[2021 Gib LR 608]

COMMISSIONER OF POLICE v. D.M. VILLA and A. VILLA

COURT OF APPEAL (Kay, P., Elias and Davis, JJ.A.): October 27th, 2021

2021/GCA/14

Civil Procedure—service of process—manner of service—claimants seeking judicial review against Commissioner of Police—claim form delivered to Commissioner's main office and signed for by reception staff—not proper service in accordance with Supreme Court Rules, r.3—deemed to be proper service under CPR 6.15(2)—Commissioner aware of claim from pre-action protocol and reasonable steps taken to effect service in accordance with rules

The respondents sought to bring a claim for judicial review.

In 2020, the home, business premises and a boat belonging to the respondents were searched pursuant to warrants signed by a Justice of the Peace. The respondents submitted that the application for and the issuing of the warrants were unlawful. They initiated judicial review proceedings against the appellant, the Commissioner of Police. A pre-action protocol letter was sent to the Commissioner by the respondents' legal firm on September 6th, 2020. The Commissioner responded, denying any wrongdoing. A judicial review claim form was filed on October 5th, 2020, the last day for lodging such a claim. The claim form was purportedly filed on the Commissioner three days after filing, on October 8th, 2020. A messenger employed by the respondents' legal firm delivered the claim form to the Commissioner's main office at New Mole House police station. The claim form was handed to a member of staff at the reception desk who recorded it and signed for its receipt. It was then given to the Commissioner's PA and very soon thereafter seen by the Commissioner or at least under his control so that he could have seen it if he wished.

The Commissioner filed an acknowledgement of service on October 23rd, 2020 in which he contested the claims. One of the grounds relied upon by the Commissioner was that the claim form had not been properly served in accordance with r.3 of the Supreme Court Rules.

In the Supreme Court, Ramagge Prescott, J. held that the manner in which the claim form was served did not constitute good personal service in accordance with the rules but accepted that the service should be deemed

good service in accordance with CPR 6.15(2). The judge considered that greater leeway should be shown to a claimant suing the holder of a high public office than claimants suing other defendants. The Commissioner appealed against the latter ruling and the respondents appealed against the judge's conclusion that there had not been proper service in accordance with r.3.

Rule 3 provided:

"3.(1) A document may be served—

(a) by personal service;

(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."

The respondents submitted that the standard practice for leaving documents with the Commissioner was by delivering them to the reception desk at his main office address. The claim form had been accepted and signed for. This practice was so well established that the court should imply that the Commissioner had authorized the employees at the reception desk to accept service on his behalf.

Held, dismissing the appeal:

(1) The claim form was not served properly in accordance with the rules. Although documents were habitually served on the Commissioner by delivery to the reception desk at his main office, and such service would no doubt in practice ensure that documents came into the Commissioner's hands, a claim form was of a different character to other documents sent to the Commissioner, which was why its service was subject to special rules. When reliance was placed on personal service, it was not enough to assume that the persons who habitually accepted other documents on the Commissioner's behalf had the implied authority to accept a claim form. The respondents' lawyers should have checked with the Commissioner that he would accept service in that manner. There was no basis on which to imply authorization. The court did not accept the alternative submission that even if there was no personal service in accordance with r.3, there was still valid service because r.3 provided that service *may* be effected in one of the four ways there identified, not that it *must* be so effected, *i.e.* that the rule was not intended to be exhaustive of the modes of service. That was not a legitimate reading of the rule. The use of the word *may* was consistent with the fact that other modes of service might be used, but it was limited to other modes of service adopted by agreement between the parties. The court therefore rejected the submission that there was proper service in accordance with the rules (paras. 11–15).

(2) When considering whether a claimant should be deemed to have effected good service applying CPR 6.15(2), the main relevant factors for consideration were (i) whether a claimant had taken reasonable steps to effect service in accordance with the rules; (ii) whether the defendant or

his lawyer was aware of the contents of the claim form; and (iii) whether the defendant would suffer any prejudice by the retrospective validation of non-compliant service of the claim form. Other points of relevance to the present case were, first, the fact that the failure to effect proper service was due to the lawyer's error could not be a good reason for the court to treat the steps taken as constituting proper service, nor the fact that the claimant would be time barred if the service were not deemed proper. Indeed, the latter factor might weigh against deeming the steps taken to be proper service. Secondly, the test of good reason in r.6.15 to authorize service by a method or at a place not otherwise permitted did not require exceptional circumstances. Thirdly, cases were highly fact sensitive and there was little if any purpose in analysing previous decisions. Fourthly, if a defendant was playing technical games, that might be a factor in the claimant's favour. Finally, the appellate court should only interfere with the judge's decision if there was an error of principle or if the judge was wrong to reach the decision he or she did (paras. 16–21).

