[2024 Gib LR 280]

PAULINO v. GIBRALTAR HEALTH AUTHORITY

SUPREME COURT (Restano, J.): July 16th, 2024

2024/GSC/021

Civil Procedure—service of process—service on solicitor—attempted service of claim form on defendant's solicitors not proper service—no "good reason" why purported service should be permitted or retrospectively validated under CPR r.6.15—no indication in exchanges between claimant's solicitors, defendant and defendant's solicitors that claim form to be served on defendant's solicitors, and not to be inferred

The claimant brought a claim for damages.

The claimant was administratrix of the estate of her husband, Mr. Paulino. She brought a claim for damages against the defendant in respect of alleged negligent medical care provided to Mr. Paulino which it was alleged resulted in his death.

Mr. Paulino died on September 17th, 2020. A claim form was issued by the claimant on September 15th, 2023, although it was not served. Instead, a pre-action letter was sent by the claimant's lawyers, Verralls, to the defendant on September 28th, 2023, enclosing a medical report and autopsy report. The claimant stated that Verralls received a telephone call from the defendant instructing them not to send it any further communications and that they should instead deal with Hassans. On October 17th, 2023, Hassans acknowledged the pre-action letter and confirmed that they had been instructed in the matter and that a response would follow. On October 24th, 2023, Hassans requested clarification about the allegations of negligence. On October 27th, 2023, a detailed response was provided by Verralls. On December 19th, 2023, Verralls sent a chasing letter to Hassans, which responded stating that the defendant's investigations were at an advanced stage and a letter of response would be sent prior to February 27th, 2024 in accordance with the relevant pre-action protocol. On January 8th, 2024, Verralls sent a letter to Hassans enclosing the claim form, response pack and copy of the notice of issue. On January 12th, 2024, Verralls sent a further letter to Hassans enclosing the particulars of claim.

The defendant applied under CPR r.11(1) for an order that the court decline jurisdiction to try the claim as a result of the failure to serve the claim form in accordance with the Rules, that the claim form be set aside, and that the claim be struck out.

The claimant applied (a) for service to be declared good service, and that the defendant be estopped from asserting effective service was defective pursuant to CPR r.6.15; alternatively an extension of time to allow the claim to proceed under s.7 of the Limitation Act; and (b) for permission to amend the name of the claimant pursuant to CPR r.17.4(3) to "Sylvia De Corzal Vela."

The defendant submitted that (a) the requirements for service on a solicitor were clearly set out in CPR r.6.7; (b) the defendant had never said that Hassans was instructed to accept service on its behalf; (c) service had to be effected on the defendant in accordance with CPR r.6.9 at its principal office or place of business, which had not happened; (d) the letters under cover of which the claim form and particulars of claim were sent did not even state that they were being served; (e) the particulars of claim did not include a schedule of loss as required by PD CPR 16.4.2 or a medical report as required by PD CPR 16.4.3; (f) the four-month period for service after the issue of the claim form, as provided under CPR r.7.5, expired on January 15th, 2024 and the limitation period for pursuing this claim had expired; (g) the claimant's application for an extension of time under s.7 of the Limitation Act was misconceived as this was not a case where the material facts relating to the claim were outside the claimant's knowledge within the three-year limitation period such as to warrant an extension of time; and (h) the application to change the claimant's name should be refused.

The claimant submitted that (a) she first became aware of the injury causing Mr. Paulino's death when she received the autopsy report in late November 2020 and a claim form was issued on September 15th, 2023 as a protective measure; (b) following a pre-action letter sent to the defendant on September 28th, 2023, the defendant had provided a clear direction that all communications should be sent to Hassans and the claimant was entitled to act in good faith on that direction; (c) Hassans was served with the claim form on January 8th, 2024 and the particulars of claim on January 12th, 2024 and they did not say that they were not instructed to accept service; (d) service had been properly effected under r.3 of the Supreme Court Rules 2000 and CPR r.6.15, and the defendant was playing technical games in alleging that service had not properly taken place; (e) the defendant had acted unreasonably, its conduct gave rise to estoppel, such that equity could assist and ensure that the claim could proceed; (f) it followed that service as effected should be permitted or validated under CPR r.6.15, that service should be dispensed with under CPR r.6.16, or an extension should be granted under s.7 of the Limitation Act; and (g) the application to change the claimant's name was no more than a correction and was not a change of party.

Held, judgment as follows:

(1) Service had not been properly effected. There was no "good reason" why the purported service of the claim form should be permitted or retrospectively validated under CPR r.6.15. In exercising the discretion

