not referred to in any of the judgments. If Lord Brown had been intending to state that they were no longer to be followed (a fortiori since the lead judgment in *Elmes* was his own) he could and would have said so. Any suggestion that *Phillips v Symes* (No 3) impliedly overruled the Vinos line of cases is unsustainable. Those cases remain good law and binding on this Court.

114. In relation to the first instance authorities, Mr Kennelly QC submitted that this Court could derive little or no assistance from those cases in which the Vinos line of cases were not put before the court or considered. The line of cases does not seem to have been cited to Popplewell J in *Integral Petroleum*. They are not referred to in his judgment. Furthermore, the case was concerned with defects in service of the particulars of claim, not with defects in service of a claim form or other originating process, where a narrower approach is required, as Popplewell J himself recognised at [37].

115. *Bank of Baroda* was another case where the Vinos line of cases does not seem to have been cited to the court and they are certainly not referred to in the judgment.

116. Mr Kennelly QC relied upon Piepenbrock which contained a useful summary of the authorities, including Vinos. In relation to the application under rule 6.15 which was refused, the judge relied, as did Morgan J in the present case on the decisions of the Supreme Court in *Abela* and *Barton*. In relation to the application under rule 3.10 which the judge also refused, having analysed the authorities and pointed out that both *Integral Petroleum* and *Bank of Baroda* were decided before the Supreme Court decision in *Barton*, Nicklin J set out his reasons for concluding that rule 3.10 could not assist the claimant at [82], all of which analysis Mr Kennelly QC relied upon:

"My conclusion is that CPR 3.10 cannot assist the Claimant in this case:

i) I consider that *Barton* is a clear statement of the underlying principles as to the importance of serving the Claim Form in accordance with the CPR.

ii) CPR 3.10 was not referred to in *Barton* yet, if the argument as to the width of the rule were correct, it would appear to have been an obvious solution to Mr Barton's predicament. In my view, the analysis of Lord Sumption as to why CPR 3.9 is inapt would apply equally to CPR 3.10.

iii) If CPR 3.10 is given an interpretation that permits the Court, retrospectively, to validate service not in accordance with the CPR on the basis that there has been a "failure to comply with a rule", then that would make CPR 6.15(2) redundant. That would be a surprising result as the terms of CPR 6.15(2) are of specific operation whereas CPR 3.10 is of general application. Further, as noted in *Godwin* the effect would be "tantamount to giving the court a discretionary power to dispense with statutory limitation periods". This would be contrary to the clear policy statement in *Barton*.

iv) *Steele -v- Mooney* [18]-[19] appears to contain the clearest pre-*Barton* statement that CPR 3.10 cannot be used in this way

a) CPR 3.10 gives the court a discretion. This must be exercised in accordance with the overriding objective of dealing with cases justly. If remedying one party's error will cause injustice to the other party, then the court is unlikely to grant relief under the rule. This gives the court the necessary control to ensure that the apparently wide scope of rule 3.10 does not cause unfairness.

b) The general language of rule 3.10 cannot be used to achieve something that is prohibited under another rule. This is the principle established by Vinos.

v) *Integral Petroleum SA* was not a case involving service of originating process (as Popplewell J made clear in [37]). *Bank of Baroda* was a case where there was no prejudice to the defendant by validating the defective service (see [18]) and the Deputy Judge acknowledged that CPR 3.10 might not apply where what was sought to be corrected was service directly contrary to a rule ([19]). Here, in contrast, (1) the expiry of the limitation period means that there is significant prejudice to the Defendants if

CPR 3.10 validates the "error of procedure"; and (2) the Claimant's service of the Claim Form on the Defendants' solicitors was directly contrary to (or at least not permitted by) CPR 6.7 and service by email (whether on the Defendants or their solicitors) was, without compliance with the relevant paragraphs of Practice Direction 6A, directly contrary to (or at least not permitted by) CPR 6.3. Finally, as I have noted, both cases were decided before the Supreme Court decision in Barton."

