[2023 Gib LR 644]

PARODY v. GIBDOCK LIMITED

SUPREME COURT (Ramagge Prescott, J.): September 27th, 2023

2023/GSC/035

Civil Procedure—service of process—time of service—pursuant to CPR r.7.5, claim form to be served on defendant within 4 months of date of issue—if last day of 4 month period is Sunday, service on Monday out of time

The claimant/respondent claimed to have suffered loss and damage as a result of the defendant/applicant's negligence.

The claimant had been employed by the defendant as a steel worker. He claimed that he had been negligently exposed to harmful chemicals during his employment which had caused or materially contributed to his ill health which included leukaemia.

The claimant issued a claim form on December 3rd, 2021 with a view to protecting limitation. The letter before claim was sent to the defendant on March 21st, 2022. On March 25th, 2022, the claimant sent to the defendant relevant enclosures which had not been provided with the letter before claim, including a doctor's letter setting out his diagnosis and current situation. The claimant filed an amended claim form on or about April 4th, 2022, naming the defendant and setting out the brief details of claim. The claimant served the claim form, particulars of claim and response pack on the defendant on April 4th, 2022 by email and by hand, leaving it at the defendant's office. The defendant said that full medical records were not provided by the claimant and that, in breach of PD16 4.3, no expert report was served with the particulars of claim.

The defendant filed an acknowledgement of service on April 8th, 2022 indicating an intention to defend all of the claim. The parties agreed that there should be a stay of proceedings for investigation. A draft consent order for a stay was approved by the parties and filed in court on April 22nd or 25th, 2022, providing for the proceedings to be stayed until August 19th, 2022. The defendant sought a more detailed letter before claim from the claimant but the claimant considered that the letter before claim adequately particularized the claim. The defendant claimed that pursuant to the pre-action protocol it had 21 days within which to respond to the letter before claim and that the time for responding had not expired, given the stay.

On July 1st, 2022, the defendant informed the claimant that it considered the claim to be statute-barred for limitation, and that the claim form had

also been served out of time. On August 19th, 2022, the defendant filed an application contesting jurisdiction and seeking summary judgment.

The claimant submitted that (a) although the end of the four month period for filing the claim form was midnight on April 3rd, 2022, as that day was a Sunday, service on the following day (Monday April 4th, 2022) was good service—he cited s.54(b) of the Interpretation and General Clauses Act 1962; (b) even if the claim form was served out of time, the defendant was out of time to challenge the court's jurisdiction and was not entitled to relief from sanctions; (c) the stay agreed by the parties was to last "until" August 19th, 2022, which meant until midnight on August 19th, 2022; and (d) the defendant filed this application on August 19th, 2022 and therefore whilst the stay was still operative.

The defendant submitted that (a) the claim form had been served out of time and s.54(b) of the Interpretation and General Clauses Act 1962 did not apply; (b) the term "until," given its ordinary meaning, meant "up to" a point in time, and therefore the proceedings were stayed until midnight on August 18th, 2022; and (c) the defendant applied for relief from sanctions in the event that the court found it had filed its application outside the 14 day time limit prescribed by CPR r.11.

Held, ruling as follows:

(1) Pursuant to CPR r.6.3(1)(d) and Practice Direction 6A, a claim form could only be served by electronic means where the party who was to be served had previously indicated in writing to the party serving that he was willing to accept service by electronic means. As the defendant had not consented to service by email, there was no doubt that service by email was not good service. However there was no dispute that service by leaving a copy of the claim form at the defendant's address was *prima facie* good service pursuant to CPR r.6.3 and r.7.5 (para. 29).

(2) The claim form was served out of time. With regard to the time of service, pursuant to CPR r.7.5, the claimant must complete the step required by the rule "before 12.00 midnight on the calendar day four months after the date of issue of the claim form." The claim was issued on December 3rd, 2021, and the claimant had until midnight on April 3rd, 2022, which was a Sunday, to validly serve the claim form on the defendant. Section 54(b) of the Interpretation and General Clauses Act 1962, which provided "in computing time for the purpose of any Act, unless the contrary intention appears . . . if the last day of the period is Sunday . . . the period shall include the next following day" did not apply to time limits in the CPR. Nor did CPR r.2.8(4), which sanctioned service on the Monday following the Sunday where the relevant period was five days or less, apply in this case where the relevant period was four months. In any event, pursuant to CPR r.6.14, a claim form was deemed to have been served on the second business day after completion of the relevant step under r.7.5(1), which in the present case was delivery to the defendant's address. If the completion of the relevant step had to take place by April 3rd, and that was a Sunday, then service would have been deemed to have taken place on the second

business day following that, *i.e.* April 5th, which would have been out of time. Pursuant to CPR r.7.5, service must have taken place by midnight on April 3rd, 2022 (paras. 30–42).

(3) The defendant's filing an acknowledgement of service did not of itself constitute a submission to the jurisdiction of the court. The defendant within 14 days of the service of the claim form had requested that the claimant seek a stay to preserve the pre-action position of the parties and to facilitate time for the defendant to consider the claim and investigate it fully. The stay preserved the position as it existed at the time of the stay. Despite the defendant being given permission to file a defence at a future date, the effect of the stay was to suspend the proceedings removing from either party the ability or option to take any further steps in the action. The step to make provision for the extension of time to file a defence was not a submission to the jurisdiction. It was a provision which was embodied in the stay order and it could be explained because in the context of a stay it preserved for the avoidance of doubt the position before the stay, which was that the defendant had 14 days to file its defence. The stay did not constitute an extension of time for the filing of a defence. In any case, the provision in the order for the filing of a defence in the particular circumstances of this case did not equate to a submission to the jurisdiction of the court. Furthermore, the whole purpose of the stay was to allow the defendant time to investigate the claim (para. 48; paras. 54–59).

(4) The application to challenge jurisdiction was not filed outside the 14 day period permitted by CPR r.11. The acknowledgement of service was filed on April 8th, 2022, following which the defendant had 14 days to file an application to contest jurisdiction. Although the stay order was issued by the court on April 27th, 2022, the agreement to stay took place on April 22nd, 2022 when the parties signed the draft stay order. The stay was therefore became operative during the time available for the filing of an application to contest jurisdiction. At the point at which the stay ceased to have effect, the defendant was still in time to file this application (paras. 65–66).

(5) Pursuant to the stay order, which provided that the proceedings were stayed "until 19th August 2022," the proceedings were stayed up to August 19th, 2022, not until midnight on August 19th, 2022. The stay therefore expired at midnight on August 18th, 2022. By filing this application on August 19th, 2022, the defendant did not file it at a time when the stay was operative (paras. 67–71).