under CPR r.6.15(2), the court needed to carry out an overall factual evaluation as to whether a "good reason" had been established for validating defective service. Three main factors needed to be addressed, none of which was decisive: (i) Had the claimant taken reasonable steps to effect service in accordance with the rules? (ii) Was the defendant aware of the contents of the claim form when it expired? (iii) What prejudice would the defendant suffer by the retrospective validation of purported service? As to (i), the claimant had not taken reasonable steps to serve the claim form as required by the Rules. In the exchanges between the defendant, Hassans and Verralls, there was no indication that Verralls should serve the claim form on Hassans, nor could this be properly inferred from the correspondence. Once the claim form was sent to Hassans on January 8th, 2024, a few days before the deadline of January 15th, 2024, Hassans did not inform Verralls that they were not instructed to accept service, but it was up to the claimant to ensure that reasonable steps were taken to serve the claim form in accordance with the Rules. There was no obstacle to the valid service of the claim form. The claimant had given no reason as to why the claim form could not have been served on the defendant, or a request made asking for written confirmation from Hassans that it was authorized to accept service. As to (ii), the defendant was fully aware of the claims being made against it. As to (iii), loss of a limitation defence, whilst not conclusive, was a powerful argument against the grant of relief. In conclusion, weighing up all the relevant circumstances, the claimant had failed to show "good reason" why the court should allow the purported service to stand as good service. Whilst each case turned on its own facts, there was little that separated this case from many others where similar mistakes had been made when attempting to serve a claim form and where the courts had refused to validate those steps. There was no exceptional reason for the court to dispense with service under CPR r.6.16. The court reached this conclusion with little enthusiasm because it effectively ended the claim. However it was important to ensure that the regime for service which had significant consequences for litigants was not undermined (paras. 35–59).

(2) The application for an extension of time under s.7 of the Limitation Act was misconceived and would be refused. The claimant issued the claim form in time. Section 7 of the Act said nothing about service of that claim form beyond the prescribed four-month period. The claimant appeared to be arguing that the court should exercise a general discretion to extend the limitation period in this case in the interests of justice, along the lines provided for in England and Wales under s.33 of the Limitation Act 1980. There was no provision in Gibraltar law equivalent to s.33 of the Limitation Act. However even if there were, it did not follow that this case was one in which a discretion to extend time in the interests of justice would be exercised in the claimant's favour (paras. 64–67).

(3) The claimant's application under CPR r.17.4(3) to amend her name from "Desiree Da Silva Paulino" to "Sylvia De Corzal Vela" would be

refused. The evidence relied on by the claimant did not properly explain how both names, which were completely different, could refer to the same person. The court was not satisfied that the new proposed claimant, Sylvia De Corzal Vela, was the same person as the claimant, Desiree Da Silva Paulino. It was important to ensure that an application to substitute a party was not made under the guise of a change of name application, as there was no equivalent in Gibraltar to s.35 of the English Limitation Act 1980 which empowered a court to add or substitute a party after the expiry of the limitation period. While the Limitation Act 1960 did not expressly prohibit substitution, the fact that there was no equivalent to s.35 of the English Act meant that any such substitution which the court might order would run from the date of that order and not the commencement of the claim. One must therefore be particularly vigilant about new claims being brought after the expiry of the limitation period (paras. 72–75).

Cases cited:

(1) *Abbott* v. *Econowall UK Ltd.*, [2016] EWHC 660 (IPEC), distinguished.

(2) *Barton* v. *Wright Hassall LLP*, [2018] UKSC 12; [2018] 1 W.L.R. 1119; [2018] 3 All E.R. 487, considered.

(3) *Euro Fixed Income Ltd.* v. *Baker Tilly (Gibraltar) Ltd.*, 2007–09 Gib LR 299, referred to.

(4) *Piepenbrock* v. *Associated Newspapers Ltd.*, [2020] EWHC 1708 (QB), considered.

Legislation construed:

Limitation Act 1960, s.7: The relevant terms of this section are set out at para. 61.

Civil Procedure Rules, r.6.7(1): The relevant terms of this provision are set out at para. 16.

C. Marsh-Finch (instructed by Verralls) for the claimant;
I. Winch (instructed by Hassans) for the defendant.

1 **RESTANO, J.:**

Introduction

The claimant has brought a claim as widow and administratix of the estate of her husband, the late Gil Vicente Da Silva Paulino. This claim is for damages against the defendant, the Gibraltar Health Authority, in respect of alleged negligent medical care provided to Mr. Paulino which, it is alleged, resulted in his death.

2 This is my judgment following a hearing that took place on May 29th, 2024, in respect of two applications, namely:

(1) An application filed by the defendant dated January 28th, 2024 made under CPR, r.11(1) seeking an order that the court decline jurisdiction to try the claim as a result of the failure to serve the claim form in accordance with the CPR, that the claim form be set aside, and that the claim be struck out. That application is supported by the evidence contained in the defendant's application notice.

(2) An application filed by the claimant, dated February 26th, 2024 that: (a) service be declared good service, and that the defendant is estopped from asserting effective service was defective pursuant to CPR, r.6.15. Alternatively, an extension of time to allow the claim to proceed under s.7 of the Limitation Act; and (b) permission to amend the name of the claimant pursuant to CPR, r.17.4(3) to "Sylvia De Corzal Vela." Those applications are supported by the evidence contained in the claimant's application notice, and the witness statement of Johnny Barcelo, a trainee barrister at Verralls dated February 16th, 2024.

The procedural history

3 Mr. Paulino died on September 17th, 2020.

4 A claim form was issued by the claimant on September 15th, 2023, although this was not served. Instead, a pre-action letter was sent by the claimant's lawyers, Verralls, to the GHA on September 28th, 2023 enclosing a medical report and autopsy report. This made no reference to the fact that a claim had been issued, and concluded as follows: "As set out above, ignoring this letter may lead to our client commencing/continuing proceedings against you and may increase your liability for costs."

