In the County Court at Liverpool
Case number: A26YP157

APPEAL NO 35/2015

BETWEEN

UNITED UTILITIES GROUP PLC

Appellant/Defendant

and

JAYNE HART

Respondent/Appellant

Before **His Honour Judge Graham Wood QC**

Mr T Wilkinson (instructed by Weightmans Solicitors) for the Appellant
Mr. C Taylor (instructed by Hattons Solicitors) for the Respondent

Hearing date: Friday 14th August

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Final Appeal Judgment

Introduction

1. This issue in this appeal is whether or not purported defective service of a claim form in that a copy of the sealed version rather than its original can be corrected by the court exercising discretion under any part of the CPR.

2. On its face this would appear to be a simple issue of rule interpretation. However on review of the complex tapestry of rules relating to service and general case management, and a number of reported cases, which on the submissions raised give rise to potential tension or conflict, it is anything but simple.

3. I am told that a number of other cases have been stayed pending this court's decision, and accordingly contrary to my initial instinct that an *ex tempore* judgment would suffice, I decided to reserve my judgment and provide it in written form. Arriving at my decision has required consideration of fifteen separate authorities at higher court level, four separate CPR rules, and detailed commentary in the White book, as well as the oral and written submissions helpfully provided by both counsel.

Background to this appeal

4. The Claimant was injured in a road traffic accident on 29th September 2011 which appears to have been the fault of the Defendant driver who collided with the rear of her stationary vehicle when exiting a motorway. She sustained soft tissue injuries which according to an orthopaedic surgeon were still troubling her over two years after the accident possibly with the acceleration of pre-existing degenerative changes. Whilst this court has not been appraised of any more information concerning the accident, it would seem that this is not a modest claim, and a reasonable amount of compensation might be awarded. What is apparent, is that after the claim was notified to the Defendant, investigations into the medical picture continued, so much so that at the time that the limitation period was about to expire, the protective issue of proceedings was required.

5. That issue took place on 16th September 2014 out of the Bulk Centre at Northampton, (Salford) as usual for this type of case, and assigned a claim number A26YP157. I understand that what this involves is the creation of three "originals", that is versions of the claim form containing the sticky label with the claim number, a barcode, and the County Court seal with the embossed image of a crown, which is jealously protected by the court. These three versions are identical, in the sense that they have all been stamped and labelled individually, without the creation of photocopied versions, and one is retained on the court file, whilst the other two are returned to the solicitors in anticipation of service in due course. (A different process might follow if there is to be court service).

6. Although an interim payment was made to fund an MRI scan post-issue, unfortunately progress continued to bedevilled by an absence of clarity as to prognosis (the court has little detail by way of explanation) and unless the time for service on the claim form was to be extended, the Claimant's solicitor only had four months to do this. Accordingly 9th January 2015, Mr Bond, the senior litigation executive handling the claim on behalf of the Claimant through Hatton's solicitors, purported to effect service with a few days to spare. He did this by sending in the DX to the Defendant's solicitors, Weightmans, who had been nominated to accept service, the document pack necessary to bring the claim form to the Defendant's attention and to allow service acknowledgement. Although he was in possession of at least one original sealed version, that is a version that had not been the subject of photocopying or printing, on this occasion he sent a copy of the claim form. To all intents and purposes they were identical, save that the sent version had either been digitally printed out having originally been scanned, so that the original seal and the sticky label were now also in the same colour ink and could not be distinguished. Mr Bond acknowledges that this was a mistake, and he did not retrieve an original which had been archived. (Like a lot of solicitors handling these claims in bulk, in order to diminish the amount of paperwork, documents are scanned into the system, and thereafter recreated electronically.)

7. That particular action, it would seem, was Mr Bond's potential undoing. Whilst there was nothing wrong with the *mode* of service (solicitor DX), by choosing this route, the original sealed and stamped version of the claim form, it is said, had to be enclosed. As incongruous as it may seem, if he had chosen another mode of service open to him, that is by fax (it is not suggested that he could not have done that in this case) it is immaterial that the Defendant solicitors were receiving a copy version. I shall return to this anomaly later in my judgment.

8. Subject to the question of the form of the documentary material, the service process was deemed complete by 11th January 2015.

9. An acknowledgement of service was required by 27th January 2015. It was not provided, and Mr Bond on behalf of his client sought to enter default judgment. However, on 28th January 2015 he received notification from the Defendant's solicitors by e-mail pointing out that the enclosure sent with the letter of service was a copy, and not the original sealed claim form, and that it was defective. In the words of Mr Turton on behalf of the Defendant, the proceedings were "irretrievably defective". Mr Bond was referred to case law, which I shall address later in this judgment, and **CPR 7.51**.