(6) If the court's interpretation of "until" was wrong and it did in fact mean until midnight on August 19th, 2022, the defendant would have filed this application whilst the stay was in place. That would amount to taking a step in breach of the stay order and the sanction that would apply would likely be dismissal of the application. The defendant had applied for relief from sanctions in the event that was necessary. An application for relief from sanctions should be addressed in three stages: first, the court must

identify and assess the seriousness and significance of the failure to comply with the stay order; secondly, the court must consider why the breach occurred; and thirdly, the court must evaluate all the circumstances of the case. The breach consisted of taking a step one day before it should have been taken. That could not prejudice the claimant in any way. It was not serious or significant. The breach arose from the defendant's interpretation of the word "until," not from any oversight of time limits or disregard for court orders. The filing of the application was prompt. If the defendant had filed the application whilst the stay was in place, it would be entitled to relief from sanctions, which would allow this application to be properly before the court (paras. 72–79).

(7) The claim form was served out of time and the defendant was able to challenge jurisdiction. Pursuant to CPR r.11(6), the court declared that the claim form had not been duly served on the defendant and that the court had no jurisdiction to try the claim. In the circumstances, the court did not need to consider summary judgment or an extension of time for filing the defence (para. 80).

Cases cited:

(1) *Caine* v. *Advertiser & Times Ltd.*, [2019] EWHC 39 (QB), referred to.
(2) *Denton* v. *T.H. White Ltd.*, [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926; [2015] 1 All E.R. 880; [2014] C.P. Rep. 40, followed.
(3) *Global Multimedia International Ltd.* v *ARA Media Servs.*, [2006] EWHC 3612 (Ch); [2007] 1 All E.R. (Comm) 1160, considered.
(4) *Grant* v. *Dawn Meats (UK)*, [2018] EWCA Civ 2212, considered.
(5) *IBS Tech. (PVT) Ltd.* v. *APM Tech. SA*, [2003] All E.R. (D) 105; [2003] 4 WLUK 172, referred to.
(6) *SMAY Invs. Ltd.* v. *Sachdev*, [2003] EWHC 474 (Ch); [2003] 1 W.L.R. 1973, considered.
(7) *Winkler* v. *Shamoon*, [2016] EWHC 217 (Ch), considered.

Legislation construed:

Interpretation and General Clauses Act 1962, s.2: The relevant terms of this section are set out at para. 32.
s.54(b): The relevant terms of this provision are set out at para. 31.

Supreme Court Act 1960, s.38A(1): The relevant terms of this subsection are set out at para. 33.

Civil Procedure Rules (S.I. 1998/3132), r.2.8: The relevant terms of this rule are set out at para. 38.
r.6.14: The relevant terms of this rule are set out at para. 40.
r.7.5: The relevant terms of this rule are set out at para. 30.
r.11(4)(a): The relevant terms of this provision are set out at para. 66.

C. Finch (instructed by Verralls) for the claimant;
O. Smith (instructed by Hassans) for the defendant.

1 **RAMAGGE PRESCOTT, J.:** This is an application ("the application") by the defendant/applicant ("the defendant") seeking an order from the court that:

(a) The court decline jurisdiction to try the claimant's claim ("the claim"), in accordance with r.11.1 of the Civil Procedure Rules ("CPR"), as a result of the claimant's failure to serve the claim form within four months of the date of issue;

(b) Alternatively, the court grant summary judgment in the defendant's favour on the basis that the claimant has no real prospect of succeeding on the claim and there is no other compelling reason why the case or issue should be disposed of at trial, in accordance with CPR r.24.2; or

(c) Alternatively, the time for filing the defence be extended to 28 days after final determination of this application;

(d) Such other order as the court shall deem necessary or appropriate; and

(e) Costs to be summarily assessed if not agreed and paid by the claimant to the defendant.

Background

2 In setting out the background I draw liberally from the skeleton arguments of the defendant and the claimant.

3 As I understand it, on April 1st, 2022 the defendant instructed TSN who had the conduct of this claim as solicitors until on or about June 2022, when Ince & Co. became the solicitors on record (instructing TSN as counsel). Subsequently in September/October 2022 the defendants instructed Hassans as solicitors who continued to instruct TSN as counsel. These changes in representation came about as a result of the sale of the defendant.

4 The claimant was employed by the defendant as a steel worker between:

(a) April 22nd, 2005 to October 23rd, 2005;

(b) November 13th, 2005 to April 7th, 2006;

(c) April 27th, 2006 to March 20th, 2007; and

(d) August 13th, 2007 to January 26th, 2010 (during which period the defendant underwent a change of name from "Cammell Laird (Gibraltar) Ltd." to "Gibdock Ltd.").

5 The claimant claims he was "negligently exposed to harmful chemicals, including benzene . . . which has caused or materially contributed to his illness." The claimant describes the illness as a likely fatal illness which was diagnosed on December 4th, 2018. The illness was diagnosed as being:

(a) Mixed phenotype acute leukaemia;

(b) Skin and lower gut graft versus host disease;

(c) Grade A esophagitis, gastritis, minimal duodenitis;

(d) Severe bile acid malabsorption; and

(e) Avascular necrosis.

6 The claimant claims that the defendant was negligent insofar as it:

(a) Failed to provide adequate safety equipment (such as masks) to the claimant; and

(b) Failed to provide for proper ventilation in the claimant's work area(s).

7 The claimant alleges that as a result of the defendant's negligence he has suffered loss and damage.

8 On December 3rd, 2021 the claimant issued a claim form.

9 The letter before claim was sent by the claimant on March 21st, 2022. The letter stated *inter alia* that that—

> "a claim form was filed in December 2021 with a view to protecting limitation. Particulars of claim will be filed shortly whereupon you will be served with the claim for your response."

10 On March 25th, 2022, the claimant sent to the defendant "relevant enclosures" which had not been provided with the letter before claim. This included a letter dated January 27th, 2022 from the Royal Marsden NHS Foundation Trust to Dr. J. Duran of St. Bernard's Hospital Gibraltar, setting out the claimant's diagnosis and current situation, written and verified by Dr. R. Saso from the Royal Marsden NHS Foundation Trust on January 27th, 2022.

11 On or about April 4th, 2022 the claimant filed an amended claim form naming Gibdock Ltd. as the defendant and setting out the brief details of claim as:

> "The Claimant's exposure to benzene and/or other chemicals whilst employed as a steelworker in the Defendant company with no protective gear or any or no proper ventilation, has caused or materially contributed to his Acute Myleiod Leukaemia and Acute Lymphatic Leukaemia. As a result, other illnesses and/or ailments have arisen as set out in the Particulars of Claim (attached). The Claimant claims that the Defendant breached their duty as employers both in contract and negligence and/or breached their statutory duty in regard to him."