5 Hassans then acknowledged that letter on October 17th, 2023 and confirmed that they had been instructed in the matter and that a response would follow in due course. On October 24th, 2023 Hassans requested clarification about the allegations of negligence being made.

6 On October 27th, 2023, a detailed response to this request was provided by Verralls. On December 19th, 2023, Verralls sent a chaser to Hassans. This resulted in a reply on the same day stating that the defendant's investigations were at an advanced stage and that a letter of response would be sent prior to February 27th, 2024 in accordance with the relevant pre-action protocol.

7 On January 8th, 2024, Verralls sent a letter to Hassans stating as follows: "Please find enclosed 2 copies (one for defendant) of the N1 Claim form, Response Pack and a copy of the Notice of issue."

8 On January 12th, 2024, Verralls sent a further letter to Hassans stating as follows: "Please find enclosed two copies of the Particulars of Claim (One for the defendant)."

The issues

9 There are four main issues before the court as follows:

(1) Has service has been properly effected?

(2) If not, should service of the claim form be retrospectively validated under CPR r.6.15?

(3) Alternatively, should an extension of time should be granted to allow the claim to proceed under s.7 of the Limitation Act?

(4) Should the claimant have permission to amend the name of the claimant in these proceedings to "Sylvia De Corzal Vela"?

Service of the claim form: the relevant rules

10 Section 15 of the Supreme Court Act 1960 provides that practice and procedure in Gibraltar is governed by that Act, rules made thereunder, and in default, in substantial conformity with English law and practice.

11 Section 38 of the Supreme Court Act empowers the Chief Justice to make rules of court under that Act, and it is under that power that the Supreme Court Rules 2000 were made. Rule 3 of the Supreme Court Rules deals with the various methods of service. Further, r.3(4) states that English rules and directions apply, so far as circumstances permit.

12 Further, s.38A of the Supreme Court Act provides that the CPR apply in Gibraltar with such modifications as the circumstances of Gibraltar may require.

13 CPR r.7.5 deals with service of a claim form. This provides that where a claim form is to be served within the jurisdiction, a claimant must complete the relevant step required in the table set out in CPR 7.5 (setting out the methods of service and steps required for service to be effected) before 12.00 midnight on the calendar day four months after the date of the issue of the claim form.

14 It is common ground in this case that the required step needed to be completed by the claimant by midnight at the end of January 15th, 2024.

15 CPR, r.6.9 provides a table for the different types of defendants, and how each should be served. In the case of a company or corporation such as the GHA, service should take place at its principal office, or where it carries out its activities, which has a real connection with the claim.

16 Service of a claim form on a defendant's solicitor is governed by CPR, r.6.7(1). This provides that subject to the rules on personal service, where:

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

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

the claim form must be served at the business address of that solicitor."

The parties' submissions in outline

17 Mr. Winch said that the requirements for service on a solicitor are clearly set out in CPR r.6.7. He said that the defendant had never said that Hassans was instructed to accept service on its behalf, and that service had to be effected on the defendant in accordance with CPR, r.6.9 at its principal office or place of business, which had not happened.

18 Further, he said that the letters under cover of which the claim form and particulars of claim were sent, did not even state that they were being served. He also pointed out that the particulars of claim did not include a schedule of loss as required by PD CPR, 16.4.2, or a medical report required by PD CPR, 16.4.3. Finally, he said that the four-month period for service after the issue of the claim form, as provided for under CPR r.7.5, expired on January 15th, 2024 and that the limitation period for pursuing this claim has now expired.

19 Mr. Winch said that there was no "good reason" under CPR r.6.15 to retrospectively validate the defective service. In support of his submissions in this regard, Mr. Winch relied principally on various passages in *Barton* v. *Wright Hassall LLP* (2) and *Piepenbrock* v. *Associated Newspapers Ltd.* (4).

20 Further, Mr. Winch said that the claimant's application for an extension of time under s.7 of the Limitation Act was misconceived. In his submission, this is not a case where the material facts relating to the claim were outside the claimant's knowledge within the three-year limitation period such as to warrant an extension of time under the Limitation Act.

21 In response, Mr. Marsh-Finch said that the claimant first became aware of the injury causing Mr. Paulino's death when she received the autopsy report in late November 2020, and that a claim form was issued on September 15th, 2023 as a protective measure.

22 Mr. Marsh-Finch then referred to the witness statement of Mr. Barcelo who stated at para. 3 as follows:

"[A] pre-action letter was dispatched to the GHA on the 28th of September 2023. Shortly after, we received a call from the GHA instructing us not to send any further communications and that we should deal with their legal representatives, which in this case was

Hassans. This was accepted and no further communications were sent to the GHA, instead, they were sent to Hassans."

23 Mr. Marsh-Finch submitted that the defendant had provided a clear direction that all communications should be sent to Hassans, and that the claimant was entitled to act in good faith on that direction. He further submitted that Hassans were served with the claim form on January 8th, 2024 and the particulars of claim on January 12th, 2024, and they did not say that they were not instructed to accepted service. Thus, he said that the defendant was playing technical games in alleging that service had not properly taken place. He submitted that service had been properly effected under r.3 of the Supreme Court Rules 2000, and CPR r.6.15.