117. Mr Kennelly QC also relied upon the decision of Foxton J in *Serbian Orthodox Church v Kesar* [2021] EWHC 1205 (QB); [2021] Costs LR 709. This contained an even more recent analysis of the authorities including Piepenbrock, the decision of Morgan J in the present case and the decision of O'Farrell J in *Boxwood Leisure v Gleeson Construction Services* [2021] EWHC 947 (TCC). Foxton J then drew his own conclusion as to the correct approach at [51]-[52]:

"51. I must confess to having some difficulty with the suggestion that CPR 3.10 could be relied upon to validate a defect in service where, for example, service had been effected by email without permission to serve at that email address, in any case in which relief could not have been obtained under CPR 6.15. A particular difficulty with CPR 3.10 is that, if it is applicable to service errors, CPR 3.10(a) would appear automatically to validate service unless the Court ordered otherwise. That, with respect, is a surprising proposition, and an approach which requires the party seeking to validate service to seek and obtain an order from the court seems inherently more appropriate.

52. Further, the reasoning which commended itself to Nicklin J and Morgan J – that CPR 3.10 as a provision of general application must yield to the more specific provisions on service in, for example, CPR 6.15, 6.27 and CPR 7.6(3) – also commends itself to me, for conventional legal reasons and because it has strong support from the majority of the Supreme Court in Barton, [8] when addressing a similar argument as [to] the interrelationship of CPR 3.9 and CPR 6.15. In these circumstances, I have concluded that if the Appellant is to validate the service of the notice of commencement, it must persuade the court to make an order under CPR 6.27."

118. Mr Kennelly QC submitted that the Court should place no reliance on the decision of Fraser J in *Citysprint*, save in relation to the issue of prejudice. The judge considered at [60] that he could grant relief under rule 3.10 because he was not extending time but as he put it: "I am simply making an order that service of unsealed claim form on 27 July 2021 should count as though it was service of sealed version of the exact same document." He then went on at the beginning of [61] to say that it was not necessary to consider alternative service under rule 6.15. Mr Kennelly QC submitted this was the wrong analysis, since what was sought in substance was service by an alternative method to which rule 6.15 was the applicable rule. Also the judge failed to consider the *Vinos* line of cases.

119. Mr Kennelly QC submitted that the distinction upon which Ms Smith QC relied between taking a procedural step defectively and taking no step at all or performing something contrary to a specific rule, where she contended that rule 3.10 was available in the former case but not the latter, was still inconsistent with the *Vinos* line of authority. Using rule 3.10 to remedy a defective step in relation to service of originating process would still be effectively seeking to override rule 7.6(3) or rule 6.15.

120. In relation to the respondents' alternative case that, even if rule 3.10 were available in principle, the Court should not exercise its discretion to remedy the defect, Mr Kennelly QC relied upon the decision of the Supreme Court in *Barton v Wright Hassall LLP* which, although it was dealing with whether there was a "good reason" for making an order under rule 6.15, he submitted contained reasoning equally applicable to rule 3.10. He referred to passages in Lord Sumption JSC's judgment which emphasised the significance of service of a claim form or other originating process, at [8] and [16]. He placed particular reliance on [23] where Lord Sumption said:

"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 Berryman 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."

121. He submitted that this reasoning was equally applicable to the remedying of a defect in service through the use of rule 3.10. Here, it was common ground that, if the defective service were validated, the respondents would be deprived of a limitation defence in respect of a proportion of the claims made in the amended claim forms. He made the point that the case law on rule 3.10 recognised that depriving a defendant of a limitation defence was a significant factor weighing against the grant of a remedy under rule 3.10 in respect of a defect in service and that the fact that the defendant had knowledge of the claims made against it was not an answer to that point. This emerged clearly from the judgment of O'Farrell J in *Boxwood* at [51]:

“Thirdly, Gleeson would suffer prejudice if the order of 7 April 2020 were varied retrospectively to extend time for service of the claim form because they would be deprived of potential limitation defences. Mr Bowdery raises a number of meritorious points in Boxwood's favour. Gleeson had notice of the issue of the claim form 1 April 2020, when the disputed application for a stay was considered by the court. The claim form was at all material times on CE-file; it could be read and downloaded by Gleeson. Gleeson had the opportunity and took advantage of that opportunity to issue some seventeen claim forms against various sub-contractors and consultants on 24 March 2020 (albeit prior to notice of the claim form having been issued by Boxwood), preserving their ability to pass on these claims to other parties. As at 10 September 2020 Gleeson had received fully pleaded particulars of claim, together with initial disclosure, enabling them to understand the nature and scope of the claims against them. Knowledge of the claims by Gleeson is a necessary, but not sufficient, factor for the court to consider when exercising any discretion to grant relief. In this case, Gleeson would suffer prejudice if the court granted the relief sought because they would be deprived of any limitation defence that has accrued since March 2020. Although that might not be conclusive, it would be a very powerful argument against extending time for service of the claim form.”

122. Mr Kennelly QC submitted that another factor in the exercise of the Court's discretion, again by analogy with Barton, was whether the appellants took reasonable steps to effect service in accordance with the CPR. He relied upon Ms Hollway's statement accepting that the task of amending and serving the claim forms between the Supreme Court judgment in Sainsbury's and expiry of the period for service was not too onerous to be achievable, together with the fact that the appellants' solicitors knew that it could take more than one business day to get a sealed claim form from the court under CE Filing and yet left filing until the last day with no sense of urgency. He also relied upon the fact that the appellants' solicitors erroneously believed that service of unsealed amended claim forms would be good service.

123. In relation to Visa's cross-appeal, Mr Kennelly QC submitted that the words “or otherwise” in the phrase: “to discontinue, withdraw or otherwise bring to an end the Proceedings” must include leaving the unserved claim form to lapse, whether that was done accidentally or deliberately, which was irrelevant from Visa's point of view. In terms of commercial reality, it was far too uncertain to leave compliance with the undertaking to the claimant's state of mind.

124. In relation to the second part of the undertaking, he submitted that the words “or otherwise” in the phrase: “whether to seek some form of perceived advantage under Directive 2014/104/EU... or otherwise” were not referring back to the seeking of some form of perceived advantage but were making it clear that the undertaking precluded the issue of a fresh claim for whatever reason. The words were thus a sweep-up provision.

125. On behalf of the appellants, Ms Smith QC submitted that the words “or otherwise bring an end to the Proceedings” only covered a situation where the appellants deliberately let the proceedings lapse. They did not cover the present situation where the appellants had not deliberately let the proceedings lapse but had fought tooth and nail to keep them alive. The judge's inclination as to the meaning of the first part of the undertaking had been correct.

126. She submitted that the judge had been correct as regards his construction of the second part of the undertaking, that the words “or otherwise” in the phrase “whether to seek some form of perceived advantage under Directive 2014/104/EU... or otherwise” meant “in a different way” not “in different circumstances”. She submitted that contrary to Visa's argument the judge's construction did not introduce an uncommercial or subjective element into the undertaking.

## Discussion

127. Before considering the two grounds of appeal in turn, I will address the overarching submission by Ms Smith QC that there is a lacuna in the Electronic Working Pilot because of the time lag between filing of a claim form and its acceptance and sealing. This is said to lead to injustice and uncertainty and the Court is, in effect, asked to alleviate that injustice and uncertainty both in its approach to the construction of PD51O and to the scope of rule 3.10.

128. I am not convinced that there is a lacuna in the Pilot which requires the intervention of this Court. Whilst it is correct that there is a gap or delay between electronic filing of a claim form and its Acceptance and sealing, which to an extent has been exacerbated by the pandemic, so that Acceptance may not take place on the same day as filing, this is something that is known to solicitors who use the Business and Property Courts in the Rolls Building, as Ms Hollway accepts. There are at least five things the appellants and their solicitors could and should have done which would have avoided the problem which they encountered.