12 Also on April 4th, 2022, the claimant served the claim form, particulars of claim, and response pack on the defendant by email at 17:16 hrs. and by hand on the same date, by leaving it at the defendant's office. The defendant

states that full medical records were not provided by the claimant, and that in breach of PD16 4.3, no expert report was served with the particulars of claim.

13 The defendant filed an acknowledgment of service on April 8th, 2022. The acknowledgement of service indicated an intention to defend all of the claim.

14 By letter on the same date the defendant wrote to the claimant stating that its letter before claim failed to comply with the pre-action protocol ("PAP") in that it failed to:

(a) Provide any of the facts or details relating to the underlying allegation;

(b) Set out the basis for the breaches alleged in respect of tortious and statutory duties; and

(c) Allow the defendant three months in which to respond prior to the service of the claim. The same letter invited the claimant to apply for a stay of proceedings ("the stay") to enable the claimant to comply with his obligations under the PAP and to provide the defendant with sufficient time within which to investigate the claim.

15 On April 12th, 2022, the claimant denied that there had been any breach of the PAP stating that the alleged deficiencies were irrelevant because the defendant had not responded to the letter before claim, and such shortcomings as there were in the letter before claim were capable of being remedied by a simple phone call or email and/or capable of being remedied by a Part 18 request. Notwithstanding they indicated that they were happy to consent to a stay and invited the defendant to provide a draft consent order.

16 On April 14th, 2022 the defendant replied to the claimant pointing out that they had not delayed in responding to the letter before claim. The defendant further stated that: "We are in agreement with your client's suggestion to enter into a stay, in order to allow our client's to fully investigate this matter," and they requested a draft consent order for the stay.

17 On April 19th, 2022 the claimant sent the defendant a draft consent order for staying the claim. The defendant made some small amendments and on April 22nd, 2022, a draft consent order ("the draft stay order") was approved on behalf of both the parties and filed in court on April 22nd or 25th, 2022. The draft stay order contained the following recital:

> "the parties having agreed to stay the proceedings to provide the Defendant with time to investigate and respond to the claim, in accordance with the Pre-Action Protocol for Personal Injury."

The draft stay order also provided for:

(a) Proceedings be stayed until August 19th, 2022;

(b) The defendant to have permission to file and serve its defence by no later than September 2nd, 2022;

(c) There be a case management conference on the first available date after September 9th, 2022; and

(d) Costs in the case.

18 On April 25th, 2022 the defendant wrote to Verralls and, *inter alia* invited them to provide a more detailed letter before claim within seven days. The letter further stated that:

(i) The defendant had not delayed in responding to the letter before claim, as pursuant to the PAP the defendant had 21 days within which to respond; and

(ii) A Part 18 request for further information to deal with the lack of particulars in the letter before claim was not appropriate given that Part 18 requests relate to proceedings once issued, rather than to information sought at the pre-action stage.

19 The draft stay order issued from the court on April 27th, 2022 ("the stay order"), and the parties continued to correspond in respect of pre-action matters only.

20 On May 9th, 2022 the defendant wrote to Verralls (solicitors for the claimant) again asking them to provide a more detailed letter before claim.

21 On May 11th, 2022 the defendant received a reply from Verralls apologizing for the delay in responding to the defendant's letter of April 25th, 2022 and stating, *inter alia*, that the letter before claim adequately particularized the claimant's claim and that the defendant was now in receipt of full particulars of claim.

22 On May 19th, 2022 the defendant wrote stating, *inter alia*, that the time for responding to the letter before claim had not yet expired (given that the defendant had entered into a three-month stay to enable the defendant to investigate the claim, in compliance with the claimant's pre-action obligations), reiterating that the existing letter before claim was not compliant with the PAP, setting out the reasons for this, and requesting once again that the claimant confirm that it would send a PAP-compliant letter before claim within seven days.

23 On June 1st, 2022, Verralls sent the defendant a letter stating that:

> "pleadings were filed to protect limitation and it is for this reason that we have consented to a Stay to allow for your reasonable investigations and potential negotiations."

They made reference to the defendant's letter of May 19th, 2022, and dealt with the matters raised in that letter by:

(i) Setting out precise employment dates between April 22nd, 2005 and January 26th, 2010;

(ii) Stating that during the dates set out the claimant: "was employed as a steelworker and exposed to harmful chemicals such as benzene and/or other similar chemicals which caused or materially contributed to his mixed phenotype acute leukaemia";

(iii) Setting out a factual explanation of the allegations against the defendant, including lack of provision of suitable mask and/or face covering, insufficient enforcement of mask or protective equipment use, insufficient ventilation in workspaces; and

(iv) Confirming that the claimant had seen numerous health professionals throughout the years and that at "all relevant times" the relevant medical experts had indicated that "exposure to chemicals used in the welding industry (particularly benzene) can cause or materially contribute to the illness that he now suffers with."

24 On July 1st, 2022 the claimant's then solicitors, Ince, wrote to Verralls and set out their view that the claim was statute-barred for limitation, and that the claim form had also been served out of time.

25 Ince wrote to Verralls again on August 2nd, 2022 reiterating that the claim was statute-barred for limitation, and that proceedings had been served out of time and indicating that if the claimant did not discontinue the claim, an application contesting jurisdiction and for summary judgment would be made on August 19th, 2022 at the expiry of the stay. Verralls were invited to respond substantively by August 5th, 2022.

26 There was no reply forthcoming by August 5th, 2022 and on August 19th, 2022, the defendant filed the application. In the event Verralls did not reply until August 22nd, 2022. In the course of that reply they stated *inter alia* that:

(i) They had not failed to comply with the PAP;

(ii) They denied that the claim form had been issued outside of the three-year limitation period stating:

> "our client could not have known before his diagnosis that he had sustained a life threatening, and therefore substantial, injury before being told of the diagnosis. Secondly, it was not until much later that his condition could be linked to the benzene and/or other products with which he was compelled to work with whilst in your client's employ";

(iii) The claim form had been served within the time required by the CPR and in any event CPR r.7.6 allowed for an extension of time application;

(iv) The stay agreement was at the claimant's request for the purposes of investigating and responding to the claim and was ordered on the basis that the claim form and particulars of claim had been issued and served.

(v) There was no reservation in the acknowledgement of service about a challenge to jurisdiction.

(vi) There was no intention to suspend the operation of CPR r.11 which was not in the contemplation of either party or the court at the time the application was made;

(vii) Jurisdictional claims should be taken at the outset as soon as possible; and

(viii) The application was an abuse of process because it was filed on August 19th, 2022 during the currency of the agreed stay which lasted until midnight on August 19th, 2022.