24 Further, Mr. Marsh-Finch said that the defendant had acted unreasonably, that its conduct gave rise to estoppel, and such as to allow equity to assist and ensure that the claim can proceed. In his submission, it followed that service as effected should be permitted or validated under CPR, r.6.15, that service should be dispensed with under CPR, r.6.16, or an extension granted under s.7 of the Limitation Act.

25 As for the application to change the claimant's name, Mr. Marsh-Finch said that this was nothing more than a correction that needed to be made to the claimant's name, and that it was not a change of party. Mr. Winch disputed this and said that this appeared to be an entirely different person.

Analysis

(1) *Service of the claim form*

26 Mr. Marsh-Finch relied on r.3 of the Supreme Court Rules 2000, and CPR r.6.15 in support of his submission that service had been effected properly.

27 Turning first to r.3. As stated above, this just deals with the various methods of service, and applies English rules and directions, so far as circumstances permit. I cannot see how this assists the claimant.

28 CPR, r.6.15(1) allows the court to authorize service by an alternative method or at an alternative place where there is good reason to do so. Under CPR, r.6.15(2) the court can 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 constitutes good service. Although it was not always clear, what Mr. Marsh-Finch appears to have been asking the court to do under CPR, r.6.15 was to validate the steps taken to bring the claim form to the attention of the defendant, namely the purported service on Hassans.

29 Although not mentioned in the claimant's application notice, Mr. Marsh-Finch also referred to CPR, r.6.16 in the course of his submissions.

This rule allows the court to dispense with service in exceptional circumstances.

(2) *CPR r.6.15*

30 The focus in relation to the claimant's applications should be on whether the steps taken to bring the claim form to the attention of the defendant by sending it to Hassans should be allowed to stand.

31 The claimant first relies on the indication given to Mr. Barcelo on the telephone in early September 2023 by someone at the GHA, as set out in para. 22 above. The defendant did not file any evidence in response to this, and I will proceed on the basis that this account of that telephone call is correct. The claimant also relies on the fact that Hassans said nothing when the claim form was sent to them on January 8th, 2024, a few days before the expiry of the limitation period.

32 A very helpful authority when considering how the court's discretion should be exercised under CPR, r.6.15(2) is *Barton* (2) upon which the defendant relied heavily. That was a case where a claimant, a litigant in person, purported to serve on the defendant's solicitors by sending a claim form and particulars of claim by email. Although there had been some correspondence between the claimant and the solicitors in question, the solicitors had not provided any prior indication that they were prepared to accept service. In that case, purported service took place on the last day before expiry of the issue of the claim form.

33 An application for an order under CPR, r.6.15(2) validating service retrospectively was refused by the judge and appeals to the Court of Appeal and the Supreme Court against that decision failed.

34 Dealing with the court's power to make orders under CPR, r.6.15(2), Lord Sumption, J.S.C. delivering the judgment for the majority, first distinguished the power under CPR, r.6.15(2) and CPR, r.3.9 (relief against sanctions), and then stated as follows ([2018] UKSC 12, at paras. 8–10):

> "8. . . . CPR rule 6.15 is rather different. It is directed specifically to the rules governing service of a claim form. They give rise to special considerations which do not necessarily apply to other formal documents or to other rules or orders of the court. The main difference is that the disciplinary factor is less important. The rules governing service of a claim form do not impose duties, in the sense in which, say, the rules governing the time for the service of evidence, impose a duty. They are simply conditions on which the court will take cognisance of the matter at all. Although the court may dispense with service altogether or make interlocutory orders before it has happened if necessary, as a general rule service of originating process is the act by which the defendant is subjected to the court's jurisdiction.

9. What constitutes 'good reason' for validating the non-compliant service of a claim form is essentially a matter of factual evaluation, which does not lend itself to over-analysis or copious citation of authority. This court recently considered the question in *Abela v Baadarani* [2013] 1 WLR 2043. That case was very different from the present one. The defendant, who was outside the jurisdiction, had deliberately obstructed service by declining to disclose an address at which service could be effected in accordance with the rules. But the judgment of Lord Clarke of Stone-cum-Ebony JSC, with which the rest of the court agreed, is authority for the following principles of more general application:

(1) The test is whether, 'in all the circumstances, there is good reason to order that steps taken to bring the claim form to the attention of the defendant is good service' (para 33).

(2) Service has a number of purposes, but the most important is to ensure that the contents of the document are brought to the attention of the person to be served (para 37). This is therefore a 'critical factor'. However, 'the mere fact that the defendant learned of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under rule 6.15(2)' (para 36).

(3) The question is whether there is good reason for the Court to validate the mode of service used, not whether the claimant had good reason to choose that mode.