129. First and foremost, they should have filed the amended claim forms earlier than the last day of the period for service as extended. They had had a month to assimilate the Supreme Court judgment in Sainsbury's and make whatever amendments to

the claim forms were appropriate, which was ample time to file the amended claim forms by, at the latest, earlier in the week of 13 July 2020, in which case they would have been accepted and sealed in good time for service to be effected before the expiry of the deadline. Although much was made by Ms Smith QC of the supposed unpredictability with CE File as to how soon a claim form would be accepted after it was filed, as Birss LJ pointed out during the course of argument, this did not help the appellants' case. It simply demonstrated that the appellants should have given themselves sufficient time to deal with the matter before the expiry of the deadline for service given that unpredictability.

130. In fact, one of the amended claim forms was accepted and sealed on 17 July 2020 (and could have been served before midnight but for the appellants' solicitors' mistaken belief that service of unsealed claim forms was good service) and all but one of the other amended claim forms were accepted and sealed on Monday 20 July 2020, the next working day after they were filed. Thus, it is clear that had they all been filed on, say, Tuesday 14 July 2020, they would in all probability have been accepted and sealed the next day, Wednesday 15 July 2020 or, at the latest, on Thursday 16 July 2020. Leaving the filing until the last day, itself a Friday, was asking for trouble. Furthermore, as Mr Hoskins QC rightly said, the position was no different under the old system pre-CE File. If the claimant's solicitors left issue until the last moment, there was always a risk that their outdoor clerk or trainee solicitor turned up at the court office too late for the claim form to be issued and sealed that day. The self-induced problem of late filing is not unique to CE File.

131. Ms Smith QC sought to counter this point by suggesting in reply that there might be a good reason for not filing and serving a claim form until the end of the period for service, but the obvious problem with that argument is that it is unsupported by the evidence in this case. It was not suggested by Ms Hollway that the appellants and their solicitors had left filing the amended claim forms until the last day for some good reason. Ms Smith QC also suggested that a solicitor might not be able for practical reasons to give an explanation as to why filing was left till the last minute, for example that there were difficulties in obtaining instructions or that without prejudice discussions were in progress. However, as I pointed out in argument, neither of those would have been a good reason for leaving filing until the last minute.

132. Second, if for whatever reason, the first course was not possible, the appellants' solicitors could have sought a further extension of time for service of the amended claim forms from the respondents' solicitors. Visa's solicitors have indicated that they would have agreed and it is possible that, if the appellants' solicitors could have shown a good reason for a further extension, Mastercard would also have agreed.

133. Third, if agreement to an extension was not forthcoming, the appellants' solicitors could have engaged in the simple expedient of serving the original claim forms on 17 July 2020, then serving the amended claim forms when they had been sealed. This would have complied with rule 7.5 and avoided the respondents obtaining any limitation defence. It is striking that Ms Hollway accepts in her first witness statement that this is one of the things they would have done had they appreciated that service of the unsealed amended claim forms was not good service.

134. Fourth, when the amended claim forms were filed electronically, the appellants' solicitors could have asked the court staff to expedite acceptance of these 16 amended claim forms, so as to ensure they were sealed and ready for service before the expiry of the deadline. Again, Ms Hollway accepts in her first witness statement that her firm would have done this if they had appreciated that service of the unsealed amended claim forms was not good service.

135. Fifth, if all else failed, the appellants' solicitors could have issued an application for an extension of time under rule 7.6(2) before the expiry of the deadline for service under rule 7.5 as extended by agreement, indicating in their supporting evidence under rule 7.6(4) any concern that delays within the CE File system might jeopardise service before the expiry of the deadline. In all probability, the court would have granted a short extension of, say, a week.

136. The problem which the appellants faced was not caused by any lacuna in the Electronic Working Pilot, but by their failure to take one or other of those courses and by their solicitors' mistaken belief that service of an unsealed amended claim form would be good service.

