[2018 Gib LR 200]

McNULTY v. GIBRALTAR HEALTH AUTHORITY

SUPREME COURT (Butler, J.): April 20th, 2018

Civil Procedure—service of process—alternative methods of service—attempted service of claim form, at end of time limit, by email to employees of defendant whom claimant's lawyer led to believe had authority to accept service in that manner authorized under CPR r.6.15—good reason retrospectively to validate service—no prejudice to defendant, aware of nature of claim (admitted breach of duty), other than removal of limitation defence

The defendant sought the striking out of a claim.

The claimant alleged negligence and/or breach of statutory duty in his clinical treatment by the defendant. The limitation period for commencement of proceedings was three years from the claimant's date of knowledge of the relevant facts. That period was extended by agreement on a number of occasions and the final extension was to Monday, April 21st, 2017. The claimant's claim form was issued on that day. The defendant admitted breach of duty but not causation. The claimant had four months from that date to serve the claim form and other documents on the defendant, *i.e.* by midnight on Monday, August 21st, 2017, failing which the action would expire (CPR r.6.9(2)).

On Friday, August 18th, 2017, the claimant's solicitor, Ms. Moran, emailed Mr. Winch at the defendant's solicitors seeking confirmation that he had instructions to accept service of the claim form on behalf of the defendant. On that day the claim form and other relevant documents were served by Ms. Moran on the defendant's solicitors by hand. Mr. Winch saw Ms. Moran's email on Saturday, August 19th but did not respond to it until Monday, August 21st, when he made it clear that he had not received instructions as to whether he could accept service on behalf of the defendant.

Ms. Moran then telephoned the defendant's offices at St. Bernard's Hospital and was told that legal matters were handled by the Ministry Department. She spoke to a Mr. Santos in that department, who confirmed that that office was the correct one on which to serve the claim documents. He said that his colleague, Mr. Ullger, dealt with such matters but was not in the office as summer hours were in operation and that he, Mr. Santos, was also about to leave. Ms. Moran indicated that she would leave the documents at the defendant's desk at St. Bernard's Hospital, but Mr. Santos was concerned about the security implications of her doing so.

He told her that she could email the documents to Mr. Ullger and confirmed that Mr. Ullger agreed to service of the documents in that way. Mr. Santos also confirmed that Mr. Ullger had stated that the documents could also be emailed to another colleague, Mr. Galliano. Ms. Moran subsequently emailed the documents to Mr. Ullger and Mr. Galliano and provided hard copies the following day.

The defendant applied for an order striking out the claim on the ground that it was not properly served with the claim documents within the required four-month period. It was submitted, inter alia, that Mr. Ullger and Mr. Galliano had no authority to agree to accept service of the documents by email.

The claimant sought (i) a declaration that the documents were properly served on the defendant's solicitors or the defendant personally within time; (ii) relief from sanctions; and/or (iii) a five-day extension of time for service (under CPR r.7.6(3)); or (iv) an order deeming service on the defendant to have been good and effective service pursuant to r.6.15 of the CPR. No explanation was given as to why the claimant did not attempt to serve the claim documents earlier within the four-month period.

Rule 6.7(1) of the CPR dealt with service on a solicitor within the jurisdiction:

> ". . . [W]here—
>
> (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,
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> the claim form must be served at the business address of that solicitor."

Rule 6.15 provided:

> "(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.
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> (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."

Rule 7.6(3) provided:

> "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—
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> (a) the court has failed to serve the claim form; or
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> (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."

Held, ordering that service of the claim documents had been effected:

(1) The claimant's initial submission that service on the defendant's solicitors constituted effective service on the defendant was abandoned, correctly in the court's view, at the outset of the hearing. It was clear that in the absence of Mr. Winch having obtained authority from the defendant to accept service, Ms. Moran was not entitled to assume that he had such authority. It seemed that she was aware of that because (a) she expressly sought Mr. Winch's confirmation that he was instructed to accept service, and (b) in the absence of a response she attempted to serve the defendant directly. Mr. Winch had not acted unprofessionally in not dealing with Ms. Moran's email until Monday 21st, even though he had seen it on Saturday 19th. No explanation had been given as to why the claimant left it to the working day prior to the last day for service to attempt to serve the claim documents. This case was a classic example of the risk taken by a claimant if service was left to so late a stage, especially in a case in which the limitation period had expired and there had been virtually no communication with the defendant, if any, following the issue of the claim. It was true that the defendant was well aware of the claimant's allegations and had had full details of the claim save as to damages claimed, the clinical negligence pre-action protocol having been followed. The defendant had admitted breach of duty (although not causation) and had been cooperative in granting extensions of time for issuing proceedings. It was not, however, Mr. Winch's duty to go out of his way to assist the claimant in the situation which the claimant had brought on himself (through his solicitor). If Ms. Moran had assumed that, by virtue of his having dealt with the case hitherto on behalf of the defendant, Mr. Winch had authority to accept service, she was incorrect. A solicitor did not generally have implied authority to accept service. CPR r.6.7(1) required either the defendant or its solicitor to notify the claimant in writing of his or her instruction to accept service, which had not been done. The defect was not merely technical (para. 12).

(2) There had not been effective service by email on Monday, August 21st. SCR r.3(1)(c) provided for service by "fax or other means of electronic communication" which clearly included email. Ms. Moran's emails to Mr. Ullger and Mr. Galliano were sent on the clear understanding, given by them, that service could be so effected. It was most unlikely that persons of the seniority of Mr. Santos, Mr. Ullger and Mr. Galliano had actual authority to accept service of a claim form. They might have had some litigation role or some dispute handling or dispute resolution role (it was perhaps unfortunate that the court had no evidence from them as to their roles). With some hesitation, the court was not prepared to draw the inference that any of the three employees of the defendant had the requisite actual authority to accept service. The fact that they purported to do so and were acting within the department which dealt with litigation

against the GHA was, on balance, insufficient. Nor was there any ostensible authority for those employees to accept service of the claim documents. Ostensible authority was a form of estoppel arising from a representation by a principal to a third party that an agent had authority to act on the principal's behalf. No such representation, express or implied, was made in the present case by the defendant. A representation by the employees was insufficient. None of them could reasonably be regarded as the principal and they had not been put forward as such. It was only their own willingness to receive the documents in the manner in which they did which was conveyed. It was most unlikely that they would have wished or been entitled to take decisions on whether to accept valid legal service without knowing the whole situation and the legal effects of what they were agreeing. The court concluded that none of Mr. Santos, Mr. Ullger and Mr. Galliano was a person holding a senior position with the defendant for the purpose of para. 6.2(1) of the UK Practice Direction 6A, Service within the United Kingdom. Mr. Santos was junior; the others were mid-ranking; and none could be described as senior or akin to the positions mentioned in para. 6.2(2). None was a lawyer or in a senior position in which they could waive the strict requirements of service. In the circumstances, the conduct of Mr. Santos, Mr. Ullger and Mr. Galliano did not give rise to any estoppel in law preventing the defendant from challenging the validity of the purported service (paras. 24–27).