27 Ince responded to the letter on August 24th, 2022. They asked Verralls to clarify the basis upon which they asserted that the claim form had been served within the time period required by the CPR and indicated that filing the application on August 19th, 2022 did not constitute an abuse of process because the claim had only been stayed until August 19th, 2022.

28 Verralls replied on September 29th, 2022 but did not offer any further basis to support their assertion that the claim form had been served within time and maintained their assertion that filing the application on August 19th, 2022 was an abuse of process.

Service of the claim form

29 With regard to the mode of service, the claimant purported to serve by email at 17:16 hrs. on April 4th, 2022, and by hand by leaving a copy of the claim form and particulars of claim at the address of the defendant, also on April 4th, 2022. Pursuant to CPR r.6.3(1)(d) and Practice Direction 6A, a claim form may only be served by electronic means where the party who is to be served has previously indicated in writing to the party serving that he is willing to accept service by electronic means. The defendant had not consented to service by email and therefore there is no doubt that service by email was not good service. That said, I do not think there is a dispute that service by leaving a copy of the claim form at the defendant's address is *prima facie* good service pursuant to CPR r.6.3 and r.7.5.

30 With regard to the time of service, pursuant to CPR r.7.5 the claimant must complete the step required by the rule, "before 12.00 midnight on the calendar day four months after the date of issue of the claim form." In this case the step required was to leave the documents at the defendant's address. The claim issued on December 3rd, 2021, and the defendant submits that

the claimant had until midnight on April 3rd, 2022 to validly serve the claim form on the defendant.

31 The claimant agrees that four months after December 3rd, 2022 would have been April 3rd, 2022. However, submitted for the claimant that "crucially the 3 April 2022 was a Sunday." The claimant submits that, in the circumstances, service on the next day, which was a Monday, is good service. In support of this the claimant cites s.54(b) (Computation of Time) of the Interpretation and General Clauses Act 1962 ("IGCA") as relevant; that section reads:

> "54. In computing time for the purpose of any Act, unless the contrary intention appears,—
>
> . . .
>
> (b) if the last day of the period is Sunday or a public holiday (which days are in this section referred to as excluded days) the period shall include the next following day, not being an excluded day."

32 For the claimant submitted that s.54(b) of the IGCA impacts upon the application of the CPR, essentially varying the application of the CPR in Gibraltar. For the defendant submitted that s.54(b) refers to the computation of time "for the purpose of any Act" and "Act" is defined in the IGCA as:

> "an Act of the Parliament of Gibraltar except where that reference was introduced into the laws of Gibraltar prior to the coming into effect of the Gibraltar Constitution Order 2006, in which case, in that reference 'Act' shall mean an Act of the Parliament at Westminster and such references to Acts of Parliament shall be references to Acts of the United Kingdom Parliament . . ."

I agree with the defendant's submission that pursuant to that definition, the CPR is neither an "Act" of the Gibraltar Parliament nor of the United Kingdom Parliament.

33 Section 38A(1) of the Supreme Court Act 1960 reads:

> "38A(1) Subject to this and any other Act (and without prejudice to the generality of sections 15 and 38), and to rules made under this Act specifying otherwise, the Civil Procedure Rules made (and as amended from time to time) under the Civil Procedure Act 1997 in England and Wales shall apply in Gibraltar with such modifications (for example, in nomenclature) as the circumstances in Gibraltar may require."

34 Trite that the CPR is enforceable in Gibraltar with appropriate modifications. I have not been addressed by the claimant as to whether the effect of the IGCA constitutes an appropriate "modification" to the CPR

and, in the absence of any persuasive, or indeed, any, argument to the contrary my view is, that it does not.

35 The policy and practice of the courts in Gibraltar is to implement the CPR to its fullest possible extent without substantive modifications, other than nomenclature changes arising from the difference in court systems between Gibraltar and England and Wales. Deadlines and time limits in the CPR have historically been the guiding force with which procedure is not only regulated but clearly identifiable as a reliable reference of practice.

36 In the circumstances I am not persuaded that the IGCA operates in this case to alter the time for service of documents as set out in the CPR.

37 Turning to the CPR, the claimant relies on CPR r.2.8(4) and Mr. Finch in his skeletons formulates the argument thus:

> "Further and in addition to the above statutory provision, CPR Part 2.8(4) applies and reads as follows:
>
> '(4) Where the specified period—
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> . . .
>
> (b) includes—
>
> (i) a Saturday or Sunday; or
>
> (ii) a Bank Holiday, Christmas Day or Good Friday,
>
> that day does not count.'"

38 It is unfortunate that having indicated that reliance was being placed on CPR r.2.8(4), the crucial part of r.2.8(4) (in terms of its applicability to the current matter) was omitted from the skeleton argument. Missing from the citation was part (a) of subs. (4) of CPR r.2.8 which reads:

> "(4) Where the specified period—
>
> (a) *is 5 days or less*; and
>
> (b) includes—
>
> (i) a Saturday or Sunday; or
>
> (ii) a Bank Holiday, Christmas Day or Good Friday,
>
> that day does not count." [Emphasis added.]

39 It is clear from the CPR that the exclusion of Saturdays, Sundays, Bank Holidays, Christmas Day and Good Friday is only relevant to the calculation of time where the relevant period is five days or less. In this case CPR r.7.5 being engaged, the relevant period is four months. CPR r.2.8(4) in my view does not apply to sanction service on the Monday following the Sunday.

40 In any event, pursuant to CPR r.6.14 a claim form is deemed to have been "served on the second business day after completion of the relevant step under rule 7.5(1)." The explanatory note at CPR r.6.14.1 places the issue of deemed service into context:

> "In a given case, the day on which service was actually effected on the defendant may not be the same day as the day on which, by operation of this rule, service was deemed to have been effected. The deemed day is a construction. Such construction is justified by the need to provide certainty. In the interests of certainty, a deemed day is not rebuttable by evidence of actual receipt of the claim form by the defendant on a day before or after the deemed day (*Godwin v Swindon BC* [2001] EWCA Civ 641; [2002] 1 W.L.R. 997, CA; *Anderton v Clwyd CC (No.2)* [2002] EWCA Civ 933; [2002] 1 W.L.R. 3174, CA).
>
> In any given proceedings, it is for various reasons important that there should be no room for doubt as to the day on which (and therefore the date on which) service of originating process is deemed effected. Within the CPR, the time limits for the taking of certain procedural steps are calculated by reference to the day on which service is deemed to have been effected (e.g. r.10.3 (The period for filing an acknowledgment of service)).
>
> A deemed day is fixed for all methods by which service of a claim form may be effected within the UK (for methods of service in Scotland and Northern Ireland, see r.6.40(2)), including personal service (see below).
>
> The deemed day is calculated from the 'completion of the relevant step' (leaving with, posting, delivering to, etc.) under r.7.5(1). Rule 7.5(1) (which incorporates by reference r.6.5) stipulates, depending on the particular method of service chosen, the 'step' that the claimant must 'complete' where the claim form is to be served within the jurisdiction. For further explanation, see 'relevant step under rule 7.5(1)' below at para.6.14.3.
>
> This arrangement marks a significant change from the effect which r.7.5 had before 1 October 2008. The principal objective of the change was to reduce the instances in which the deemed day of service provisions had the effect of rendering service of claim forms out of time, with the result that, for the purpose of doing justice in individual cases, other provisions in the CPR that might conceivably be called in aid to rescue the claimant's claim, for example r.3.10 (court's power to rectify error of procedure), and r.6.16 (power of court to dispense with service), were pressed into uses for which they were not designed. (A similar policy objective underlies the provision now found in r.6.15(2); see para.6.15.5 below.)