10. Whilst the battle lines were now drawn, this court notes with dismay that both parties have sought to secure tactical advantages of the other, which I fear still remains the culture in civil litigation, notwithstanding the exhortations of the Court of Appeal in recent procedural cases to a greater spirit of cooperation and tolerance. The

Defendant's solicitors could have pointed out the defect as they perceived it in the served claim form when there was still opportunity to correct this (especially when it would cause them no prejudice other than the loss of potential to secure a tactical advantage); equally, a call or e-mail to the Defendant's solicitor by the Claimant's solicitor referring to the lack of an acknowledgement of service was conspicuous by its absence.

11. Be that as it may, this action could not continue (or be struck out) without procedural intervention by the court, and there were two applications made. The Defendant's application was to strike out the claim for non-service of the claim form in time pursuant to **CPR 7.5 (1),** and the Claimant's application two weeks later was for a discretionary extension of time. The claimant relied on four potential discretions, namely **CPR 3.10**, **CPR 6.15**, **CPR 6.16** or section 33 of the **Limitation Act 1980**. Undoubtedly the limitation discretion application was a fallback position, and it has never been advanced either in the lower court, or before this court with anything other than a passing nod. To all intents and purposes it can be disregarded. In any event, it would be hopeless on the basis of existing authority.

The decision of District Judge Benson

12. Thus the matter came before District Judge Benson who received a very detailed argument from Mr Mulrooney of counsel, then appearing on behalf of the Claimant, and Mr Wilkinson of counsel on behalf of the Defendant who has also appeared before this court. The judge after a short period of deliberation gave *an extempore* judgment which maintained a level of clarity notwithstanding its brevity.

13. First of all, after summarising the facts, the judge decided that he was bound by the recent authority of **Hill Contractors and Construction Ltd v Strath [2013] EWHC 1693 (TCC)** confirming an earlier decision of the Court of Appeal in **Cranfield v Bridgegrove Ltd[2003] EWCA Civ 656** that the original sealed claim form should be served, and not a copy, and thus service has not been effected. He agreed that it was a case of non-service rather than mis-service. Whilst it would have been open to the claimant to apply pursuant to **CPR 7.6** for an extension of time prior to expiry of the four months, that was clearly no longer open to her.

14. The judge then addressed the discretions respectively under **CPR 6.15** and **CPR 6.16**, the first dealing with alternative methods of service or place of service, and the second the power of the court to dispense with service altogether. In relation to the **CPR 6.15** discretion, the judge held that this can only apply in the context of mis-service, and not non-service as had happened here, and accordingly ruled that the Claimant could not rely upon it.

15. Turning to the **CPR 6.16** discretion the learned district judge considered the relationship between that rule and the broad discretionary rule under **CPR 3.10** to correct an error of procedure and in particular the explanatory notes in the White book referring to the recent cases of **Integral Petroleum**, and **Phillips** (dealt with in detail later in this judgment). He did not believe that if the court were to rectify the error implicit in the service of documents of the wrong type (copy rather than original) this would amount to extending a statutory time limit. He did not deem it appropriate to dispense with service, in other words acceding to a **6.16** application, but instead, acknowledging that if service had been effected by fax the Defendant would have all the information required, thus implicitly regarding this as a technical breach, the wider discretion under **CPR 3.10** was not excluded. He then went on to consider his discretion, and after carrying out a balancing exercise decided that it was appropriate to make an order remedying the error and to direct that service was effective on 9th January 2015, as if the Claimant had served the correct type of documents.

16. In a brief exchange with counsel thereafter, he clarified that whilst acknowledging that service had not been effected (non-service) he was nevertheless making a corrective order. A confusion appears to have been borne out of the fact that the judge indicated that he was bound by the **Hill** case. I shall deal with this issue later in my judgment, as it is central to the appeal advanced on behalf of the Defendant/Appellant.

The legal position including case law

17. To understand the inter-relationship between the various rules, it is necessary to set these out in full. The general discretionary power of the court to correct procedural errors is contained in **CPR 3.10**:

> **3.10 General power of the court to rectify matters where there has been an error of procedure**
>
> Where there has been an error of procedure such as a failure to comply with a rule or practice direction-
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
> (b) the court may make an order to remedy the error.

18. There is a matrix of rules in CPR part 6 dealing with service. The first relevant one is:

> **6.15 Service of the claim form by an alternative method or at an alternative place**
>
> (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.