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

10. This is not a complete statement of the principles on which the power under CPR rule 6.15(2) will be exercised. The facts are too varied to permit such a thing, and attempts to codify this jurisdiction are liable to ossify it in a way that is probably undesirable. But so far as they go, I see no reason to modify the view that this court took on any of these points in *Abela v Baadarani*. Nor have we been invited by the parties to do so. In the generality of cases, the main relevant factors are likely to be (i) whether the claimant has taken reasonable steps to effect service in accordance with the rules and (ii) whether

> the defendant or his solicitor was aware of the contents of the claim form at the time when it expired, and, I would add, (iii) what if any prejudice the defendant would suffer by the retrospective validation of a non-compliant service of the claim form, bearing in mind what he knew about its contents. None of these factors can be regarded as decisive in themselves. The weight to be attached to them will vary with all the circumstances."

35 In exercising the discretion under CPR, r.6.15(2), one therefore needs to carry out an overall factual evaluation as to whether a "good reason" has been established for validating the defective "service." There are three main factors, as summarized by Lord Sumption, that need to be addressed, none of which is decisive. They are as follows:

(i) Has the claimant taken reasonable steps to effect service in accordance with the rules?

(ii) Was the defendant aware of the contents of the claim form when it expired?

(iii) What prejudice would the defendant suffer by the retrospective validation of purported service?

Has the claimant taken reasonable steps to effect service?

36 Mr. Marsh-Finch's central point was the defendant was "playing technical games." First by telling Verralls that they should communicate with Hassans in relation to this claim, which they did, and then by Hassans keeping quiet after the purported service on January 8th, 2024, when there was still time for the claimant to rectify matters. Further, he said that the defendant had suffered no prejudice as it was fully aware of the claim being made against it.

37 In *Barton* (2), the defendant also told the claimant that all future correspondence should be addressed to their solicitors. The defendant's solicitors then corresponded with the claimant about an inquiry concerning the costs of earlier proceedings, and they informed the claimant that they awaited service of the claim form and particulars of claim. The judge in that case concluded that the claimant was not entitled to assume that the solicitors in that case had indicated that they would accept service, a conclusion that Lord Sumption endorsed ([2018] UKSC 12, at para. 20), referring to the correspondence between the claimant and the defendant's solicitors in that case as "brief and desultory." Lord Sumption explained that it was not necessarily a condition of success in an application for retrospective validation that a claimant should have left no stone unturned in trying to effect service, and that it was enough that reasonable steps had been taken to serve in time. In that case, Lord Sumption observed that the claimant had made no attempt to serve in accordance with the rules at all.

38 The exchanges in this case are outlined in paras. 4–8 above and were only aimed at the defendant providing a response to the letter of claim, and they refer to possible discussions and negotiations with a view to a resolution of the matter. There was no reference in these exchanges, express or implied, to Hassans informing Verralls that it was authorized to accept service. Indeed, Verralls made no express reference in their communications to the defendant or Hassans that a claim form had been issued.

39 Further, on December 19th, 2023 Hassans made it clear to Verralls that the response to the letter of claim would be sent prior to February 27th, 2024, which clearly signalled that their response could well come after the deadline for service on January 15th, 2024. As from December 19th, 2023, and therefore over three weeks before the expiry of the deadline for service, it should have been clear to Verralls that they should be attending to service of the claim form which had been issued on September 15th, 2023. Further, effective service was particularly important at that point because more than three years had passed since the relevant date of knowledge. At no point did Hassans or the defendant say anything about service.

40 The usual step to have taken at this stage would have been to serve the claim form and seek a stay of the claim to allow the pre-action exchanges to run their course as provided for in the pre-action protocol for the resolution of clinical disputes.

41 Thus, whilst the exchanges in this case were slightly less brief and desultory than those in *Barton* (2), the import is the same. There was no indication given to Verralls that they should serve the claim form on Hassans, nor can this be properly inferred from the correspondence.

42 Once the claim form was sent to Hassans on January 8th, 2024, a few days before the deadline of January 15th, 2024, Hassans did not inform Verralls that they were not instructed to accept service. In *Barton*, purported service took place the day before the deadline for service, and in this case, it was only a few days before that. Either way, Lord Sumption also made it clear that there is no duty on the opposing side to raise the issue. He stated ([2018] UKSC 12, at paras. 22–23):

> "22. Mr Elgot repeated before us the submission that he made in the Court of Appeal that Berrymans had been 'playing technical games', with his client. However, the sole basis for that submission was that they had taken the point that service was invalid. Since they did nothing before the purported service by email to suggest that they would not take the point, this does nothing to advance his case. After the purported service by email, there is nothing that they could reasonably have been expected to do which could have rectified the position. The claim form expired the next day. Even on the assumption that they realised that service was invalid in time to warn him to re-serve properly or begin a fresh claim within the limitation

> period, they were under no duty to give him advice of this kind. Nor could they properly have done so without taking their client's instructions and advising them that the result might be to deprive them of a limitation defence. It is hardly conceivable that in those circumstances the client would have authorised it.
>
> 23. Naturally, none of this would have mattered if Mr Barton had allowed himself time to rectify any mishap. But having issued the claim form at the very end of the limitation period and opted not to have it served by the Court, he then made no attempt to serve it himself until the very end of its period of validity. A person who courts disaster in this way can have only a very limited claim on the court's indulgence in an application under CPR rule 6.15(2). By comparison, the prejudice to Wright Hassall is palpable. They will retrospectively be deprived of an accrued limitation defence if service is validated. If Mr Barton had been more diligent, or Berrymans had been in any way responsible for his difficulty, this might not have counted for much. As it is, there is no reason why Mr Barton should be absolved from his errors at Wright Hassall's expense."