> In effect, r.6.14 provides that the time between the completion of the relevant step and the deemed day should be the same for all methods of service (the second business day after completion of the relevant step), thereby removing distinctions that existed under the previous rule between 'day after' and 'second day after'. Further, no matter what method of service is used, the deemed day will be a business day."

41 A business day is defined in CPR r.6.14 as "any day except Saturday, Sunday, a Bank Holiday, Good Friday or Christmas day." This is to be contrasted with a calendar day which in my view must include the holidays excluded from the definition of business day. It is clear from CPR r.7.5 that the computation of time for service of the claim form within the four-month period is calculated on calendar days (indeed the claimant appears to accept this). Thereafter CPR r.6.14 deals with business days and makes it clear that the actual day upon which a claim form is delivered to the address of a defendant, is not the date upon which it is considered served. The date of service is deemed to be on the second business day after the completion of the relevant step under 7.5(1) which in this case would be delivery to the defendant's address. If the completion of the relevant step had to take place by April 3rd, and that was a Sunday, then service would have been deemed to have taken place on the second business day following that, *i.e.* on April 5th, and that would have been out of time. In any event, even if the claimant was right to serve on the 4th (which I do not accept), the date upon which service would have been deemed to have taken place would have been April 6th, 2022, and that too would have been out of time.

42 Pursuant to CPR r.7.5 service must have taken place by midnight on April 3rd, 2022 and there is no doubt in my mind that the claim form was served out of time.

43 It was open to the claimant to have made an application pursuant to CPR r.7.5 to extend the time for service of the claim form, indeed evidence that he was alive to this option is to be found in Verralls' letter of August 22nd, 2022 (see para. 26(iii) *ante*). The claimant has made no such application. The position therefore is that the claimant took no steps before April 4th, 2022 to serve the claim form, nor did he make any application within the period specified by CPR r.7.5, or at all, to extend the time allowed for service. I find that the claim form was served out of time.

44 Submitted for the defendant that their submissions are equally applicable to the claim form as amended on April 4th, 2022 because the issue date remains December 3rd, 2021. The claimant takes no issue with this latter issue.

Dispute of jurisdiction

45 For the claimant submitted that even if the claim form is found to have been served out of time, the defendant is himself out of time to challenge the court's jurisdiction and, if he is, he is also not entitled to relief from sanctions.

Filing of the acknowledgment of service

46 Not in dispute that the acknowledgment of service indicated that the defendant intended to contest the whole of the claim and did not indicate that jurisdiction was to be contested.

47 Although the point was not addressed in his skeleton arguments, at the hearing Mr. Finch submitted that a failure to indicate a challenge to jurisdiction in the acknowledgment of service is fatal. No authority is relied on in support. Mr. Finch further submits that in the absence of an indication to challenge jurisdiction in the acknowledgement of service, the court must assume it has jurisdiction pursuant to CPR r.11(8).

48 Mr. Smith submits, that filing an acknowledgment of service does not constitute an acceptance of jurisdiction. For this proposition he relies on two cases *IBS Tech. (PVT) Ltd.* v. *APM Tech. SA* (5) and *SMAY Invs. Ltd.* v. *Sachdev* (6). *IBS Tech.* was included in the authorities bundle as a brief summary and from that I cannot assess if it supports Mr. Smith's argument. With regard to *SMAY Invs.*, it seems to me that that case is better authority for Mr. Smith's second argument, that whether or not the defendant has submitted to the jurisdiction of the court is to be deduced not from the ticking or not of a particular box in the acknowledgment of service form but rather from the defendant's actions, which is what would indicate whether or not the defendant had submitted to the court's jurisdiction. It seems to me that the filing of the acknowledgment of service does not of itself constitute a submission to the jurisdiction of the court.

49 Further developing the argument, Mr. Smith submits that filing an acknowledgment of service that does not indicate that jurisdiction will be contested, does not prevent a party from subsequently contesting jurisdiction, and following Henry Carr, J. in *Winkler* v. *Shamoon* (7), I agree ([2016] EWHC 217, at para. 39 *et seq.*):

> "I do not accept that a defendant who wishes to contest the jurisdiction 'enters an appearance' within the meaning of Article 24 by filing an acknowledgement of service which expressly indicates his intention to contest the jurisdiction. In support of his argument, Mr Colton relies on [186] of the judgment of Andrew Smith J. in *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm):
>
> > 'In my judgment, the defendants entered an appearance within the meaning of the Brussels Regulation in respect of the claims

> originally brought by Maple Leaf when they acknowledged service of these proceedings. They did not thereby lose the right to challenge the jurisdiction: they had the right to do so under the CPR. To that extent the defendants did not unconditionally enter an appearance by the filing of the acknowledgment of service. They made this explicit by expressing their intention to challenge jurisdiction on the form, but it would have been the case in any event: see the judgment of Mr. Michael Briggs QC in *IBS Technologies (PVT) Ltd v APM Technologies SA*, unreported, 7 April 2003.'

40. The first sentence, taken in isolation, could support the Claimants' proposition. However, I consider from the rest of the citation that Andrew Smith J considered that the defendant did not unconditionally enter an appearance by the filing of an acknowledgement of service, because of the explicit statement of intention to challenge jurisdiction on that form.

41. In *Antonio Gramsci Shipping Corp v Recoletos Ltd* [2012] EWCH 1887 (Comm); [2012] Lloyd's Rep 365. Teare J recorded at [65] that it was common ground that:

> 'in determining whether there has been an appearance pursuant to Art. 24 of the Brussels regulation it is appropriate to consider whether there has been a submission to the jurisdiction in accordance with the local law, in this case, English law.'