(3) The expiry of time for service of claim documents and the consequent lapsing or termination of the proceedings was not a sanction. The claimant's application for relief from sanctions was therefore misconceived (para. 29).

(4) The application for an extension of time for service of the claim documents added nothing to the application under CPR r.6.15, which was included by way of amendment. It was made under CPR r.7.6(3), which was far more restrictive than r.6.15. It was inconceivable that an application under r.7.6(3) would succeed if the application under r.6.15 failed. For example, the former rule required specifically that the claimant had taken all reasonable steps to serve within the four-month period of the claim's validity. An order would only be made under r.7.6(3) in exceptional circumstances (para. 30).

(5) It was regrettable that CPR r.6.15 had given rise to many reported authorities as to its interpretation and application. The rule itself contained no guidance as to the principles to be applied in exercising the clear power given to the court, save that there must be "good reason to authorise" a different place or mode of service. What amounted to good reason was left to the court to decide. It was a discretionary exercise. In the recent case of *Barton* v. *Wright Hassall LLP*, the UK Supreme Court was divided as to the proper approach but the present court derived the following principles from the opinion of the majority (which were not exhaustive). (i) An order under r.6.15 was a discretionary order. It hardly needed to be stated that the discretion must be exercised judicially. The test was fact specific, but it

was a precondition that there had been an attempt at service which was not in accordance with the rules. (ii) The disciplinary factor which applied strongly on an application for relief from sanctions under CPR r.3.9 was of less weight when considering an application under r.6.15, which specifically governed service of a claim form. (iii) What was good reason was essentially a matter of factual evaluation, which did not lend itself to over-analysis or copious citation of authority. The test was whether in all the circumstances there was good reason to order that steps taken to bring the claim form to the attention of the defendant constituted good service. (iv) The most important purpose of service was to ensure that the contents of the document served were brought to the attention of the person to be served. Other purposes were to notify the person served that the claim had actually commenced and to ensure that the recipients of service had the opportunity to put in place administrative arrangements for monitoring and dealing with that mode of service. (v) The mere fact that the defendant learned of the existence and content of the claim form could not, without more, constitute a good reason to make an order under r.6.15(2). It was "likely," however, to be a "necessary condition." (vi) The question was not whether the claimant had good reason to choose the mode of service used but whether there was good reason for the court to validate that mode. (vii) The object of the rule was that in appropriate cases a claimant might be enabled to escape the consequences of limitation when a claim form expired without having been validly served. (viii) In most cases, the main relevant factors were likely to be (a) whether the claimant had taken reasonable steps to effect service in accordance with the rules; (b) whether the defendant or his solicitor was aware of the contents of the claim form at the time it expired; and (c) 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 those factors could be regarded as decisive in itself. The weight to be attached to such factors would vary with all the circumstances. (ix) There was in reality only one stage to the inquiry, namely whether there was good reason to make the order. A claimant who had failed to take all reasonable steps to serve in accordance with the rules might nevertheless succeed in circumstances where the claimant had done nothing at all other than attempt service in breach of the rules. (x) Where the limitation period had expired, an order under r.6.15 had the effect of extending the limitation period. (xi) There might be particular problems with electronic service. (xii) The overriding objective required the court to enforce compliance with the rules. (xiii) The claimant need not necessarily demonstrate that there was no way in which he could have effected service according to the rules within the period of validity of the claim form. It was enough that he had taken such steps as were reasonable in the circumstances. (xiv) It was not necessary for the claimant to show that the circumstances were exceptional. (xv) A person who made no attempt to serve until the very end of the claim form's delivery courted disaster and could have only a very limited claim on the court's indulgence. The

prejudice to the defendant was palpable as he would retrospectively be deprived of an accrued limitation defence if service was validated. It was almost axiomatic that to leave service to the eleventh hour would be a significant feature militating in most cases against a retrospective validation of service. (xvi) The weight to be attached to the deprivation of the defendant's accrued limitation defence would depend on the circumstances of each individual case (paras. 32–33).

(6) In the present case the claimant's default was clearly serious and significant. To remedy it now would deprive the defendant of a valid limitation defence. The defendant was not at fault. Although Mr. Winch was "not comfortable" with what he did or failed to do, there was no valid criticism of his conduct. The real reason for the claimant's failure was the unexplained choice of Ms. Moran to leave the issue of service until the eleventh hour. Unforeseen difficulties often arise. They could be overcome without problem if time had been left. Appropriate diary entries reminding of the need for action well before expiry of the time limit should always be made. Furthermore, it was a simple precaution to obtain clear confirmation from the other party's solicitor at an early stage as to whether he was instructed to accept service. No explanation had been offered for that failure save that Ms. Moran and Mr. Winch had dealt with each other previously in such claims in which he was instructed to accept service. It seemed that that fact, through no fault of Mr. Winch, led Ms. Moran into a false sense of security. It was true that Mr. Winch could have given this case last-minute priority over his other work and commitments over the weekend but he had no obligation to do so. Ms. Moran did not assume that he had such authority, as was apparent from her request for confirmation. She must have known that there was a substantial risk that her email to Mr. Winch on the Friday would not reach him until Monday (though in fact it had reached him before then). On balance the court did not find that the defendant had engaged in "tactical games," nor that it failed significantly to comply with the overriding objective. Earlier service had not proved impracticable; it had not been attempted. The failure to offer any explanation for earlier service was significant. The following considerations pointed against exercise of the discretion to validate service in this case. The defendant was entitled to rely on the limitation period as a bar to further proceedings. It would be deprived of an unanswerable defence if service were deemed to have been valid. There was no valid criticism of the conduct of the defendant. There was criticism of the claimant's having left service so late and there had been no attempt to justify or explain why that had happened. Ms. Moran was an experienced lawyer who was aware of the requirements for service and should have been aware of the risks of leaving her attempts at service until the last minute. During the four-month period following issue of the claim, there was no significant communication on behalf of the claimant to the defendant concerning this action. There was no evidence of tactical game-playing by the defendant. Balanced against those considerations were the following. There was no relevant criticism of the conduct of the claimant's claim up to the date of