(3) There was no basis for asserting that claimants suing persons in high office would be treated more favourably than other claimants. The question was whether there was good reason to validate the particular mode of service. The nature of the claim or its potentially wider public significance was not a relevant factor. The court understood why the judge might have thought that it was unattractive for the Commissioner in this case to stand on his legal rights, but he was entitled to do so in the same way as any other defendant. The judge therefore erred in principle. Applying the relevant test itself, the court found that, considering the circumstances in the round, there was good reason why the steps taken to effect service should be deemed to be proper service. Emphasis was placed on the following matters: first, that the Commissioner knew of the claim and its nature and was not prejudiced in any way by the service taking the form which it did; secondly, from the pre-action protocol, the Commissioner would have anticipated the initiation of proceedings; and thirdly, although there was no proper service, in the unusual circumstances of this case, the respondents could nonetheless properly be said to have taken reasonable steps to effect service in accordance with the rules. Their lawyers adopted a mode of service which they believed to be in accordance with the rules and which was almost certain to ensure the Commissioner received the claim form. It was not an obviously defective form of service. The Commissioner's appeal would be dismissed (paras. 26–35).

Cases cited:

(1) *Abela* v. *Baadarani*, [2013] UKSC 44; [2013] 1 W.L.R. 2043; [2013] 4 All E.R. 119; [2013] 2 CLC 92, followed.

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

Legislation construed:
Civil Procedure Rules, r.6.15: The relevant terms of this provision are set out at para. 16.

Supreme Court Rules 2000, r.3(1): The relevant terms of this provision are set out at para. 9.

C. Rocca, *Q.C.* with *J. Lennane* (instructed by the Office of Criminal Prosecutions and Litigation) for the appellant;
R. Fischel, *Q.C.* with *C. Butler* (instructed by Verralls) for the respondents.

1 **ELIAS, J.A.:**

Introduction

On July 5th and 6th, 2020, the home, business premises and a boat belonging to Mr. Dale Villa and his wife Angelina were searched pursuant to warrants signed by a Justice of the Peace. The boat and a substantial sum of money were seized and have not yet been returned. Mr. and Mrs. Dale submit that the application for, and the issuing of, the warrants were unlawful. They have initiated judicial review proceedings against the Commissioner of Police. The issue before the court is whether the claim form was properly served on the Commissioner of Police.

2 The relevant procedural stages leading to the application before us were as follows. A pre-action protocol letter was sent to the Commissioner by Verralls, the legal firm acting for the Villas, on September 6th, 2020. The Commissioner responded by email on September 9th denying any wrongdoing.

3 A judicial review claim form was filed on October 5th, 2020. This was the last day for lodging such a claim, although the court has the power to extend time in an appropriate case. The claim form must be served on the defendant within seven days of filing. It was purportedly served on the Commissioner three days after filing, on October 8th. Leo Hayes, a messenger employed by Verralls, delivered the claim form to the Commissioner's main office at New Mole House police station. The claim form was handed to a member of staff at the reception desk who recorded it and signed for its receipt. It was then given to the Commissioner's PA and it is conceded that very soon thereafter it was either seen by the Commissioner personally, or was at least under his control so that he was in a position to see it if he so wished.

4 The Commissioner filed an acknowledgement of service on October 23rd, in which he contested all the claims. One of the grounds relied upon by the Commissioner was that the claim form had not been properly served as the relevant rule, r.3 of the Supreme Court Rules, requires.

5 On October 28th, the Villas filed a certificate of service, pursuant to an order of the Chief Justice, in which they asserted that the claim form had been given to "the person approved by the defendant to receive documents."

6 On November 6th, the Commissioner filed an application notice seeking a declaration that the court had no jurisdiction to hear the case because no lawful service had been effected within the seven day time limit as the rules require. On the same day the claimants serve an *ex parte* application on the Chief Constable claiming that the method of service adopted was good alternative service under CPR 6.15(2).

7 On November 27th, the Villas sought to serve the same claim form with relevant documents for a second time, but on this occasion by registered post. This was undoubtedly proper service but it was still in breach of the rules because it was outside the seven days within which service must be effected.