43 Mr. Marsh-Finch, relied heavily on the decision of H.H. Judge Hacon in *Abbott* v. *Econowall UK Ltd.* (1). That was a case where the claimant's lawyer acting made an honest mistake about an extension of time agreed for service with the other side, thinking that the deadline for service that had been agreed was December 3rd, 2015, when in fact it was November 15th, 2015. The court held that it would have been clear from a letter from the claimant's lawyer to the defendant's lawyer dated October 21st, 2015 that he had wrongly interpreted the extension of time agreed, and this led to service taking place late. The defendant's lawyer chose not to clear up the misunderstanding about what had been agreed on service when it became clear to him that this was a significant possibility. On the facts of that case, the judge retrospectively authorized service under CPR r.6.15(2).

44 In his judgment, the judge said that parties to litigation are not obliged to inform the opposing side of their mistakes, adding that each side must look after itself. He said, however, that this is subject to parties never losing sight of the overriding objective which requires parties to take reasonable steps to ensure, so far as reasonably possible, that there is a clear common understanding between them as to the identity of the issues in the litigation and also as to related matters, including procedural arrangements. He then concluded as follows ([2016] EWHC 660 (IPEC), at para. 40):

> "Therefore, in my view, where a litigant becomes aware of a real possibility that a genuine misunderstanding has arisen between the parties regarding a significant matter, the litigant should take reasonable steps to clear it up. Dispelling such misunderstandings is

> likely to ensure that the litigation will be conducted more efficiently and I see no real likelihood of any consequent unfairness to either side."

45 *Abbott* was therefore a case where the parties had agreed to extend time for service of the claim form but where confusion arose as to the correct deadline that had been agreed. The judge held that the defendant's lawyers had effectively taken advantage of this confusion and had therefore not complied with the overriding objective.

46 In the present case, there is no question of any confusion arising from any agreement between the parties' respective lawyers as to service. In fact, the existence of the claim form had not even been mentioned by the claimant or her lawyers until January 8th, 2024 when it was sent to Hassans. The present case is therefore a different sort of case altogether from *Abbott*. Although ultimately each case turns on its own facts, if anything, the facts of this case are more akin those in *Barton* (2) and *Piepenbrock* (4), as Mr. Winch submitted.

47 In *Piepenbrock*, the court held that purported service of a claim form on solicitors was ineffective. Mr. Justice Nicklin held that the fact that the claimant, a litigant in person, had been told by both firms of solicitors involved in that case that he should correspond with them or refer further communictions to them, rather than their clients, did not alter the requirements for valid service. Further, the court refused an application for extension of time for service of the claim form under CPR, r.7.6, and for validation of the purported service under CPR, r.6.15. In response to the argument that the defendant's lawyers should have done more when they received the claim form to alert the claimant as to his failure to effect service in accordance with the rules, the judge referred to para. 22 of the judgment in *Barton*, set out in para. 42 above. Insofar as the criticism was levelled against the defendants personally, the judge said in his judgment that it was unrealistic and added ([2020] EWHC 1708 (QB), at para. 64):

> "Providing s/he has done nothing to mislead or obstruct, a defendant could hardly be criticised if s/he decided to follow Napoleon's advice not to interrupt an enemy when s/he is making a mistake."

48 It was therefore up to the claimant to ensure that reasonable steps were taken to serve the claim form in accordance with the rules, especially after the communication from Hassans on December 19th, 2023. At no point has any reason been given by the claimant as to why the claim form could not have been served on the defendant, or a request made asking for written confirmation from Hassans that it was authorized to accept service. It seems to me that there was no obstacle in the way of valid service of the claim form taking place in good time before the deadline for service.

49 The fact that the relevant date of knowledge for the purposes of limitation is late November 2020 means that the importance of ensuring

correct service of the claim form was amplified. Leaving service until a few days before the deadline for service and sending the claim form to Hassans in the way that it was, without checking first whether they were instructed to accept service, is the sort of conduct which Lord Sumption described as courting disaster, and which has a limited claim on the indulgence of the court.

50 The fact that the claimant was legally represented for the purposes of service, unlike the claimants in *Barton* and *Piepenbrock*, only serves to diminish the claim for the court's indulgence in relation to the botched attempt at service. Further, as *Barton* makes clear, even if the defendant or its lawyers may have suspected that service had not been validly effected on January 8th, 2024, they are under no duty to raise this.

51 It follows, therefore, that the claimant has not taken reasonable steps to serve the claim form as required by the rules.

52 I pause here to observe that the claimant has not made an application under CPR, r.7.6(3) which deals with extensions of time for service of a claim form after four months from the date of issue of the claim form. In order that an application to succeed under that rule, claimants must also show that they have taken all reasonable steps to serve within that four-month period but have been unable to (see CPR, r.7.6(3)(b)). Clearly, the same conclusion that I have reached in the context of the present application would apply had an application been made on that basis.