issue of the claim form. The parties, in accordance with the overriding objective, had agreed extensions of time for filing the claim. The clinical negligence protocol was observed and the defendant was well aware of the allegations—sufficiently aware to enable it to admit breach of duty, whilst not admitting causation of damage to the claimant. That the application under r.6.15 was made somewhat late by way of amendment to the claimant's application was unfortunate but had caused no material loss or prejudice to the defendant. The three purposes of service (referred to in the judgment of the UK Supreme Court in *Barton* v. *Wright Hassall LLP*) were satisfied prior to the expiry of the four-month period. The defendant was entirely aware of the fact that the claimant had issued his claim (as opposed to it having simply been formulated). The defendant was entirely aware of the nature of the claim, the pre-action protocol having been observed. It had admitted negligence. The contents of the claim form were brought to the defendant's attention by the actions of Ms. Moran, who had clearly attempted to effect valid service. There was no problem putting in place administrative arrangements for monitoring and dealing with service by email. It was relevant that Ms. Moran had dealt with Mr. Winch in other cases against the defendant and had experienced no difficulty with regard to service. Her assumption that this case would be no different was unwise, but understandable and genuine. It was only because summer hours were in operation that personal service could not be effected easily. Ms. Moran had in fact suggested that she leave the documents at the defendant's desk at St. Bernard's Hospital and had only emailed them instead to allay Mr. Santos's concerns as to security. She had checked that Mr. Ullger and Mr. Galliano were able to accept service by email and had been led to believe that they were. She genuinely believed that she had effected good service. She did not deliberately flout the rules. Save for the important fact that the circumstances presented the defendant with an apparently unanswerable limitation defence which it had not expected, it would not be prejudiced by an exercise of discretion in favour of the claimant. The claimant would, on the other hand, suffer injustice if he were deprived of the opportunity to pursue his claim. The breach did not cause any significant delay in the proceedings and did not prevent either party from presenting its case and had no other effect on the ability of the court to deal with cases justly. While the circumstances in the present case were not exceptional, they were unusual. The court concluded that (a) there was good reason for deeming valid service to have taken place; and (b) it should order that service of the claim documents took place on Monday, August 21st, 2017. The court authorized service retrospectively at the place and by the method used by Ms. Moran on that day. That conclusion was fair, proportionate and in accordance with the overriding objective (paras. 34–48).

Cases cited:

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

(2) *El Hajji* v. *Bencrafts (Constr.) Ltd.*, 2003–04 Gib LR 115; further proceedings, 2003–04 Gib LR 325, distinguished.
(3) *Glencore Agriculture B.V. (formerly Glencore Grain B.V.)* v. *Conqueror Holdings Ltd.*, [2017] EWHC 2893 (Comm); [2018] 2 All E.R. (Comm) 352; [2017] Bus. L.R. 2090; [2018] 1 Lloyd's Rep. 233, considered.
(4) *Société Générale* v. *Goldas Kuyumculuk Sanayi Ithalat Ihracat AS*, [2017] EWHC 667 (Comm), referred to.
(5) *Vinos* v. *Marks & Spencer plc.*, [2001] 3 All E.R. 784; [2000] C.P.L.R. 570, considered.

Legislation construed:
Supreme Court Rules 2000, r.3: The relevant terms of this rule are set out at para. 10.

Civil Procedure Rules (S.I. 1998/3132), r.6.7(1): The relevant terms of this sub-rule are set out at para. 11.
r.6.15: The relevant terms of this rule are set out at para. 31.

R. Devereux-Cooke for the claimant;
I. Winch for the defendant.

1 **BUTLER, J.:** This claim arises from alleged negligence and/or breach of statutory duty in the clinical treatment of the claimant by the defendant. The limitation period for commencement of proceedings in such a case is three years from the claimant's date of knowledge of the relevant facts. In this case that period (which would have expired in August 2016) was extended by agreement on a number of occasions, the defendant having admitted breach of duty but not causation. The final extension was to April 21st, 2017. The claimant's claim form was issued just in time, on that day.

2 The claimant had four calendar months from the date of issue of the claim form within which that form and other documents had to be served on the defendant (namely by midnight on Monday, August 21st, 2017), failing which the action would expire (CPR r.6.9(2)).

3 By email sent to Mr. Winch at Messrs. Hassans (the defendant's solicitors) on Friday, August 18th, 2017 (the working day before expiry of the four-month period) the claimant's solicitor (Ms. Moran) sought confirmation that Mr. Winch had instructions to accept service of the claim on behalf of the defendant. On that day the claim form and relevant other documents were served by Ms. Moran on Hassans by hand. Having received no reply from Mr. Winch, on Monday, August 21st, Ms. Moran caused her secretary to telephone him. He made it clear that he had not received instructions as to whether he could accept service on behalf of the defendant.

4 Ms. Moran "as an abundance of caution" telephoned the defendant's offices at St. Bernard's Hospital and spoke to staff in a number of departments, being told eventually that legal matters were handled on the 7th floor at the "Ministry Department." She telephoned that department and spoke to David Santos, who confirmed that that department was now dealing with claims against the defendant and that that office was the correct department on which to serve the claim documents (the previous position of CEO of the defendant no longer existing). He said that his colleague, Mr. Ullger, dealt with such matters but was not in the office as everyone had left because summer hours were in operation. Mr. Santos was also about to leave. Ms. Moran said that, if necessary, she would serve the documents by hand that same day by leaving them at the desk at St. Bernard's Hospital. Mr. Santos was not comfortable with the security implications of leaving such documents at the desk. He told Ms. Moran that she could instead send the documents by email to Mr. Ullger. Ms. Moran asked him to check with Mr. Ullger that he would agree to service of the documents in that way. He did so and called Ms. Moran back to confirm that Mr. Ullger was willing to accept service by email at either of two email addresses which were supplied to Ms. Moran. One was a GHA address; the other was a Gibraltar Government address. Mr. Santos also confirmed that Mr. Ullger had stated that the documents could be emailed to another colleague, whose similar email addresses were also supplied to Ms. Moran. She then sent an email to Mr. Winch confirming that if she did not hear from him she would send the documents to the GHA.

5 Not having heard from him, she sent by email to Mr. Ullger and Mr. Galliano copies of the claim documents, informing them that she would provide printed copies the following morning. Both Mr. Ullger and Mr. Galliano sent receipts. The hard copies were duly provided by Ms. Moran on the following day.