42. Similarly, in *Future New Developments limited v B&S Patente und Marken Gmbh* [2014] EWCH 1874 (IPEC) HH Judge Hacon recorded at [18] that:

> 'If the proceedings before this Court were considered in isolation, B&S did not enter an appearance. In the acknowledgement of service the box for challenging the jurisdiction was crossed and within 14 days of filing the acknowledgement B&S made its application disputing the Court's jurisdiction supported by evidence pursuant to CPR 11(4).'

43. I consider that in both those cases, the parties were right to accept that the filing of an acknowledgement of service with an express indication of an intention to challenge jurisdiction does not constitute the entry of an appearance within the meaning of Article 24. CPR 11(2) requires an acknowledgement of service to be filed in order to challenge jurisdiction."

50 Further, in *Caine* v. *Advertiser & Times Ltd.* (1), an acknowledgement of service had been filed without ticking the box to contest jurisdiction, and the court found that that did not constitute a waiver of the right to contest jurisdiction.

51 Turning back to *Winkler* v. *Shamoon* (7), Henry Carr, J. further stated that the issue was whether there had been a waiver of the right to challenge jurisdiction, he stated ([2016] EWHC 217 (Ch), at paras. 43–44):

> "The question of whether a defendant has entered an appearance depends on whether there has been a submission to the jurisdiction in accordance with the local law.
>
> 44. Furthermore, I do not accept that this question is answered by asking whether the defendant has done more than is *required* or is *necessary* in order to challenge jurisdiction. Rather, the Court must be satisfied that the defendant has unequivocally renounced his right to challenge the jurisdiction." [Emphasis in original.]

52 In the course of his oral submissions (but not in his skeleton arguments), Mr. Finch argued that in any event the defendant had taken steps in the action over and above the filing of an acknowledgment of service, which show that he had unequivocally submitted to the jurisdiction of the court, such steps he submits are inconsistent with a challenge to jurisdiction, and the defendant should be barred from mounting such a challenge. The steps Mr. Finch refers to are paras. 2–3 of the stay order which read:

> "2. The Defendant has permission to file and serve its defence by no later than the 2 September 2022.
>
> 3. There be a case management conference on the first available date after 9 September 2022."

In support Mr. Finch places reliance on *The White Book*, para. 11.1.10 which reads:

> "It is inconsistent with an intention to challenge the jurisdiction that a defendant should seek an extension of time for their defence, advance a defence on the merits in reliance of a purported settlement and threaten to strike out the claim if the claimant refuses to discontinue it (Global Multimedia International Ltd v ARA Media Services [2006] EWHC 3612 (Ch); [2007] 1 All ER (Comm) 1160 (Sir Andrew Morrill C))."

53 Mr. Finch did not address me on the *Global Multimedia* case (3), cited in the CPR, as support for the above position. Mr. Smith has taken me to that case in some considerable detail, I simply propose to highlight the following:

(i) Merrit, C. in *Global Multimedia* addressed the issue of what amounted to a submission by a defendant to the jurisdiction of the court. Quoting from the skeleton of Mr. Smith:

"Merritt C quoted Spargos Mining NL v Atlantic Capital Corporation [1995] as quoted in SMAY Investments Ltd. v Sachdev [2003] 1 WLR 1973. Merritt C at paragraph 27 of Global Multimedia quoted paragraph 41 of SMAY verbatim, stating that:

> 'In Sage v Double A Hydraulics Ltd, [1992] Times Law Reports, 165, Lord Justice Farquharson said (and this is a report of the judgment which is not reported in oratio recta):
>
> > "A useful test was whether a disinterested bystander with knowledge of the case would have regarded the acts of the Defendant, or his solicitors, as inconsistent with the making and maintaining of his challenge."
>
> In arriving at the view to be imputed to the disinterested bystander, it seems to me that one has to bear in mind that there will be an effective waiver, or a submission to the jurisdiction, only where the step relied upon as a waiver, or a submission to the jurisdiction, cannot be explained, except on the assumption that the party in question accepts that the court should be given jurisdiction. If the step relied upon, although consistent with the acceptance of jurisdiction, is a step which can be explained also because it was necessary or useful for some purpose other than acceptance of the jurisdiction, there will, on the authorities, be no submission.'

Merritt C then concluded at paragraph 28 that:

> 'Thus the test to be applied is an objective one and what must be determined is whether the only possible explanation for the conduct relied upon is an intention on the part of the defendant to have the case tried in England.'

This constitutes what is now more commonly referred to as the 'unequivocal submission' test when evaluating claims with jurisdictional issues. This was confirmed in Deutsche Bank AG London v Petromena AS [2015] EWCA Civ 226 at paragraph 32:

> 'The doing of an act inconsistent with maintaining a challenge to the jurisdiction. Such a waiver must clearly convey to the claimant and the court that the defendant is unequivocally renouncing his right to challenge the jurisdiction, and the application of a bystander test is plainly apt.'"

(ii) Merritt, C. in his conclusion stated that ([2006] EWHC 3612 (Ch), at para. 31):

"A defendant who intends to challenge the jurisdiction of the court does not seek an extension of time for his defence, he does not advance a defence on the merits in the form of settlement agreements,

> nor does he threaten to strike-out the claim if the claimant refuses to discontinue it . . ."

54 Whilst at first blush it may appear that the principles in *Global Multimedia* (3) preclude the defendant in this case from mounting a challenge to jurisdiction, when those principles are applied to the factual context of this case in my view it does quite the opposite. From a consideration of the facts of *Global Multimedia* evident that the Part 20 defendant had taken various steps in the litigation process over the course of five weeks, including seeking an extension of time for the filing of the defence. By contrast in the present case the defendant within 14 days of the service of the claim form had requested that the claimant seek a stay to preserve the pre action position of the parties, and to facilitate time for the defendant to consider the claim and investigate it fully.

55 I am of the view that the stay preserved the position as it existed at the time of the stay. Despite the defendant being given permission to file a defence at a future date, the effect of the stay was to suspend the proceedings removing from either party the ability or option to take any further steps in the action. Coulson, L.J. in *Grant* v. *Dawn Meats (UK)* (4), having referred to the glossary of the CPR and r.3.1.8, summarized the position thus ([2018] EWCA Civ 2212, at para. 18):

> "[A] stay operates to 'halt' or 'freeze' the proceedings. In general terms, no steps in the action, by either side, are required or permitted during the period of the stay. When the stay is lifted, or the stay expires, the position as between the parties should be the same as it was at the moment that the stay was imposed. The parties (and the court) pick up where they left off at the time of the imposition of the stay."

56 In *SMAY Invs.* (6), Patten, J. said ([2003] EWHC 474 (Ch), at para. 41):

> "[I]t seems to me that one has to bear in mind that there will be an effective waiver, or a submission to the jurisdiction, only where the step relied upon as a waiver, or a submission to the jurisdiction, cannot be explained, except on the assumption that the party in question accepts that the court should be given jurisdiction. If the step relied upon, although consistent with the acceptance of jurisdiction, is a step which can be explained also because it was necessary or useful for some purpose other than acceptance of the jurisdiction, there will, on the authorities, be no submission."