137. In relation to the first ground of appeal, I agree with the respondents that the starting point under the CPR, in a case where Electronic Working does not operate, is that the general rule is that the claim form must be sealed before it can be validly served. Reading rules 2.6(1) and 7.5 together, the claim form that is issued and served must by definition be a sealed one. This is not only the court practice as accurately stated by the notes at 6.2.3 and 6.3.2 of the White Book, but is reflected in the case law. The general rule that what is served must be an original sealed claim form is made absolutely clear from the passage in [57] of the judgment of this Court in *McManus v Sharif*, one of the cases reported with *Cranfield v Bridgegrove* which I cited at [100]

above. Although that case was decided under the previous version of the CPR, the same general rule applies under the current version of the CPR, as is clear from the decision of Ramsey J in *Hills* which was correctly decided.

138. It is no answer for Ms Smith QC to say that the only defect identified in *Hills* was that a photocopy of the claim form was served rather than the original. Morgan J was correct in the present case in saying that, if service of a photocopy of a sealed claim form is not good service, it is absolutely obvious that service of an unsealed claim form is not sufficient.

139. Any suggestion that it made any difference that what were to be served were amended claim forms is misconceived. There is nothing in rule 17.1 which removes the requirements in earlier rules such as Parts 6 and 7 in relation to the commencement of proceedings. I agree with Mr Hoskins QC that, were it otherwise, the claimant could avoid the requirement to serve a sealed claim form simply by amending an original claim form without permission under rule 17.1 and then serving the amended unsealed claim form, which, as he said, would make a nonsense of the scheme of the Rules.

140. The question then is whether the general rule that a claim form must be sealed before it can be validly served is in some way abrogated in the case of Electronic Working under PD51O. The answer is clearly no. Paragraph 1.2(1) makes clear that the Pilot operates within the CPR and subject to the applicable procedural rules unless there is an exclusion or revision within the practice direction. Since the present claims are Part 7 claims, this means that the provisions as regards service of such claims apply, including the general rule that claim forms have to be sealed before service.

141. I agree with Mr Hoskins QC that any abrogation from the general rule would need to be expressly stated in PD51O, which it is not. Far from there being any exclusion or revision as regards the requirement of sealing, the practice direction confirms that requirement. Paragraph 7 is headed “Electronic sealing” and 7.1 makes it clear that a claim form is not sealed until it has been accepted by the court. It follows that with one exception on 17 July 2020 there was no sealed amended claim form in existence which could be served. To the extent that Fraser J in *Citysprint* suggests the contrary, that must be in error. In any event, as Mr Hoskins QC correctly submitted, there is nothing in that case to suggest that service of an unsealed claim form would be good service.

142. Paragraph 8.1 also confirms the general rule providing: “The Court will electronically return the sealed and issued claim form...to the party’s Electronic Working online account and notify the party that it is ready for service.” Contrary to Ms Smith QC’s submission, this provision is not simply some permissive notification provision. Paragraph 8 is headed: “Service” and is clearly predicated upon the claim form not being ready for service until it has been accepted and sealed by the court, which is completely inconsistent with the claimant being entitled to serve an unsealed claim form, which by definition is not ready for service. Far from paragraph 5.4 of the practice direction dealing with issue and filing providing any assistance to the appellants’ argument, (6) of that paragraph, which provides that if a claim form fails Acceptance, it is deemed not to have been issued, is completely inconsistent with a claimant being entitled to serve an unsealed claim form before the court has determined whether it is accepted or not.

143. Nor is there any basis for giving these clear provisions some other, distorted meaning because of some lacuna in the practice direction. I have already held that, in my judgment, there is no such lacuna, but even if there were, it could only be addressed by a change in the Rules at the behest of the Civil Procedure Rules Committee, not by distortion of clear language by this Court.

144. Accordingly, in my judgment, Morgan J was right to conclude as he did at [58] of his judgment that the unsealed documents served by the appellants on 17 July 2020 were not “claim forms” within the Rules and that no claim form was served on the respondents within the period for service as extended by agreement. It follows that the first ground of appeal should be dismissed.