6 Although there are before me affidavits of Ms. Moran and Mr. Santos which contain conflicting evidence of the precise conversations between them, Mr. Winch has not sought to challenge Ms. Moran's account for the purpose of the present applications.

The applications

7 The defendant now applies for an order striking out the claimant's claim on the basis that this court has no continuing jurisdiction in the matter because the defendant was not properly served with the claim documents within the required four-month period.

8 The claimant seeks (i) a declaration that the documents were properly served on Hassans or on the defendant personally in time; or (ii) "relief from sanctions"; and/or (iii) a five-day extension of time for service; or (iv) an order deeming service on the defendant to have been good and

effective service pursuant to r.6.15 of the UK's Civil Procedure Rules ("CPR").

9 I shall deal with the claimant's applications in turn. The defendant's will thereby be determined and will follow.

Was there effective service on the defendant at Hassans on Friday August 18th?

10 Rule 3 of the Supreme Court Rules ("SCR") provides:

> "3.(1) A document may be served—
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> (a) by personal service;
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> (b) by post in a registered letter addressed to the person to be served at his usual or last known address;
>
> (c) by fax or other means of electronic communication;
>
> (d) by any alternative method ordered by a judge.
>
> (2) A document shall be deemed to be served:
>
> (a) if served by registered post . . .
>
> (b) if served by fax . . .
>
> (c) if served by other means of electronic communication, on the second day after the day on which it is transmitted.
>
> (3) The Court may dispense with service of a document.
>
> (4) On matters of service the provisions of the rules and directions that apply for the time being in England in the High Court will apply, so far as circumstances permit."

11 Rule 6.7(1) of the CPR deals with service on a solicitor within the jurisdiction:

> ". . . [W]here—
>
> (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." [Emphasis supplied.]

12 The claimant's initial submission that Ms. Moran's service on Hassans constituted effective service on the defendant was abandoned, correctly in my view, at the outset of the hearing. It is clear that in the absence of Mr. Winch having obtained authority from the defendant to accept service, Ms. Moran was not entitled to assume that he had such authority. It seems that she was aware of that since (a) she expressly sought Mr. Winch's confirmation that he was instructed to accept service and (b) in the absence of a response she attempted to serve the defendant directly. There was an unfortunate suggestion that Mr. Winch had acted unprofessionally, which was abandoned and I reject. He did receive Ms. Moran's email sent on Friday, August 18th. He went to his office on Saturday, August 19th and saw it. He had only intended to stay for a short while to deal with another matter and did not deal with Ms. Moran's email until Monday 21st. During the course of submissions Mr. Devereux-Cooke accepted that it was not a case of "bad faith in the real meaning of the word" and that he was not alleging bad faith in the sense of setting a trap. Mr. Winch frankly conceded that he was not comfortable, with the benefit of hindsight, with his actions (or lack of them) but I do not take the view that he acted in any way unprofessionally. If he had been in his office for the whole of the Friday and raised immediate enquiries of the defendant and their insurers, it is possible that he could have obtained a response by the Monday afternoon. But he had no duty to do so. No explanation has been given as to why the claimant left it to the working day prior to the last day for service to attempt to serve the claim documents. This case is a classic example of the risk which is taken by a claimant if service is left to so late a stage, especially in a case in which the limitation period has expired and there had, it seems, been virtually no communication with the defendant, if any, following issue of the claim. It is true that the defendant was well aware of the claimant's allegations and had had full details of his claim save as to damages claimed, the clinical negligence pre-action protocol having been followed. It is true that the defendant had admitted breach of duty (though not causation). The defendant had been cooperative in granting extensions of time for issuing proceedings. It was not, however, Mr. Winch's duty to go out of his way to assist the claimant in the situation which the claimant had brought upon himself (through his solicitor). If Ms. Moran had assumed that, by virtue of his having dealt with the case hitherto on behalf of the defendant, Mr. Winch had authority to accept service, she was incorrect. I have no doubt that she thought that he would have such authority but her last-minute actions do not suggest that she was confident of it and she was not entitled to assume it. "A solicitor does not generally have implied authority to accept service and if he does so without express authority he . . . is in breach of his professional duty to his client." CPR r.6.7(1) requires either the defendant or its solicitor to notify the claimant *in writing* of his or her instruction to accept service. That had not been done.

The defect was not, as suggested in Mr. Devereux-Cooke's skeleton argument, merely "technical."

13 It was submitted for the claimant that by saying on Monday, August 21st, 2017 that he was taking instructions on whether to "challenge" service, "clearly, he accepted that he . . . had been served." I regard that submission as entirely without merit. It does not affect the fact that he had not received instructions to accept service. Nor had he suggested that he had. Ms. Moran certainly did not assume that he had; nor did she act on any such assumption.

Was there effective service by email on Monday, August 21st?

14 SCR r.3(1)(c) (see above) provides for service by "fax or other means of electronic communication," which clearly includes email. Mr. Winch accepts that the provision deeming service by such means to have taken place on the second day after the day on which it is transmitted only relates to the time for filing the defendant's acknowledgement of service and defence. Thus it does not affect the claimant's case.

15 In England the equivalent provision is CPR r.6.3, which provides for service by "fax or other means of electronic communication *in accordance with Practice Direction 6A*." By virtue of SCR r.3(4) (*ante*) the Practice Direction should apply in Gibraltar in relation to SCR r.3(1)(c). There is nothing in the circumstances which would not permit that to be so.

16 Ms. Moran's emails to Mr. Ullger and Mr. Galliano were sent on the clear understanding, given by them, that service could be effected by sending the emails to their email addresses. Mr. Winch submits that (a) they had no authority to agree to accept service in that way; (b) it was in practice at least for the defendant's insurers also to confirm their agreement; and (c) though Miss Moran's emails had been sent to Mr. Winch, they had not sought any advice before purporting to accept such service.

17 Mr. Winch did not, in the end, take the point that any agreement was not in writing as required by CPR r.3 (above). Mr. Devereux-Cooke did not challenge that SCR r.6 must be read with CPR r.3 but Mr. Winch accepted that if persons with authority had agreed to accept service in the way in which Mr. Ullger and Mr. Galliano purported to do, there would at least be an estoppel which would operate to make service effective. Alternatively, the court could deem service to have taken place.

18 They were, it seems, both Higher Executive Officers. Mr. Santos was more junior. Paragraph 6 of the UK Practice Direction 6A ("the Practice Direction") applies to personal service on a company or other corporation (which includes the defendant in this case):

"**6.1** Personal service on a registered company or corporation in accordance with rule 6.5(3) is effected by leaving a document with a person holding a senior position.