8 The issue of service came before Ramagge Prescott, J. as a preliminary issue on February 12th, 2021. The judge held, in brief, that the manner in which the document was served did not constitute good personal service in accordance with the rules. However, she acceded to an alternative submission by the Villas that the service should be deemed good service in accordance with CPR 6.15(2). The Commissioner sought to appeal the latter ruling and permission to do so was granted by the Chief Justice. By way of a respondent's notice and cross-appeal, the Villas have in turn sought to overturn the judge's conclusion that there had not been proper service in accordance with r.3. Accordingly, both limbs of the judge's reasoning are now before the court. I will deal first with the question of whether there was proper service in accordance with r.3.

Was there proper service under r.3?

9 Rule 3(1) of the Supreme Court Rules in Gibraltar lays down the following methods of service specific to Gibraltar:

"3.(1) A document may be served—

(a) by personal service;

(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."

10 The Villas' submission can be shortly and simply stated. It is asserted that the standard and universally adopted practice for leaving documents with the Commissioner is by delivering them to the reception desk at his main office address. Verralls had personally left all sorts of documents,

including licences and summonses, without objection. This is in practice a guaranteed way of ensuring that documents get to the Commissioner, as they did in this case. The claim form was accepted and signed for and was not returned. The Commissioner had never suggested that claim forms should be treated differently to other documents. So well established is this practice that the court should imply that the Commissioner had given authority to the employees manning the desk to accept service on his behalf, notwithstanding that he did not expressly authorize them to accept this particular claim form. The fact that the Commissioner received the claim form supports this sensible inference. This was not, as the Commissioner dismissively described it, simply a "dropping off" of the claim form at the Commissioner's office. It was a responsible and sensible mode of delivery, on signature giving proof of delivery, designed to ensure that the Commissioner would in fact receive the document.

11 The judge rejected this argument and so would I—albeit with some reluctance—essentially for the reasons she gave. The fact that documents are habitually delivered in this way will no doubt in practice ensure that they come into the Commissioner's hands (or the appropriate officer acting on his behalf). I accept the submission of Mr. Fischel, Q.C., counsel for the claimants, that it was not a casual or irresponsible method of delivery and that it was almost certain to ensure that the Commissioner received the claim form. But as the judge pointed out, a claim form is of a different character to other documents sent to the Commissioner in the ordinary course of his business, and that is why its service is subject to special rules. When reliance is placed on personal service, it is not enough to assume that the person or persons who habitually accept other documents on the Commissioner's behalf have the implied authority to accept a claim form. The practice relating to other documents does not justify the inference that the Commissioner must be taken to have authorized the desk officers to accept service on his behalf of this document. The solicitors ought to have checked with the Commissioner, either personally or through his lawyers, that he was prepared to accept service in that manner. Had he been prepared to do so (as Mr. Rocca, Q.C., counsel for the Commissioner, conceded would have been highly likely) the desk officers would then have been authorized in the appropriate way. But there was no proper basis for implying any such authorization on the facts of this case. Had there been evidence that the Commissioner had specifically accepted claim forms in this way in the past, that might have provided some ammunition for an argument that there was implied authorization or that the Commissioner was estopped from denying that there had been proper service, but there was no direct evidence to that effect. Mr. Fischel pointed out that summonses are delivered in this way, but that is because there is a specific rule permitting this in the criminal procedure rules, so this fact does not assist the argument.

12 An alternative submission was that even if there was no personal service in accordance with any of the specifically identified modes of service enumerated in r.3, this was still valid service in accordance with that rule. Rule 3 provides that service *may* be effected in one of the four ways there identified; it does not say that it *must* be so effected. This suggests, it is said, that the rule is not intended to be exhaustive of the modes of service. There may be other legitimate methods of effecting good service, and in the circumstances this should be treated as one of them.

13 Again I agree with the judge that this is not a legitimate reading of the rule. It would lead to considerable uncertainty if other modes, not specifically identified in the rules relating to service, were to be treated as proper service. It is not obvious what principle or principles would guide the courts into determining what other modes should count. It would also leave the parties uncertain about whether the claim form had been validly served or not until a court had ruled on the issue, with all the delays and costs involved in such proceedings.