57 In this case, the step to make provision for the extension of time to file a defence was not, in my view a submission to the jurisdiction. It was a provision which was embodied in the stay order, and it can be explained because in the context of a stay it preserved for the avoidance of doubt the position before the stay, which was that the defendant had 14 days within

which to file his defence. For the defendant submitted that on the date the parties had agreed to stand still the time for filing an application to contest jurisdiction had not expired and there remained 14 days for the filing of the defence, therefore the stay simply preserved that position by allowing for the filing of the defence 14 days after the lifting of the stay. I am of the view that the stay does not constitute an extension of time for the filing of a defence.

58 Even if I am wrong and para. 2 of the stay order does in fact constitute an extension of time for filing a defence, Patten, J. in *SMAY Invs.* made it clear that (*ibid.*, at para 43):

> "Insofar as the extension of time for a defence was sought and obtained, that is not inconsistent with a continuing intention to challenge jurisdiction. On the contrary, it seems to me equally consistent with a desire to postpone any obligation to serve a defence until after the issue of jurisdiction had been determined."

59 The provision in the order for the filing of a defence in the particular circumstances of this case does not in my view equate to a submission to the jurisdiction of the court. Furthermore as is evident from the correspondence in this case, the whole purpose of the stay was to allow the defendant time to investigate the claim, time, he alleged he had not been given, in contravention of the PAP. The freezing of time was what gave the defendant the opportunity to consider the matter as a whole.

Filing of the application to challenge jurisdiction

60 The claimant submits that the application to challenge jurisdiction was filed outside the 14 day period permitted by CPR r.11; the defendant disputes this.

61 On April 8th, 2022 the defendant both filed their acknowledgement of service and proposed the stay. The defendant's position is that they suggested a stay in pursuance of C1A-005 of the pre-action conduct and protocols because that the claimant had failed to comply with the PAP. The claimant whilst not conceding that they failed to comply with the PAP, agreed to enter into a stay of proceedings to enable the defendant to investigate the claim. As the recital in the stay order reflects, its purpose was "to provide the Defendant with time to investigate and respond to the claim in accordance with the Pre-Action Protocol for Personal Injury."

62 On April 12th, 2022 the claimant by letter agreed to the stay in the following terms:

> "Insofar as your letter relates to the provision of a full investigation of the claim, we confirm that we are happy to consent to a stay. Kindly revert with a draft consent order the contents of which we will consider."

63 On April 14th, 2022 the defendant replied in the following terms:

> "We are in agreement with your client's suggestion to enter into a stay, in order to allow our clients to fully investigate the matter. As a result we would request that you provide us with a draft consent order for our review and approval"

64 At this stage whilst there was an agreement in principle not to take any further steps in the proceedings, the terms of the agreement had not yet been canvassed, let alone agreed and it would be too great a leap to infer from the letters of April 12th and 14th, 2022 respectively, that an agreement for an immediate stay or a standstill agreement was in place at that time. The precise terms of the proposed stay not being identified and agreed upon, there could only have been an "in principle" standstill agreement, but there was no agreement identifiable by its terms to point to, or to hold a party to. I reject the defendant's claim that a standstill agreement was in place by April 12th or 14th, 2022. My view is reinforced by reason of the fact that on April 19th, 2022, solicitors for the claimants sent to solicitors for the defendants the draft stay order which the defendants did not feel able to approve, instead they suggested some amendments, and following this, on April 22nd, 2022, the parties each approved the draft stay order which was then filed in court.

65 Although the court did not approve the order until April 27th, 2022, the parties had endorsed the draft stay order on April 22nd, 2022, with their signatures reflecting their commitment to be bound by it. Faced with a draft consent order of the kind that was proposed in this case, the role of the court is essentially administrative. In my view although the stay order issued from the court on April 27th, 2022, the agreement to drop hands, stand still and be bound by the stay took place on the April 22nd, when the parties set their signatures to the draft stay order. The ascribing of those signatures indicates that as from that date the parties had agreed to the specific terms of a stay, and it indicates their consent to be bound by its terms. I find that there was a standstill agreement in place on April 22nd, 2022, which was an agreement to stay proceedings. The stay order (and indeed the draft stay order) states in the recital: "the parties having agreed to stay the proceedings," this reinforces my view that the agreement to stay proceedings and stand still was entered into before the order was approved by the court, indeed, arguably that is the very nature of a consent order, an order which reflects a negotiated and agreed position to be approved by the court.

66 The need to identify the date at which the stay became operative is relevant because if the stay was operative within the time available for filing an application to contest jurisdiction, then the defendant would still have been in time to file this application at the termination of the period of stay. Pursuant to CPR r.11(4)(a) an application to contest jurisdiction

"must—(a) be made within 14 days after filing an acknowledgement of service." The acknowledgement of service was filed on April 8th, 2022, and the stay was agreed upon on April 22nd, 2022, within the time available for the filing of an application to contest jurisdiction. At the point therefore at which the stay ceased to have effect, the defendant was still in time to file this application.

The end of the stay

67 The draft stay order and the stay order provided that: "Proceedings be stayed until 19th August 2022." On August 19th, 2022 the defendants filed this application. The claimant submits that pursuant to the stay order proceedings were stayed until midnight on August 19th, 2022 and this application was therefore filed whilst the stay was still operative. It is unfortunate that the claimant does not proffer any reference to precedent or authority in support of the submission that a stay which is described as being in place "until" August 19th operates until midnight of that day. In the absence of any such authority that submission can be no more than a bare assertion.

68 For the defendant submitted that that the term "until":

> "given its ordinary meaning, means 'up to' a point in time in which moment a transition from one event to another occurs. It does not prima facie and unless qualified carry the alternative meaning, proposed by the Claimant, of 'up to and including.'"

As authority for this proposition the defendants rely on *Grant* v. *Dawn Meats* (4). That was a case which validated pre-action stays of proceedings. Mr. Smith submits that in *Grant* v. *Dawn Meats* it was "held that as a matter of common ground a stay which extended 'until 30 November 2016' expired 'on that date' (at paragraph [5])." In my view the case reads slightly differently. In the course of setting out the factual background at the start of the case, Coulson, L.J. stated ([2018] EWCA Civ 2212, at para. 5):

> "On 5 October 2016, at the appellant's request, the court further extended the stay until 30 November 2016. It is common ground that the stay expired on that date"

69 Whilst it may have been common ground in *Grant* v. *Dawn Meats* that the parties agreed that the stay expired on the nominated day, I do not necessarily draw from that, a point of principle of general applicability. In any event the authority is of limited assistance because it provides no guidance as to when on "that date" the stay expired. Was it at one minute past midnight on November 29th, or was it midnight on November 30th?