6.2 Each of the following persons is a person holding a senior position—

(1) in respect of a registered company or corporation, a director, the treasurer, the secretary of the company or corporation, the chief executive, a manager or other officer of the company or corporation; and

(2) in respect of a corporation which is not a registered company, in addition to any of the persons set out in sub-paragraph (1), the mayor, the chairman, the president, a town clerk or similar officer of the corporation."

19 Mr. Winch argues that neither Mr. Ullger nor Mr. Galliano came within para. 6 of the Practice Direction. Mr. Santos was certainly not authorized to deal with litigation matters and did not understand what was involved in Ms. Moran's situation. That is why he referred her to Mr. Ullger. He recalls that she asked that he remain in his office until the papers were delivered to the office. Mr. Santos was about to leave. She suggested that she send the documents by email to Mr. Ullger. Mr. Santos then felt out of his depth and called Mr. Ullger, to whom he explained the position as best he could. Mr. Ullger said that, in order to assist, he could tell Ms. Moran that she could send him an email. He passed on that message to her and left his office. The position then was that Ms. Moran had been led to believe that it was accepted that she could serve the claim documents by email. But, says Mr. Winch, the issue is whether Mr. Santos understood the implications of what Ms. Moran was asking him to do and whether he (or Messrs. Ullger and Galliano through him) had ostensible authority to do so.

20 Neither Mr. Ullger nor Mr. Galliano, says Mr. Winch, is an "officer" of the defendant, let alone an officer similar to a mayor, chairman, president or town clerk. Nor does either come within para. 6.2(1) of the Practice Direction. I observe that in any event UK Practice Direction 6A deals with personal service. There was no personal service on the defendant on Monday, August 21st. Service by electronic means is dealt with separately from personal service.

21 The issues remain as to whether (a) para. 6.2 exhaustively defines "a person holding a senior position" within para. 6.1, rather than simply clarifying that the persons mentioned in para. 6.2 are included; (b) whether Mr. Santos had ostensible authority to waive the requirements of CPR r.4.2 that "where a party intends to serve a document by electronic means (other than by fax) that party must first ask the party who is to be

served whether there are any limitations to the recipient's agreement to accept service by such means (for example the format in which documents are to be sent and the maximum size of attachments that may be received) for prior permission in writing, nomination of a particular address in writing and the statement of any limitations (none of which was satisfied) and whether he did so; and (c) whether Mr. Ullger and/or Mr. Galliano had ostensible authority to do so and in fact did so.

22 It would have been simple for Ms. Moran, says Mr. Winch, to have obtained details of persons holding a senior position with the defendant from the defendant's website, which contains details of its board members. It does not seem that they are specifically named on the site or that their contact details are given. Had the claimant sought relevant details sooner, they could have been provided. It is the claimant's error to have left it too late to ensure that it had proper details. In any event, he says, none of the three persons with whom Ms. Moran dealt had any authority to waive the relevant requirements. No evidence has been placed before me as to exactly what role and/or responsibility and/or authority had been given to Messrs. Ullger and Galliano but there is no reason to suppose that they were given the authority to waive the requirements of service or that they would have known of them or understood them. It seems that they did forward Ms. Moran's email to Mr. Winch after the event but he needed to communicate with persons with authority for the defendant and with their insurers on the issue.

23 In *Glencore Agriculture B.V. (formerly Glencore Grain B.V.)* v. *Conqueror Holdings Ltd.* (3), Popplewell, J. was concerned with the validity of service of a notice of arbitration and notice under s.17 of the Arbitration Act 1996. The notices had been sent to the defendant's "relatively junior" employee by email. He had previously corresponded with the defendant concerning routine matters, using his individual email address. Popplewell, J. held that in such a situation the role of the employee concerned would be decisive. He found that the employee in that case had at most an operational role at a relatively low level in the defendant's managerial structure. He decided the issue by applying agency principles. The test, he found, was whether the defendant company had given actual authority, express or implied, to receive the notices or was estopped from denying that he had such authority as a result of representations made as to the employee's authority. I agree that those principles are useful, by analogy, in the present case. He accepted that even when an employee "has a wide general authority to act on behalf of his employer/principal, such authority does not (without more) generally include an authority to accept service of a notice of arbitration." He rejected the suggestion that it was sufficient that the sender of the notice reasonably believed that the person or department to whom it was sent was dealing with the dispute. Nor would it be sufficient to serve someone in a

commercial department who had been involved in the dispute; nor that the person served was concerned in the commercial operations giving rise to the dispute. That would be to confuse the functions of those whose functions were operational and those involved in dispute handling or resolution. They are distinct functions involving different experience and qualifications. He gave the following example as a consequence of such confusion:

> ". . . [I]f a claimant had been dealing with the legal department of the company . . . in relation to the dispute, it would nevertheless be able to serve notice . . . on an employee in the commercial or operational department who although involved in the original transaction might never have been involved in the dispute itself, or indeed never even have had any knowledge of any dispute having arisen."

There will be cases where the company has promulgated a generic email which will be sufficient or where the role of an individual will justify notification to his individual email address. "But it does not follow that sending an email to someone who has an operational role, rather than dispute handling or dispute resolution role, must be sufficient."

> ". . . [I]t conflates the role within a company of those whose function is operational with the very different and distinct role of those whose function involves dispute handling or dispute resolution, and ignores the serious nature of acceptance of legal process as distinct from that of the conduct of the company's ordinary commercial activities."

In the context of service of originating process there will rarely be implied actual authority for a third party to accept service: ". . . [I]mplied actual authority to accept service of originating process is a serious and distinct matter from general implied authority to conduct business on behalf of the principal . . ." In the case of an employee it may not be rare.

24 It is most unlikely that persons of the seniority of Messrs. Santos, Ullger and Galliano had actual authority to accept service of a claim form. They may have had some litigation role or some dispute handling or dispute resolution role. It is perhaps unfortunate that I have no evidence from them and no evidence as to their contracts of employment. In *Glencore Agriculture B.V. (formerly Glencore Grain B.V.)* v. *Conqueror Holdings Ltd.* (3) too there was a lack of detail and evidence of what the employee was doing on a day-to-day basis but the defendant had provided documentary evidence of his contract and personnel file and all the evidence suggested that he did not have the relevant actual authority, whether express or implied. With some hesitation, in the present case, I am not prepared to draw the inference that any of the three employees of the defendant had the requisite actual authority to accept service. The facts that they purported to do so and that they were acting within the department which dealt with litigation against the GHA are, on balance in

this case, insufficient. No applications for further disclosure were made prior to the hearing and it is unlikely that the contract of a Higher Executive Officer would provide for such specialist authority. Evidence from Mr. Ullger could have resolved clearly and simply the issue of actual authority. But even if they felt that they had authority to agree to receive litigation documents, that does not mean that he or Mr. Galliano had authority to waive the usual requirements of such documents or to agree that receipt by them of those documents was good service for the purposes of this kind of litigation.