14 I accept that the use of the word "may" is indeed consistent with the fact that other modes of service may be used, as Mr. Fischel argues. But in my view it is limited to other methods of service adopted by agreement between the parties. Serving by an agreed method is very different from the claimant claiming to have the right unilaterally to serve the document in a manner not expressly recognized in r.3. Nor does that contention sit happily with CPR 6.15 which allows the court to deem "alternative methods" of service as valid even when they have not been agreed. In my view these are plainly intended to refer to methods adopted by a claimant other than those specifically identified in r.3. Such modes of service will only be deemed lawful with the approval of the court.

15 For these reasons I reject the submission that there was proper service in accordance with the rules.

Deemed service

16 I turn to consider the Commissioner's challenge to the decision of the judge that the Villas should be deemed to have effected good service applying CPR 6.15(2). This rule provides as follows:

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

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

17 As Lord Sumption observed in *Barton* v. *Wright Hassall LLP* (2) ([2018] 1 W.L.R. 1119, at para. 12), the rule is framed so as to suggest that there are two stages which a court must consider: first, whether there is a good reason to authorize service by a mode otherwise not permitted by the rules and, if so, whether the court ought to exercise its discretion to do so. In substance, however, only the first question is relevant because, as Lord Sumption pointed out, it would be irrational not to exercise a discretion in the claimant's favour once it is found that there is good reason to authorize service.

18 Subsection (2) applies here. It envisages a situation where the court will retrospectively deem steps which have already been taken in an attempt to achieve proper service to be proper service, even though in fact they do not comply with the requirements of the rule. Lord Briggs succinctly explained the position as follows in the *Barton* case (*ibid.*, at para. 27):

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

19 *Barton* is one of two relatively recent decisions of the Supreme Court on the application of CPR 6.15, the other being *Abela* v. *Baadarani* (1). We were referred to a number of other authorities in addition, but I do not think it necessary to consider them. In *Abela*, Lord Clarke of Stone-cum-Ebony gave a judgment with which Lords Neuberger, Reed, Sumption and Carnwath agreed. He set out a number of principles which courts should apply when considering the application of CPR 6.15. His judgment was in turn considered in *Barton* by Lord Sumption, giving the majority judgment with which Lords Wilson and Carnwath agreed. Lord Sumption summarized the effect of *Abela* in the following way (*ibid.*, at paras. 9–10):

> "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 1, para 6.15.5, Lord Clarke JSC 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] 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 r 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."

Lord Sumption then identified what he considered would usually be the main factors (*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."

20 When considering whether the claimant has taken reasonable steps to effect service in accordance with the rules, it is not necessary that a claimant should have left "no stone unturned" as Lord Sumption put it (*ibid.*, at para. 21). The question what is reasonable will depend on all the circumstances.

21 I would respectfully add certain other points of relevance to this case. The first is that the fact that the failure to effect proper service is due to the lawyer's error cannot be a good reason for a court to treat the steps taken as constituting proper service, and nor can the fact that the claimant would be time barred if the service were not deemed proper. Indeed, in *Barton* (2), the latter was treated as a strong factor weighing against deeming the steps taken as proper service (*ibid.*, at para. 23, although the minority judges, Lord Briggs and Lady Hale, dissented on this point). But nor do those factors necessarily preclude a court from exercising its discretion in a claimant's favour; indeed, as Lord Sumption made clear, the purpose of CPR 6.15(2) is in no small part to allow a claimant to escape the limitation fetters in an appropriate case (*ibid.*, at para. 9(iv), reproduced above in para. 19). The second is that the test of good reason does not import any requirement that the circumstances must be exceptional; that would be an improper fetter on the application of the test (*Abela* (1) ([2013] 1 W.L.R. 2043, at para. 45)). The third is that cases are highly fact sensitive and there is little, if any, purpose in analysing previous decisions which turn on their own facts (*ibid.*, at para. 35). The fourth is the fact that if a defendant is "playing technical games" that may be a factor in the claimant's favour (para. 38). The last concerns the role of the appellate court: it should only interfere with the judge's decision if there was an error of principle or if the judge was wrong to reach the decision he or she did (*ibid.*, at para. 29).

The judge's ruling

22 As I have said, the judge held that in the circumstances it was an appropriate case to deem the service to be good service. The essence of the judge's ruling on this point is contained in the following paragraphs:

> "When the holder of high public office accepts that he has received a claim form having been put on notice that the issue of that claim form was imminent and having acknowledged that and cognisant that the claim relates to the exercise of police powers, then it seems to me, that someone who has the power over liberty and property as the Commissioner of Police, has a higher duty and should not be allowed to avoid review, if such review is proper and that is something that

needs to be addressed in due course by challenging the issue of service.