70 Referring myself to *Stroud's Judicial Dictionary of Words and Phrases*, the relevant entry suggests that whilst the word "until" may be read as either inclusive or exclusive, it is generally inclusive:

> "In a memorandum enlarging the time within which an award may be made, 'until' will generally include the whole of the day named (*Russ. on Arb.* (8th ed.), 102, citing *Kerr v Jeston* 1 Dowl. N.S. 538; *Knox v Simmonds* 3 Bro. C.C. 358; see further *Pugh v Leeds* 2 Cowp. 714). So, it seems that, as a general rule, the word 'till' is inclusive of the day to which it is prefixed; so that where a defendant was given 'till' a certain day to plead, judgment signed on such day for want of a plea was bad, as the defendant might have delivered a plea during such day (*Dakins v Wagner* 3 Dowl. 535; see also *Kerr v. Jeston*, above) And the rule is the same in the case of the word 'until' (*Isaacs v Royal Insurance* L.R. 5 Ex. 296). So, where a bankrupt was protected from process 'until the 29th July', that protection extended during the whole of that day (*Bellhouse v Mellor* 28 L.J. Ex. 141)."

This definition would seem to lean in favour of the claimant's interpretation of the duration of the stay, extending it until midnight on August 19th. That said the entry continues:

> "But a plaintiff having obtained a judgment, but with a stay of execution 'until a stated day,' was held (in Ireland) entitled to issue his execution on that day if the money was not then paid (Rogers v Davis 8 Ir. L.R. 399), in that case Burton J., said, 'I think until does not mean 'after.'"

This latter definition would seem to favour the defendant's interpretation.

71 Turning to the *Oxford English Dictionary* for guidance, the definition of "until" cited therein reads: "up to the time of." This concords with the definition in the *Cambridge Dictionary* which reads "up to the time that." Giving the word its literal and indeed ordinary meaning "up to the time of" or "up to the time that" would suggest, applying it to the current period under discussion, that the stay would be in force up to the time that the day of August 19th starts. This would mean that the stay expired at midnight on August 18th, and the defendants would not have filed this application during the course of the stay. In the absence of any authority to suggest that in this context "until" means "up to and including" I prefer to attribute to the word its ordinary and natural meaning. The defendants therefore did not file this application at a time when the stay was still in place.

Relief from sanctions

72 The defendants made an application for relief from sanctions in the event that I should find that they had filed their application outside of the 14 day time limit prescribed by CPR r.11. I have not so found, but if my interpretation of the meaning of "until" is wrong and "until" does in fact mean until midnight on August 19th, then the defendant would have filed this application whilst the stay was in place. The question would then arise whether the application would fall to be dismissed. In effect, Mr. Finch

submits that in that case this application would be "null and void and have no effect," but he does not elaborate that submission beyond that bare assertion, and has not referred me to any authority on point. My view is that if the defendants were found to have filed this application whilst the stay was in force, that would amount to taking a step in breach of the stay order and the sanction that would apply would likely be dismissal of the application. In my judgment, given the application for relief from sanctions before me, it would be appropriate to consider whether the defendants would be entitled to relief from sanctions for breaching the stay order. For the purposes of this consideration only, I shall deal with the issue on the basis that the defendants filed this application whilst the stay was still in place.

73 Not in dispute that CPR r.3.9 provides a mechanism by which relief from sanctions can be sought. Also not in dispute that the leading case in relation to relief from sanctions is *Denton* v. *T.H. White Ltd.* (2). The Court of Appeal set out a three-stage test to be used when determining the question of relief from sanctions ([2014] EWCA Civ 906, at para. 24):

> "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)].'"

74 Turning to stage one I must identify and assess the seriousness and significance of the failure to comply with the stay order. *Denton* v. *White* made it clear that the focus at the first stage of the inquiry should not be on whether the breach has been trivial but on whether the breach has been serious or significant. The breach consisted of taking a step one day before it should have been taken. In the circumstances I fail to see how that could prejudice the claimant in any way. It does not impact upon future hearing dates, nor does it in any way disrupt the progress of the litigation. Filing the application a day earlier does not put the claimant at any greater disadvantage than if the application had been filed a day later. The breach in my view was neither serious nor significant.

75 Turning to stage two I must consider why the breach occurred. Given that I have found that the breach was neither serious nor significant I propose to deal with stage two (and three) only briefly. The breach of the stay order arose from the defendant's interpretation of the word "until" and not from any oversight of time limits or disregard for court orders. The breach in these circumstances arose from an error of interpretation. It is not

a breach which is the result of a dilatory act, but rather the opposite, it is an over eagerness to take prompt action.

76 Turning to stage three, I must evaluate all the circumstances of the case, This was a case where I have found that the claim form was served out of time, where the claimant did not seek an extension of time within which to serve the claim form, where the defendant alleges that the claimant had not complied with its obligations under the PAP, and where despite the claimant's denial of the same, he nevertheless agreed to the stay. The filing of this application was prompt, *i.e.* on the day that the defendant believed the stay expired.

77 Mr. Finch submits that:

> "the allegations in relation to working practices and other failures on the Applicant's part deserve to be considered at trial. The injuries suffered are likely to be fatal and the Respondent simply does not have time for these procedural issues."

With respect I find that an extraordinary submission to advance. Non-compliance with procedural rules would quickly result in a case becoming unmanageable. I do not consider a lack of time to be a justifiable reason for ignoring procedure, quite the opposite, it should have prompted speedy and timely service of the claim form and compliance with the CPR in order to bring the matter to trial as soon as possible and avoid the possibility of satellite litigation such as this.

78 In addition, I note their lordships comments in *Denton* v. *White* (*ibid*., at para. 41):

> "We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage. In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation. The parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days as envisaged by the new rule 3.8(4)."

79 For the reasons given this was not a serious or significant breach and there is nothing at stage two or three which would persuade me otherwise. If the defendant had filed this application whilst the stay was operative, he would be entitled to relief from sanctions which would allow this application to be properly before the court.

80 That said, I have found that the claim form was served out of time, and that the defendant is able to challenge jurisdiction. That the challenge to jurisdiction can successfully be premised on the fact that the claim form was served out of time. Pursuant to CPR r.11(6), I declare that the claim form has not been duly served on the defendant and that the court has no jurisdiction to try this claim. In the circumstances I do not need to consider summary judgment or an extension of time for filing the defence.

81 Orders to issue and I shall hear the parties as to costs.

Judgment accordingly.