25 Nor do I find that there was any ostensible authority for these employees to accept service of the claim documents. Ostensible authority is a form of estoppel arising from a representation by the principal to a third party that the agent has authority to act on the principal's behalf *in the matter*. No such representation, express or implied, was made in this case by the defendant. A representation by the employees is insufficient. None of them could reasonably be regarded as the principal and they had not been put forward as such. It was only their own willingness to receive the documents in the manner in which they did which was conveyed. It is most unlikely that they would have wished or been entitled to take decisions on whether to accept valid legal service without knowing the whole situation and the legal effects of what they were agreeing. It has been emphasized that in the context of service of originating process the scrutiny of whether facts establish ostensible authority calls for even more caution than the intense scrutiny required when considering implied actual authority in that context. That scrutiny applies as much in relation to an employee as to a third-party agent.

26 I conclude that neither Mr. Santos nor Mr. Ullger nor Mr. Galliano was a person holding a senior position with the defendant for the purpose of para. 6.2(1) of the Practice Direction. Mr. Santos was junior; the others were mid-ranking; none could be described as senior or akin to the positions specifically mentioned in para. 6.2(2). I am not satisfied that any of those three persons is likely to have had actual or ostensible authority to waive the requirements of paras. 6 or 4. On the balance of probabilities, they were simply trying to be helpful to Ms. Moran. None was a lawyer. None was in the kind of senior position in which (without specific authorization for someone in a senior position or at least Mr. Winch) they could waive the strict requirements of service, rather than allowing Ms. Moran to send the documents to their email addresses. Though I have wavered on this point, I have concluded that they did not have ostensible authority to do so and that no estoppel arises as a result of their actions. Ms. Moran did all she was able to think of to effect service within the very tight window which she had left herself but she was not entitled to place the defendant's employees in the position of more senior employees who could understand the implications of what was happening. They were

willing to agree to her emailing the documents to them but it is most unlikely that they would, if asked or if they were aware of the strict legal requirements for service and the consequences in this case of waiving those requirements, have been willing to take the decision to waive them or authorized to do so.

27 In those circumstances, I conclude that the conduct of Messrs. Santos, Ullger and Galliano did not give rise to any estoppel in law preventing the defendant from challenging the validity of the purported service.

El Hajji

28 In *El Hajji* v. *Bencrafts (Constr.) Ltd.* (2), Schofield, C.J. held that CPR r.6.7, as it then was, did not apply in Gibraltar, since its wording was incompatible with the ways in which service could be effective in Gibraltar. The claimant therefore suggests that r.6.7 has no application in the present case. I disagree. Since that case, the rules have been redrafted materially. The Chief Justice in *El Hajji* was concerned with service by ordinary post (then covered by CPR r.6.3(1)(b) but now amended and appearing as CPR r.6.3(1)(b)). Schofield, C.J. found that no attempt had been made to serve the claim form in a manner which was allowed by the Gibraltar Supreme Court Rules, which did not allow for service by ordinary post. There had been no personal service. In those circumstances the claimant in that case could not rely upon the court's power under CPR r.6.9 to dispense with service of the claim form retrospectively, in exceptional circumstances, where the claimant had already made an ineffective attempt to serve it by a permitted method. Reference was made to *Vinos* v. *Marks & Spencer plc.* (5), in which it was held that the general power under CPR r.3.10 to rectify errors could not be invoked to circumvent r.7.6(3). In my view there is nothing now in the provisions of CPR r.6.7(1) which is incompatible with Gibraltar law on service. The claimant's submission in relation to *El Hajji* was puzzling, since the claimant's purported service in this case would without doubt be defective if CPR r.6.7, as it now appears, were not applicable in Gibraltar. Doubtless for these reasons, the point was not pursued with any force by Mr. Devereux-Cooke at the hearing.

Relief from sanction

29 I accept that the expiry of time for service of claim documents and the consequent lapsing or termination of the proceedings is not a sanction. The claimant's application for relief from sanctions is therefore misconceived.

Extension of time for service of the claim documents

30 In my view this application adds nothing to the application under CPR r.6.15, which was included by way of amendment. It is made under CPR r.7.6.3, which is far more restrictive than r.6.15. It is inconceivable that an application under r.7.6.3 would succeed if the application under r.6.15 failed. The former rule requires specifically, for instance, that the claimant has taken all reasonable steps to serve within the four-month period of the claim's validity. An order will only be made under r.7.6.3 if the circumstances are exceptional.

Authorization of the service which took place as "an alternative method of service under r.3(1)(d)"

31 CPR r.6.15 provides:

> "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.
>
> (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."

32 It is a regrettable that CPR r.6.15 has given rise to many reported authorities as to its interpretation and how it should be applied. I have been referred to many of those and have read and considered them all. The rule itself contains no guidance as to the principles to be applied in exercising the clear power given to the court, save that there must be "good reason to authorise" a different place or mode of service. What amounts to good reason is left to the court to decide. It is a discretionary exercise. In the recent case of *Barton* v. *Wright Hassall LLP* (1), the Supreme Court in England considered this issue for the second time in two years. That court was divided as to the proper approach. Whilst I confess to having considerable sympathy for the dissenting opinion of Lord Briggs (with whom Lady Hale agreed), I shall apply the principles as set out in the opinion of Lord Sumption, with whom the majority agreed.

33 I derive the following principles from that opinion. They are not exhaustive:

(1) An order under r.6.15 is a discretionary order. It hardly needs stating that the discretion must be exercised judicially. The test is fact specific. But it is a precondition that there has been an attempt at service which was not in accordance with the rules as to service.

(2) The disciplinary factor which applies strongly on an application for relief from sanctions under CPR r.3.9, is of less weight when considering an application under r.6.15, which specifically governs service of a claim form ([2018] UKSC 12, at para. 8):

> ". . . 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 . . . as a general rule service of originating process is the act by which the defendant is subjected to the court's jurisdiction."

(3) What is good reason is (*ibid.*, at para. 9) "essentially a matter of factual evaluation, which does not lend itself to over-analysis or copious citation of authority." 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'."