145. The second ground of appeal concerns the scope of rule 3.10 and whether it is available in principle in this case. It is important to analyse correctly what is the error of procedure which the appellants are asking the Court to remedy. They are in substance asking the Court to treat the service of unsealed amended claim forms as good service and to dispense with the requirement for any further service. Those are matters to which rules 6.15 and 6.16 are applicable and yet the appellants’ applications under those provisions were refused. It is also important to note that none of the appellants’ applications included an application for an extension of time under rule 7.6(3) for service of the sealed amended claim forms. Yet, in seeking to remedy the defect in service, the appellants are, in a very real sense, seeking to achieve the same result as would a successful application under rule 7.6(3).

146. It follows that the appellants are asking the Court to do the very thing which Vinos and the line of authority which follows it does not permit. The general provision in rule 3.10 cannot be used to override a specific provision, here rule 6.15 or rule 6.16. The appellants could not satisfy the “good reason” or “exceptional circumstances” criteria under those two rules and they are



not permitted to use rule 3.10 to bypass the requirements of those specific provisions. Likewise, since the appellants could not have satisfied condition (b) of rule 7.6(3), as they could not have shown that they had taken all reasonable steps to comply with rule 7.5 or that they had been unable to do so, they cannot be permitted to use rule 3.10 to bypass the requirements of rule 7.6(3).

147. This is clear from the judgments in *Vinos* of May LJ at [20] and Peter Gibson LJ at [27] and from the judgment of Simon Brown LJ in *Elmes* at [13]. It is also clear that the Court of Appeal in *Steele v Mooney* approved that principle established by *Vinos* (see [24] of the judgment) but was able to grant relief because, unlike in the present case, the error which was sought to be remedied was not a failure to serve originating process in accordance with the Rules, but an error in the form of the consent orders made by the Court (see [27]-[28] of the judgment).

148. Whilst it is correct that *Steele v Mooney* draws a distinction at [27] between making an application which contains an error and not making an application at all, it seems to me that this is not saying that in the former case rule 3.10 will be available even if the remedying of the error will involve bypassing a specific rule about service. It is simply making the point that, because the claimant there had sought extensions of time, but the order made contained an error, the remedying of that error did not circumvent the prohibition in rule 7.6(3), the point made in [28] of the judgment:

“In our judgment, the error made in the present case falls into the first of these two categories. The applications for an extension of time were clearly intended to be applications for an extension of time for service of the claim form, but by mistake they referred to the wrong, albeit closely related, document ie the particulars of claim. Our reference to what was intended is not to Ms Watkins' subjective state of mind. It is to what she must be taken to have intended on an objective assessment of the terms in which the applications were expressed and all the surrounding circumstances. If the error were a failure to make an application for an extension of time at all within the period specified by rule 7.5(2), then an application to remedy that error would in substance be an application for an extension of time after the expiry of the specified period, and would fail for the reasons stated in *Vinos*: it would in substance be an application for an extension of time for service of the claim form after the expiry of the time for service in circumstances where such an extension of time would be prohibited by rule 7.6(3). But for the reasons that we have given, the application of 18 February 2004 was not in substance an application for an extension of time for service of the claim form. It was in substance an application to correct the applications for an extension of time which were made within the time specified for service by rule 7.5(2) and which by mistake did not refer to the claim form. To remedy the error contained in the applications (and resultant orders) does not circumvent the prohibition in rule 7.6(3).”

149. The judge in *Bank of Baroda* sought to draw a distinction between “where a procedural step was taken defectively rather than omitted or performed directly contrary to a rule” at [19] of her judgment and Ms Smith QC seeks to draw the same distinction, contending that where a procedural step has been taken albeit defectively, rule 3.10 is available to remedy the defect. However, I do not consider that this is a valid distinction. *Bank of Baroda* needs to be approached with some caution, since it did not consider the *Vinos* line of cases (albeit it can be said that the judge referred at [15] to [17] to the judgment of HHJ Graham Wood QC in *United Utilities* which did refer at [34] and [38] to *Vinos* and *Elmes* respectively). Furthermore, in my judgment, if the remedying of a procedural step taken defectively would involve bypassing a specific provision such as rules 7.6(3) or 6.15, it would still fall foul of the principle established by *Vinos*. *Elmes*, where the *Vinos* principle was applied, was on analysis a case where a procedural step was taken but was taken defectively: i.e. service of the claim form in time but on the defendant's insurers rather than the defendant.