The defendant's awareness of the claims made against it

53 That brings me to the next question, which is that the defendant was fully aware of the claims being made against it. As Lord Sumption said, the fact that a defendant is aware of a claim is a necessary but not a sufficient factor for the court to consider when exercising its discretion as to whether to grant relief. He stated as follows in this connection ([2018] UKSC 12, at para. 16):

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

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

Prejudice

54 Turning then to the question of prejudice. Mr. Marsh-Finch submitted that it would be unfair and disproportionate to deny the claimant the right to pursue her claim when the defendant would suffer no prejudice if service was allowed to stand. Alternatively, he said that the prejudice of the defendant being deprived of a limitation defence would be outweighed by the claimant not being able to pursue her claim.

55 As Lord Sumption stated (*ibid.*, at para. 23), the prejudice to a defendant being deprived of an accrued limitation defence is "palpable" if an order is made under CPR, r.6.15(2). Loss of a limitation defence, whilst not conclusive, is therefore a powerful argument against the grant of relief.

56 I must also briefly refer to estoppel as Mr. Marsh-Finch said that the defendant was estopped from challenging service pursuant to CPR r.6.15. It will only require a moment's reflection in the light of what I have said to appreciate that, given the limited nature of the communications between Verralls, the defendant and Hassans, that there is no question of an estoppel arising in this case.

Conclusion

57 Weighing up all the relevant circumstances, with an eye on the three main relevant factors identified by Lord Sumption which should bear considerable weight in this evaluation, the clear conclusion to be drawn is that the claimant has failed to show a good reason why the court should allow the purported service to stand as good service. As I have already observed, whilst each case turns on its own facts, there is little that separates this case from many others where similar mistakes have been made when attempting to serve a claim form and where the courts have refused to validate those steps.

58 This is not therefore a case where the purported service should be permitted or retrospectively validated. Applying the same logic, there is no exceptional reason for the court to dispense with service under CPR r.6.16.

59 This is a conclusion that I have reached with little enthusiasm as it effectively ends this claim. It is, however, important to ensure that the regime for service which has significant consequences for litigants is not undermined. It is for that reason that the courts have repeatedly underlined that there is a very high bar to excuse claimants, even litigants in person, from the strict rules of service, and that parties who fail to observe these rules cannot automatically seek refuge in CPR, r.6.15.

(3) *Extension of time under the Limitation Act 1960*

60 Alternatively, the claimant seeks an extension of time under s.7 of the Limitation Act 1960 "in the interests of justice."

61 Section 7 provides as follows:

"7. (1) The provisions of this section shall have effect in relation to—

(a) any such action as is mentioned in section 5(2) being an action in respect of one or more causes of action surviving for the benefit of the estate of a deceased person by virtue of section 12 of the Contract and Tort Act; and

(b) any action brought by virtue of Part IV of the Contract and Tort Act for damages in respect of a person's death, and, in relation to an action falling within paragraph (a) shall have effect to the exclusion of sections 5 and 6 of this Act.

(2) Section 4(1) shall not afford any defence to an action falling within subsection (1)(a) or (b) of this section, in so far as it relates to a cause of action in respect of which—

(a) the court has, whether before or after the commencement of the action, granted leave for the purposes of this subsection; and

(b) the requirements of section 7B(1) are fulfilled.

(3) So much of section 7 of the Contract and Tort Act as requires actions under that Act to be commenced within three years after the death of the deceased shall not afford any defence to an action falling within subsection (1)(b) of this section, in so far as it relates to a cause of action in respect of which—

(a) the court has, before the commencement of the action, granted leave for the purposes of this subsection; and

(b) the requirements of section 7B(2) are fulfilled.

(4) Nothing in subsection (2) or (3) shall be construed as excluding or otherwise affecting—

(a) any defence which, in any action falling within subsection (1)(a) or (b) of this section, may be available by virtue of any enactment other than section 4(1) or so much of section 7 of the Contract and Tort Act as aforesaid (whether it is an enactment imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any enactment or rule of law or equity which, apart from those subsections, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued or the death of the deceased, as the case may be.

(5) In the application of this Part to an action brought by virtue of Part IV of the Contract and Tort Act—

(a) any reference to a cause of action to which an action relates shall be construed as a reference to a cause of action in respect of which it is claimed that the deceased could (but for his death) have maintained an action and recovered damages; and

(b) any reference to establishing a cause of action shall be construed as a reference to establishing that the deceased could (but for his death) have maintained an action and recovered damages in respect thereof.

(6) In this section and in section 7B 'the deceased' means the person referred to in subsection (1)(a) or (b) of this section, as the case may be."

62 As can be seen, s.7 of the Limitation Act gives effect to s.12 of the Contract and Tort Act such that on the death of a person with an existing cause of action, that cause of action shall survive for the benefit of the deceased's estate.

63 Further, s.7(3) of the Limitation Act provides that a limitation defence cannot be raised in cases such as this one where a three-year limitation period applies and the requirements of s.7B(2) are fulfilled. The requirements of s.7B(2) are fulfilled if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all material times outside the knowledge (actual or constructive) of each relevant person until three years before the claim was commenced. Thus, s.7 enables, indeed requires, the court to extend time in circumstances where material facts were outside the knowledge of a claimant.