(4) The most important purpose of service is to ensure that the contents of the document served are brought to the attention of the person to be served. Other purposes are to notify the person served that the claim has actually commenced and to ensure that the recipients of service have the opportunity to put in place administrative arrangements for monitoring and dealing with that mode of service.

(5) 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 r.6.15(2). It is "likely," however, to be a "necessary condition."

(6) The question is not whether the claimant had good reason to choose the mode of service used but whether there is good reason for the court to validate that mode.

(7) The object of the rule is that in appropriate cases a claimant may be enabled to escape the consequences of limitation when a claim form expires without having been validly served.

(8) It is these additions to the judicial interpretation of r.6.15 with which the dissenting judges in *Barton* (1) were not in full agreement (*ibid.*, at para. 10).

> "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."

But it is clear that Lord Sumption was not intending to lay down rigid principles which would be determinative in any case. On the contrary, he emphasized (*ibid.*) that:

> "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 . . . None of these factors can be regarded as decisive in themselves. The weight to be attached to them will vary with all the circumstances."

(9) "There is in reality only one stage to the inquiry, namely whether there is 'good reason' to make the order" (*ibid.*, at para. 12). A claimant who had failed to take all reasonable steps to serve in accordance with the rules might nevertheless succeed in circumstances where the claimant had done nothing at all other than attempt service in breach of the rules. The factual matrix in *Barton* was such that the fact that the claim form could have been served in accordance with the rules was the decisive consideration in that case.

(10) In cases such as *Barton* (and the present case) where the limitation period has expired, an order under r.6.15 has the effect of extending the limitation period.

(11) There may be particular problems with electronic service.

(12) The overriding objective requires the court to enforce compliance with the rules.

(13) The claimant need not necessarily demonstrate that there was no way in which he could have effected service according to the rules within the period of validity of the claim form. "It is enough that he has taken such steps as are reasonable in the circumstances . . ." In *Barton* (1), the claimant had made no attempt to serve in accordance with the rules.

(14) It is not necessary for the claimant to show that the circumstances are exceptional.

(15) A person who makes no attempt to serve until the very end of the claim form's delivery (*ibid.*, at para. 23)—

> ". . . courts disaster [and] 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 [the defendant] is palpable. They will retrospectively be deprived of an accrued limitation defence if

> service is validated. If Mr Barton had been more diligent, or [the claimant's solicitors] 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."

It is this statement of principle with which Lord Briggs disagreed in his dissenting opinion. His view was that once the three underlying purposes of service are shown to have been achieved, that is capable of being, at least prima facie, a good reason for validating service under r.6.15, providing that there are not adverse factors pointing against validation sufficient to outweigh the full achievement of those purposes (such as deliberate failure to comply by someone cognizant of the relevant rules, failure due to negligence, in particular by a trained professional who is expected to know the rules, or failure due to sheer neglect of the requirement for due service until the very last moment). On careful re-reading of the opinions in *Barton* it does not seem to me that there is much difference between them. After all, the majority simply decided that the decisions of the District Judge and of His Honour Judge Godsmark on appeal were within the range of proper decisions which could have been made. Lord Sumption did not decide that an additional "good reason" necessarily has to be established once the three purposes have been shown to have been achieved. It is almost axiomatic that to leave service to the eleventh hour will be a significant feature militating in most cases against a retrospective validation of service.

(16) Lord Briggs said (*ibid*., at para. 40):

> ". . . I do not regard the fact that validation would deprive the defendant of an accrued limitation defence as a factor militating against validation (or for that matter in favour of it). The defendant's solicitors were aware of Mr Barton's attempt to serve them before the expiry of the claim form. The acquisition of a limitation defence would have been . . . a windfall."

Lord Sumption's view was that the fact that retrospective validation of service would deprive a defendant of a limitation defence militated against validation. But I do not read Lord Sumption's observations as intending to detract from the proposition that the weight to be attached to this aspect of the exercise (as with other considerations) will depend on the circumstances of each individual case.

This case

34 The claimant's default in this case was clearly serious and significant. To remedy it now would deprive the defendant of a valid limitation defence. The defendant is not at fault. Whilst Mr. Winch was "not comfortable" with what he did or failed to do, I see no valid criticism of

his conduct. The real reason for the claimant's failure was the choice (entirely unexplained in Ms. Moran's affidavit) to leave the issue of service until the eleventh hour. Unforeseen difficulties often arise. They can be overcome without problem if time has been left. Appropriate diary entries reminding of the need for action well before expiry of the time limit should always be made. Furthermore, it is a simple precaution to obtain clear confirmation from the other party's solicitor at an early stage as to whether he is instructed to accept service. No explanation for that failure has been offered save that Ms. Moran and Mr. Winch have dealt with each other previously in such claims in which he was instructed to accept service. It seems to me that that fact, through no fault of Mr. Winch, led her into a false sense of security.

35 True it is that Mr. Winch could have given this case last-minute priority over his other work and commitments over the weekend and on the Monday but he had no obligation to do so. Furthermore, Ms. Moran did not assume that Mr. Winch had such authority, as is apparent from her request for confirmation. Nor was she led into further inactivity by the absence of a reply to her request. She must have known that there was a substantial risk that her email to Mr. Winch on the Friday would not reach him until the Monday (though in fact it reached him before then).

36 On balance I do not find that the defendant has engaged in "tactical games." Nor did it fail significantly to comply with the overriding objective. Earlier service had not proved impracticable and had not been attempted.

37 I have considered why the default took place. The failure to offer any explanation for earlier service is significant. I consider further the events of August 18th to 21st, 2017 below.

38 Against exercise of the discretion to validate service in this case are the following. The defendant is entitled to rely on the limitation period as a bar to further proceedings. It would be deprived of an unanswerable defence if service were deemed to have been valid. There is no valid criticism of the conduct of the defendant. There is criticism of the claimant's having left service so late and there has been no attempt to justify or explain why that happened. Ms. Moran is an experienced lawyer who deals with this type of claim and was aware of the requirements for service and should have been aware of the risks of leaving her attempts at service, and clarifying Mr. Winch's position concerning authority to accept service, until the last minute. During the four-month period following issue of the claim, there was no significant communication on behalf of the claimant to the defendant concerning this action. There is no evidence of tactical game-playing by the defendant. Messrs. Ullger and Galliano were employed by the Government of Gibraltar rather than the defendant. The significance of that fact, however, is reduced by the fact

that she was given GHA email addresses for them in addition to Government addresses.