I accept immediately that the court needs to be rigorous in our application of the Criminal Procedure Rules and the Rules of the Supreme Court but it also needs to balance overall principles of fairness and it seems to me that the principles of fairness is what Rule 6.5 envisages and that essentially is its purpose for being. It is certainly regrettable that the Claimant did not follow the rules of service other than their claim that they believe leaving the claim form at the desk of the Commissioner of Police was good service, there is no real excuse for them having not followed the rules when effecting good service but the objective position here remains that the Claimant has taken steps to deliver the claim form into the possession and control of the Defendant. It was not delivered by way of information but by way of service. The Defendant knew of its existence and content. There has been no injustice to the Defendant and that I can see if the claim form is treated as served even if it wasn't served in accordance with Rule 3.

It seems to me that the position of the Defendant as holder of high public office in conjunction with the fact that he has accepted that he has received the original claim forms qualifies as a good reason under Criminal Procedure Rule (the judge obviously meant CPR) 6.15 to persuade me to order that the steps already taken to bring the claim form to the attention of the Defendant by leaving it at the reception in that particular case, I will deem to be good service."

The grounds of appeal

23 The principal ground is that the judge erred in law in concluding that greater leeway should be shown to a claimant suing the holder of a high public office than claimants suing other defendants. Mr. Rocca submits that there is no warrant for any such principle. The rules draw no distinction between different kinds of defendants and it would be invidious to do so. All defendants should be subject to the same procedural principles and these militate strongly against the court deeming the steps taken to be proper service in this case.

24 Mr. Rocca also advanced other reasons why the court should not deem the service to be proper service. In this case, the claimants left the taking of proceedings until the last minute. They had plenty of time properly to file and serve their claim and took the risk that for one reason or another they may fall foul of the rules. The failure to serve properly was solely the result of an error by the claimants' solicitors and this cannot constitute a justification for allowing the service to be deemed good. On the contrary, it should defeat the application. Furthermore, although it is conceded that

the Commissioner in fact knew of the existence and nature of the claim, that is not a factor which operates conclusively in the claimants' favour. It will generally be a necessary but not a sufficient condition for deeming the improper mode of service to be appropriate. In this case there were no other factors justifying the mode of service to be deemed proper and Mr. Rocca went so far as to contend that no reasonable judge could have held that it was.

25 As the cases emphasize, it is important that parties comply with the rules of procedure and the court should not be unduly lenient. This is particularly so, as Lord Sumption recognized in *Barton* (2) ([2018] 1 W.L.R. 1119, at para. 23), when the defendant is denied a potentially determinative limitation defence. It is not certain that a judge would extend time to allow the judicial review to be heard out of time, and the Commissioner should not be denied the opportunity to argue that any such extension would be unjustified. It was not legitimate for a judge to say, in effect, that it is improper for a person holding high office to seek to avoid scrutiny by relying on proper compliance with the rules. This is a perfectly proper position for the Commissioner to adopt. He has not engaged in any underhand practice; he has merely sought compliance with the rules as he is fully entitled to do.

Discussion

26 I accept the principal submission that there is no basis for asserting that claimants suing persons in high office will be treated more favourably than other defendants. The question is whether there is good reason to validate the particular mode of service. I do not believe that the nature of the claim or its potentially wider public significance is a relevant factor to consider. There is in my view an analogy with the argument in *Barton* that a more lenient approach should be shown to a litigant in person. The majority rejected that submission. Lord Sumption said this (*ibid.*, at para. 18):

> "The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights, under the Limitation Acts for example."

27 The status of the claimant does not, therefore, justify any modification in the application of the rules. I do not see why the status of the defendant should do so either. I also believe that the approach would lead to arid and contentious arguments as to who constitutes a person in high office. I understand why the judge might have thought that it was unattractive for

the Commissioner in a case such as this to stand on his legal rights, but in my view he was entitled to do so in the same way as any other defendant.

28 I would accept, therefore, that, in adopting the approach she did, the judge erred in principle. The decision cannot be upheld for the combination of reasons she gave and it is not certain that she would have come to the same conclusion absent this particular factor (although I suspect she would have done so). Accordingly, as both parties accepted, this court must now apply the relevant test for itself.