64 In the present case, the claimant's case at its highest is that she did not have the requisite knowledge until late November 2020. That, however, does not assist her because she issued the claim form in time. Section 7 of

the Limitation Act, however, says nothing about service of that claim form beyond the prescribed four-month period, which is what this case is about.

65 What Mr. Marsh-Finch really appeared to be arguing was that the court should exercise a general discretion to extend the limitation period in this case in interests of justice, along the lines provided for in England & Wales under s.33 of the Limitation Act 1980. This was reinforced by the fact that the English authorities on limitation relied on by Mr. Marsh-Finch all concerned applications made under s.33 of the Limitation Act 1980.

66 Section 33 of the Limitation Act 1980 is a significant provision that confers on the courts of England & Wales a wide discretion to disapply the primary limitation period of three years in claims for personal injuries or death if it appears that it would be equitable to allow the claim to proceed. In exercising that discretion, the court is required to take account the facts and matters of subs. (3) of that section. This power is therefore a safeguard for claimants who may have valid reasons for not being able to adhere to the standard limitation period and has been successfully invoked in different sorts of cases, for example, historic sex abuse cases. This was one of various provisions that was enacted when the Limitation Act 1980 was passed in England & Wales, following previous amendments to the limitation legislation, which removed some of the harshness of the previous legislation and provided a more equitable scheme.

67 Unfortunately, Gibraltar's limitation law lags behind the position in England & Wales and does not have the benefit of a provision equivalent to s.33 of the Limitation Act 1980. Even if it did, it hardly follows that this case is one where the discretion to extend time in the interests of justice would be exercised on the claimant's favour. In any event, there is no such power, and this part of the claimant's case can therefore quickly be consigned to the ocean floor.

(4) *Change of name*

68 The final issue which falls for determination is the claimant's application made under CPR r.17.4 (3) to amend her name from "Desiree Da Silva Paulino" in this claim to "Sylvia De Corzal Vela." In the light of my conclusions above, it is not strictly necessary for me to consider this question but I will deal with it as the point was argued at the hearing.

69 Mr. Barcelo's witness statement also refers to this part of the application, and states as follows:

> "5. During a review of the client's KYC documentation, it came to our attention that an error existed in the identification of the Claimant's name. The correct name is Sylvia De Corzal Vela, as opposed to the current representation in the legal documents and the pre-action

disclosure, as Desiree Da Silva Paulino. The aforementioned discrepancy was the result of an historical oversight.

. . .

7. Further the change of name is made to regularize the claim and it is submitted that there is nothing objectionable regarding this application as it simply corrects the Record."

70 Mr. Winch provided a copy of medical notes for Mr. Paulino which bear no date but which he said was dated 2012, and which includes his wife's name as his contact person, which is given as "Silvia De Cozar Vella."

71 In Mr. Marsh-Finch's submission, this was therefore nothing more than a straightforward correction that the court should order. Mr. Winch said that this appeared to be two different people altogether. Further, relying on *Euro Fixed Income Ltd.* v. *Baker Tilly (Gibraltar) Ltd.* (3), he said that it was particularly important to ensure that this was not a case of substitution, as the date of substitution could not relate back to the date of the issue of the claim.

72 The evidence relied on by the claimant in support of this part of the application does not properly explain how both names, which are completely different, can refer to the same person. Not only is the claimant's surname completely different now but so is her first name. I cannot understand how they can both be the same person, and none of this has been properly explained by the claimant.

73 It is particularly important to ensure that an application to substitute a party is not being made under the guise of a change of name application in Gibraltar as there is no equivalent to s.35 of the Limitation Act 1980. That empowers the court to add or substitute a party after the expiry of the limitation period, and subject to certain conditions being satisfied, the substitution of a party is a separate action which is deemed to have commenced on the same date as the original action.

74 Whilst the Limitation Act 1960 does not expressly prohibit substitution, the fact that there is no equivalent to s.35 of the English Act means that any such substitution which the court might order would run from the date of that order and not the commencement of the claim. One must therefore be particularly vigilant about new claims being brought after the expiry of the limitation period. This is another omission in Gibraltar's limitation law that has the potential of operating as an instrument of injustice, although whether that is the case here is another matter.

75 Ultimately, however, the claimant has provided very flimsy evidence to support this part of the application, which raises more questions than it answers. Based on this evidence, I am not satisfied that the new proposed

claimant, Sylvia De Corzal Vela, is the same person as Desiree Da Silva Paulino. The claimant's application for permission to change her name in this claim is therefore refused.

Summary of conclusions

76 My conclusions are as follows:

(1) Service has not been properly effected.

(2) There is no "good reason" why the purported service of the claim form should be permitted or retrospectively validated under CPR r.6.15, and the claimant's application in that regard is refused.

(3) It follows that there is no exceptional reason for the court to dispense with service under CPR r.6.16.

(4) The extension of time sought under s.7 of the Limitation Act for the claim to proceed is misconceived, and it is therefore refused.

(5) The court, therefore, has no jurisdiction to try this claim.

(6) The claimant's application for permission to amend the name of the claimant in these proceedings to "Sylvia De Corzal Vela" is refused.

77 I trust that the parties can agree on the wording of an appropriate order to give effect to my decision. I will resolve any outstanding points of disagreement at the handing down of this judgment or at a further hearing.

Judgment accordingly.