39 Balanced against those considerations are the following. There is no relevant criticism of the conduct of the claimant's claim up to date of issue of the claim form. The parties, in accordance with the overriding objective, had agreed extensions of time for filing the claim. The clinical negligence protocol was observed and the defendant was well aware of the allegations made by the claimant. It was sufficiently aware of them to enable it to admit breach of duty, whilst not admitting causation of damage to the claimant. There remained the issue of quantum of damages, which would no doubt have depended at least in part on findings as to causation. Mr. Winch also relies on the delay in the claimant making its application. In this case I find that the delay is of limited importance, given that the defendant has known, since service was attempted by Ms. Moran, all that the defendant needed to know. The defendant's application was filed very promptly. That the application under r.6.15 was made somewhat late by way of amendment to the claimant's application is unfortunate but has caused no material loss or prejudice to the defendant.

40 The three purposes of service referred to in the opinions in *Barton* (1) were satisfied prior to expiry of the four-month period. The defendant was entirely aware of the fact that the claimant had issued his claim (as opposed to it having simply been formulated). It was entirely aware of the nature of the claim, the pre-action protocol having been observed. It had admitted negligence. The contents of the claim form were brought to the defendant's attention by the actions of Ms. Moran (Mr. Winch has not challenged this—after all, he attempted to obtain instructions as to whether he could accept service; he has not suggested that he had not been able to contact the relevant persons). Ms. Moran had certainly attempted to effect valid service. The third purpose referred to in their Lordships' opinions was to ensure that recipients or their solicitor have the opportunity to put in place administrative arrangements for monitoring and dealing with service by email. In this case there was no problem in that regard and the claim documents were received by Messrs. Ullger and Galliano, who forwarded them to Mr. Winch, who represented the defendant.

41 It is, in my judgment, relevant that Ms. Moran had dealt with Mr. Winch in other cases against the defendant and had experienced no difficulty with regard to service. She had no reason to suppose that this case would be different. Though she was unwise in her assumption, it was understandable and genuine. She and Mr. Winch had an established and healthy professional relationship which she expected would result in his having instructions to accept service as he had had in previous cases. Indeed, as I have indicated, had she sought confirmation sooner, there would probably have been no problem. There were also difficulties as a

result of movement of the defendant's office dealing with claims against the defendant, resulting in Ms. Moran's somewhat frantic efforts to establish the address at which personal service could be effected. Eventually she was put through to what was the correct department. It was only because summer hours were in operation that personal service could not be effected easily. In fact Ms. Moran did suggest that she leave the documents at the defendant's desk at St. Bernard's Hospital and she could have done so. It was because Mr. Santos was concerned about the security aspects of her doing this that she offered to send the documents by email. It is, in my judgment, significant that she attempted to effect service in this way in order to allay Mr. Santos's concerns. She took the precaution of asking Mr. Santos to confirm with Mr. Ullger that he and Mr. Galliano could and were able to accept service by email. She was told specifically that Mr. Santos was insufficiently senior to do so but that the person who would normally deal with such matters was Mr. Ullger. Mr. Ullger confirmed his willingness for the documents to be sent by email to him. Ms. Moran was trying to accommodate Mr. Santos's concerns about her leaving the documents at St. Bernard's Hospital at the front desk. He and Messrs. Ullger and Galliano, probably unwittingly, led her to believe that Mr. Ullger did have authority to accept service. She had explained that she needed formally to serve the documents. On balance, I do not believe that she had any real reason to think, in the light of what Mr. Santos said to her, that sending the documents by email as she did would not amount to effective service or that Mr. Ullger had no authority to accept service. This is particularly so, given that Mr. Santos had indicated that he did not have such authority but the other two employees did. Whilst they had not intended to set a trap for her, a trap was set unintentionally, into which she fell. By the end of Monday, she genuinely believed that she had effected good service. If she had not so believed, she would have caused hard copies of the documents to be delivered to the defendant at St. Bernard's Hospital. There has been no deliberate flouting of the rules by Ms. Moran.

42 Those facts do not amount to an excuse. The test which I have to apply is not simply whether there was good reason for the failure to serve within the four-month period but whether there is good reason to make an order retrospectively validating a genuine attempt to effect service which transpired to be defective.

43 It is important that to make an order under r.6.15 will deprive the defendant of what clearly would be a windfall and unanswerable limitation defence. But I must also take into account that the claimant would otherwise be deprived of proceeding with a claim in which the defendant had admitted negligence.

44 Whilst I do not level criticism of Mr. Winch for failing to respond on the Saturday to Ms. Moran's email and he cannot be blamed for responding on the Monday that he was attempting to obtain instructions, it may be

that he or the defendant could have acted with more haste, given the obvious significance of a failure of the claimant to effect valid service by midnight on the Monday.

45 Save for the important fact that the circumstances presented the defendant with an apparently unanswerable limitation defence which it had not expected, they will not be prejudiced by exercise of my discretion in favour of the claimant. The claimant would, in my judgment, suffer injustice if he were deprived, in the particular circumstances of this case, of the opportunity to pursue his claim. No doubt the documents were brought to the attention of sufficiently senior persons by Messrs. Ullger and Galliano very quickly.

46 The breach in this case did not in itself cause any significant delay in the proceedings. It did not prevent either party from presenting its case and had no other effect on the ability of the court to deal with the case justly.

47 It must not be thought that difficulties in effecting service when it is left to the last day without apparent excuse will normally amount to a good reason for validating service retrospectively, especially when a limitation defence has arisen. Nor must it be thought that incompetence on the part of a legal representative will normally be sufficient to justify validation. As Popplewell, J. observed in *Société Générale* v. *Goldas Kuyumculuk Sanayi Ithalat Ihracat AS* (4) ([2017] EWHC 667 (Comm), at para. 49(5)), it is a bad reason. He also drew a distinction between cases in which there had been no attempt at service and those in which defective service had brought the claim form to the defendant's attention. Whilst the circumstances in this case may not be "exceptional," they are unusual. I hope that all practitioners will appreciate and avoid the real dangers involved in leaving important steps in litigation until there is insufficient time to deal with unforeseen problems. The court has increasingly been robust in its approach to this type of situation. The laxity of previous culture will not be tolerated.

48 I have concluded after detailed consideration of all of the circumstances of this case that (a) there is good reason for deeming valid service to have taken place; and (b) that I should order that service of the claim documents took place on Monday, August 21st, 2017. I authorize retrospectively service at the place and by the method used by Ms. Moran on that day. That conclusion is, I find, fair, proportionate and in accordance with the overriding objective.

49 I ask that counsel draft the order accordingly, bearing in mind r.6.15(4).

Order accordingly.