29 There is obvious force in the arguments advanced on behalf of the Commissioner. In particular the fact that the claim form was served at the last minute is a factor of real importance. As Lord Sumption pointed out in *Barton* (*ibid.*, at para. 23): "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 r 6.15(2)." Equally, the loss of a potential limitation defence is a factor weighing against exercising discretion in the claimants' favour, although it is of lesser weight in a case such as this where the limitation is not absolute and there is a broad discretion to allow the judicial review claim to be pursued out of time.

30 In the end, however, and notwithstanding the attractive argument of Mr. Rocca, I think that, considering the circumstances in the round, there is good reason why the court should deem the steps taken to effect service to be treated as proper service. I place emphasis on the following matters in particular. First, and importantly, the Commissioner knew of the claim and its nature and was not prejudiced in any way by the service taking the form it did. This was not a case where there was no attempt at service, nor was it one where the defendant only knew of the nature of the claim. He also knew that the claimants had taken active steps by way of service with the intention of engaging the jurisdiction of the courts. The Commissioner's knowledge was not gained fortuitously and he knew that delivery of the claim form was intended to be part of the formal legal process.

31 Secondly—and this is interlinked to the first ground—the Commissioner also knew from the pre-action protocol that proceedings were at that time being threatened. He would have been anticipating the initiation of proceedings.

32 Thirdly, although I have concluded that there was no proper service, I consider that in the unusual circumstances of this case the claimants can nonetheless properly be said to have taken reasonable steps to effect service in accordance with the rules. I recognize that there were no specific barriers making it difficult for the claimants to serve the claim form as the rules require, such as attempts by the defendant to evade service. However, the lawyers did adopt a mode of service which they genuinely believed to be in accordance with the rules and which was in fact almost certain to ensure

that the Commissioner would receive the claim form, as of course he did. Indeed, it is likely that had the claim form been validly served by registered post, another valid mode of service under r.3, it would have come to the attention of the Commissioner in much the same way as it did by this defective method of service. In practice it will be difficult for a claim form to be personally served on the Commissioner as an individual. In *Barton* (2), the majority held that the claimant should not have the discretion exercised in his favour because he sought to employ a mode of service which he ought to have known was not in accordance with the rules. That is not this case. Although I have concluded that the mode of service did not in fact comply with r.3, the claimants' lawyers had in my view respectable grounds for believing that it did. It was not an obviously defective mode of service. Furthermore, as Mr. Rocca realistically conceded, had the lawyers formally sought agreement to serve indirectly through the Commissioner's lawyers, it is almost inconceivable that the Commissioner would not have been perfectly content to accept it. Equally, it is difficult to believe that he would have objected to service direct to his office. Whether or not the failure formally to obtain agreement can be said to have be a purely technical error, as Mr. Fischel has asserted, I am satisfied that the mode of service actually adopted not only caused no prejudice to the defendant, but in reality it was never going to do so.

33 The claimants also alleged in support of their argument that the Commissioner was "playing technical games" with them and behaving in a procedurally abusive way. The Commissioner is said to have tried to obstruct them at every stage by taking a number of bad procedural points against them. The Commissioner in turn submits that the Villas have been woefully deficient in the way the case has been pursued. We are not in a position to assess the merits or otherwise of these wider matters; they were not directly before us and we heard no argument on them.

34 So far as service is concerned, I do not think that it can properly be said that there was any abuse of proceedings or tactical manipulation. Much the same argument, advanced in similar circumstances, was rejected by Lord Sumption in *Barton* (2) ([2018] 1 W.L.R. 1119, at para. 22). It is true that the Commissioner did not in any way cooperate with the claimants by, for example, returning the claim form or telling them that the service was defective, but he was not obliged to do so. He did not in any way obstruct the claimants and he was not bound to take steps to try to save them from their own errors. The desire of the Commissioner to insist on compliance with the rules and to seek to take advantage of the possibility of a limitation defence cannot be described as "playing technical games." Nor was it improper for him to seek to take advantage of a limitation defence (although in my view he might have had difficulty in persuading a court not to grant an extension of time in the circumstances of this case). I do not, therefore, find that this is a factor weighing in the claimants' favour.

35 Nevertheless, for the reasons given, I would dismiss the appeal. In my judgment, the judge below did reach the right conclusion, albeit that she took into consideration a factor which was not a legitimate one to consider.

36 **DAVIS, J.A.:** I agree with the judgment of Sir Patrick Elias, J.A.

37 **KAY, J.A.:** I also agree.

Appeal dismissed.