150. Thus in the present case it is no answer for Ms Smith QC to rely upon the distinction she seeks to draw and to categorise this as a case where the appellants did take a procedural step (purported service of the amended claim forms) but did so defectively (serving unsealed amended claim forms). The remedying of that error under rule 3.10 would still involve bypassing rules 6.15 or 6.16 or 7.6(3) and is thus not permissible. The provisions on service of originating process in rules such as 6.15, 6.16 and 7.6 form part of what Peter Gibson LJ described in *Vinos* at [27] as a “specific sub-code” dealing with service and cannot be overridden or bypassed by the general power in rule 3.10.

151. None of this analysis is affected by the obiter dictum of Lord Brown in *Phillips*. As I have already held, there is no question of what he said having somehow overruled the *Vinos* line of cases and this Court is obliged to follow that line of cases which, in any event, I consider to have been correctly decided. However wide and beneficial a scope rule 3.10 is to be given in other circumstances than the present, it cannot be used to remedy a defect in service which is incapable of being remedied by the more specific rules applicable, here rules 6.15, 6.16 and 7.6(3), since to permit it to do so would involve bypassing those specific rules, contrary to the principle enunciated in *Vinos*.

152. I consider that there is much force in what Foxton J said in *Serbian Orthodox Church v Kesar* at [51] that if rule 3.10 applies to service errors, rule 3.10(a) would appear automatically to validate service unless the court ordered otherwise, which,

as he said, is a surprising proposition. To permit it to be used in that way would not only contravene the principle enunciated in *Vinos* but would also be contrary to what was said about the significance of service of originating process by the majority of the Supreme Court in *Barton v Wright Hassall LLP* in particular at [16] of the judgment of Lord Sumption JSC:

“...it cannot be enough that Mr Barton’s mode of service successfully brought the claim form to the attention of Berryman’s. 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.”

153. None of the first instance decisions cited to this Court are binding on us, but to the extent that the issue which has arisen in this case has arisen in those other cases I would prefer the reasoning of Nicklin J in *Piepenbrock* (as followed by Morgan J in the present case, O’Farrell J in *Boxwood* and Foxton J in *Serbian Orthodox Church v Kesar*) to that in any of the earlier cases or in the judgment of Fraser J in *Citysprint*. Whilst those earlier cases and *Citysprint* may be correct on their own particular facts, they should not be followed in relation to the scope of rule 3.10.

154. Since I have concluded that rule 3.10 is not available in principle to cure the defect in service in the present case, it is not strictly necessary to consider whether, if it were available in principle, the Court should grant a remedy as a matter of discretion. However, since this issue was fully argued on both sides, I will deal with it, albeit shortly.

155. For a number of reasons, I do not consider that this would be an appropriate case in which to grant the remedy which the appellants seek. First, where a claimant leaves the filing of claim forms until the last day for service, as Lord Sumption said in *Barton*, it courts disaster and has a limited claim on the indulgence of the Court. This is all the more so where the failure to serve sealed amended claim forms was due to a mistake on the part of the appellants’ solicitors, as in this case. As I have already held in dismissing the suggestion that there is some lacuna in the Electronic Working Pilot, there are a number of steps the appellants’ solicitors could have taken to avoid the problem which occurred. Since they failed to take any of those steps, the Court should be reluctant to grant them the indulgence of an Order under rule 3.10 remedying the defect in service.

156. Second, whilst there is force in the appellants’ point that the respondents were fully aware of the claims being made against them and had a 30 page particulars of claim on 17 July 2020, so that the error in procedure here caused them no prejudice, as O’Farrell J said in *Boxwood* at [51], knowledge of the claims by the defendant is a necessary but not sufficient factor for the Court to consider when exercising its discretion as to whether to grant relief.

157. Third, whilst there is also force in Ms Smith QC’s point that, unless relief is granted under rule 3.10, the appellants will suffer the prejudice of some of their claims becoming time-barred, that prejudice is outweighed by the prejudice to the respondents of being deprived of limitation defences. Whilst that is not a decisive factor, it is as O’Farrell J said a powerful argument against the granting of relief under rule 3.10.

158. Accordingly, even if relief under rule 3.10 were available in principle, which I have held it was not, I would not exercise the discretion to grant relief in favour of the appellants. In my judgment, the second ground of appeal should be dismissed.

159. Turning to the cross-appeal by Visa in relation to the correct construction of the undertaking, the first question is whether the words; “or otherwise bring to an end the Proceedings” in the phrase: “to discontinue, withdraw or otherwise bring to an end the Proceedings” encompass what occurred in the present case. In my judgment the words entail something deliberate rather than something inadvertent. For example, if, in order to obtain what was perceived as an advantage from commencing fresh proceedings, the appellants had deliberately chosen not to serve the Proceedings by 17 July 2020 at all so as to be able to issue fresh proceedings, that would be contrary to the undertaking. However, that is not what occurred here. As Ms Hollway explained in her evidence, her firm genuinely but mistakenly thought that service of the unsealed amended claim forms on 17 July 2020,

before the expiry of the period for service, would be good service. There was no question of intending to bring the Proceedings to an end. On the contrary the intention was to serve the Proceedings and continue with them.

160. When the respondents challenged the validity of the purported service, the appellants sought to remedy the defect in service by their applications under rules 6.15, 6.16 and 3.10. Again, their intention was to validate the service and continue with the Proceedings. The reason why the Proceedings came to an end was because the respondents successfully resisted those applications. In those circumstances, it cannot be said that the appellants “otherwise [brought] the proceedings to an end”. Accordingly any fresh proceedings which they have to commence because Visa succeeded on the appellants’ applications will not be in breach of the undertaking.

161. In view of that conclusion, it is not strictly necessary to consider the second question, but I will do so as the matter was fully argued. The second question is whether the undertaking precludes the appellants from commencing the fresh proceedings in substantially the same form, even though they are not seeking a perceived advantage either under the Directive 2014/104/EU or in any other way. I agree with the construction advanced by the appellants, which found favour with the judge, that the words “or otherwise” in the second part of the undertaking are indeed referring to the seeking of a perceived advantage in any other way than under the Directive.

162. I do not consider that the alternative argument advanced by Mr Kennelly QC that the words “or otherwise” preclude the bringing of a fresh claim for whatever reason is sustainable. The problem with that argument, as I put to Mr Kennelly QC at the hearing, is that it renders the second half of the undertaking otiose. The same result could have been achieved more simply and directly by ending the undertaking with the words: “the same or equivalent form”. Mr Kennelly QC accepted that the second part of the undertaking was indeed surplusage, although he submitted that the reference to the Directive had been included because Visa’s principal concern was that the appellants might seek to take advantage of the limitation period under the Directive. I did not find that argument a convincing reason for including all the surplusage which that construction entails, when precisely the same result could have been achieved by an undertaking in absolute terms ending with the words: “the same or equivalent form”.

163. In all the circumstances, I consider that any fresh proceedings commenced by the appellants against Visa will not be in breach of the undertaking and that the cross-appeal must be dismissed.

#### Conclusion

164. Accordingly, for the reasons I have given I consider both the appeal and the cross-appeal must be dismissed.

Lady Justice Elisabeth Laing

165. I agree.

Lord Justice Birss

166. I also agree. As my Lord the Chancellor’s judgment at paragraph 23 above notes, PD51O is due to expire on 6 April 2022. However in December 2021 the Civil Procedure Rules Committee approved a further extension of PD51O. That extension is due to come into force before 6 April 2022 and will have the result that PD51O will expire in April 2023.

Crown copyright