(3) An application for an order under this rule-
(a) must be supported by evidence; and
(b) may be made without notice.

(4) An order under this rule must specify-
(a) the method or place of service;
(b) the date on which the claim form is deemed served; and
(c) the period for-
(i) filing an acknowledgment of service;
(ii) filing an admission; or
(iii) filing a defence.

19. This particular rule in an earlier guise was **CPR 6.8**. The important consideration if there is to be an application under this rule, and the court is asked to exercise its discretion, is whether or not there is "*good reason*" to specify an alternative method or place of service, even though application can be made after service has been attempted. This is the rule which the judge appears to have accepted (and indeed counsel during the course of argument also acknowledged) could be applied where a party was being frustrated in achieving effective service, thus creating a situation of mis-service" rather than where there had been no service at all.

20. Service can be dispensed with altogether:

6.16 Power of court to dispense with service of the claim form

(1) The court may dispense with service of a claim form in exceptional circumstances.
(2) An application for an order to dispense with service may be made at any time and-
(a) must be supported by evidence; and
(b) may be made without notice.

21. The keywords in this rule lie in subparagraph (1) namely "*exceptional circumstances*". Thus if the court is to exercise a discretion under CPR 6.16 this is significantly circumscribed. The rule has as its predecessor 6.9, which is extensively discussed in the case law to which I shall shortly make reference.

22. The methods of service are prescribed by **CPR 7.5**

7.5 Service of a claim form

(1) Where the claim form is served within the jurisdiction, the claimant must complete the step required by the following table in relation to the particular method of service chosen, before 12.00 midnight on the calendar day four months after the date of issue of the claim form.

Method of service	***Step required***
First class post, document exchange or other service which provides for delivery on the next business day	**Posting, leaving with, delivering to or collection by the relevant service provider**
Delivery of the document to or leaving it at the relevant place	**Delivering to or leaving the document at the relevant place**
Personal service under rule 6.5	**Completing the relevant step required by rule 6.5(3)**
Fax	**Completing the transmission of the fax**
Other electronic method	**Sending the e-mail or other electronic transmission**

23. It is unnecessary to deal in detail with the circumstances in which an entitlement to serve proceedings by fax or e-mail arise. Seemingly, fax service (where by the very nature of the process original documents are copied) is commonplace where a solicitor has been nominated to accept service, and has provided a fax number. No issue arises but that the claimant could have done that in this case.

24. Although the Claimant has never sought a discretion under **CPR 7.6** and this rule was not referred to in argument other than in passing, it has a relevant context in the light of the case law referred to below and accordingly I set it out in full:

> **7.6 Extension of time for serving a claim form**
> (1) The claimant may apply for an order extending the period for compliance with rule 7.5.
> (2) The general rule is that an application to extend the time for compliance with rule 7.5 must be made-
> (a) within the period specified by rule 7.5; or
> (b) where an order has been made under this rule, within the period for service specified by that order.
> (3) If the claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if-
> (a) the court has failed to serve the claim form; or
> (b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and
> (c) in either case, the claimant has acted promptly in making the application.
> (4) An application for an order extending the time for compliance with rule 7.5 -
> (a) must be supported by evidence; and
> (b) may be made without notice.

25. The important consideration here is that there is a very high hurdle for a party seeking to invoke this discretion to overcome. It is used almost invariably prospectively and it is difficult to contemplate circumstances in which a court might retrospectively make an order. This emerges from the case law which will be considered. In the experience of this court such an application is usually a last

desperate attempt by a party which has missed the four month deadline, before passing a file to professional indemnity insurers.

26. I now turn to the case law. It is important to note at the outset of this review, that nowhere within the CPR is there any specification as to the form of the documentation which has to be served. This is derived from two particular cases which should be considered first and foremost, because they are important planks in the Appellant's argument and if this decision is to be upheld, they will have to be considered in context, namely how they affect the exercise of a section 3.10 discretion.

27. In **Cranfield v Bridgegrove Ltd [2003] EWCA Civ 656** the Court of Appeal was concerned with a number of conjoined appeals in which questions had been raised about how the court should exercise its discretion under **CPR 7.6 (3**) where there had been a failure of court service (thus relevant to subparagraph (3)(a)) and also addressed the situation where the wrong defendant had been served, and an application was being made for the discretionary exercise of a power under **6.9** (**6.16** as it now is) to dispense with service. The Court of Appeal was providing its judgment in the light of a series of authorities (see below) where the use of the various discretionary powers had been defined in circumstances of service failure. Whilst there had been no situation akin to the one which arises in the present case, Dyson LJ made comments in relation to the form of documentation which it is expected would be served, which are relied upon by the Appellant:

> "87. In these circumstances, it is not necessary to decide whether the judge was right to dispense with service under CPR 6.9. However, in view of the importance of giving some guidance as to the scope of CPR 6.9 in cases such as this, we shall express our opinion on this issue on the footing that (contrary to the view just expressed) service should have been on the defendant's solicitors under CPR 6.4(2). In our judgment, on that hypothesis, the ircumstances identified by the judge did not make this an "exceptional" case within the letter or the spirit of *Anderton* and *Wilkey* . But we wish to emphasise the following features. It is clear that a copy of the claim form as issued was sent to Branton on 15 March 2002. In other words, a copy of the right document was sent to the right person at the right address and, if CPR 6.7 applied, it was deemed to have been served before the expiry of the 4 month period. Moreover, Branton were informed by Horwich that the original documents had been served on the defendant's registered office that same day. The only flaw in the process was that Horwich sent a copy of the issued claim form, rather than the original document itself. In this regard, it is to be noted that, if Horwich had sent the issued claim form to Branton by fax, that would have been good service. A document received by fax is a copy document. The circumstances revealed by this case do not precisely satisfy the *Anderton* criteria: Branton received a document served by one of the permitted methods of service (ie by first class post on the right person at the right address), but it was a copy of the document that should have been served.

28. These comments were made in one of the appeals where the issue which arose was whether or not alternative methods of service could be utilised where a defendant company had a registered address, and section 725 of the Companies Act 1985 applied. The court held that the elected method of service adopted by the claimant was a good one, and accordingly it was unnecessary for the claimant to have any kind of discretion exercised under **6.9** (**6.16**) although Dyson LJ thought it was appropriate to give guidance on the hypothetical situation whereby the claimant had been required

to serve on the solicitors only. If that had been the case, the claimant's solicitor had served only a copy claim form and not the original sealed version. Whilst proceeding hypothetically, he went on to say this:

> "88. In these very unusual circumstances, had it been necessary to do so, we would have decided that it was right to dispense with service under CPR 6.9. It is possible that the relationship between service under section 725(1) and service under the CPR was not fully understood, and that the importance of serving on the party to be served the original claim form that has been issued (rather than a copy) was not appreciated. But in future the significance of these points will have to be taken into account. Errors of this kind will generally not be regarded as good reasons for making an order under CPR 6.9. In stipulating a strict approach for the future in such circumstances, we have been guided by what was said in *Anderton* and *Wilkey*."

29. Thus Dyson LJ was saying, without identifying the specific rule or practice direction which required the form of the documentation to be the original, in future where reliance was sought to be placed upon **CPR 6.9** (**6.16**- dispensing with service) the court would have to adopt a stricter approach. However, nowhere within the judgment does he refer to any other discretionary power which may be open to the court, vis **CPR 3.10**.

30. It is worth noting before leaving this case that Dyson LJ in one of the other conjoined appeals (**McManus**) did distinguish between a copy issued and sealed claim form and a mere bare copy, an important factor for the court in not exercising a **CPR 6.9** discretion, but he did not indicate what difference it might have made if a copy sealed form had been served.

> "57. The circumstances of the present case fell outside the scope of para 58 of *Anderton* in a number of respects. First, what was purportedly served was not the claim form issued by the court or a photocopy of that document, but a draft claim form. Thus, unlike the document issued by the court, it was not stamped with the court seal, and it did not contain a statement of truth. CPR 7.5 provides that, after a claim form has been issued, "*it* must be served on the defendant" (emphasis added)."

31. Whilst these comments do not comprise the *ratio* of the decision in the particular conjoined appeal, it is suggested that as guidance it may amount to more than *obiter dicta* and indeed influenced the court in a later case relied upon by the appellant, namely **Hill Contractors and Construction Ltd v Strath [2013] EWHC 1693 (TCC).** This is a case where the claimant building company, who had brought proceedings in relation to an unpaid balance under a JCT contract when the bill was being challenged for defective workmanship, sought to have its claim reinstated after it was struck out for non-service of the particulars of claim. To obtain a final sum under the contract, proceedings had to be issued quickly whilst negotiations were continuing, and the claimant issued but did not (purportedly at least) serve those proceedings. Instead its solicitors sent a photocopy of the sealed form by way of information. The claimant did not want to prejudice its position by serving prematurely, because that would have required service of the particulars of claim within 14 days. As it happened, there was no such service of the particulars of claim, because the claimant did not believe it was necessary, but on the defendant's

application it was struck out on an *ex parte* application only to be reinstated by Ramsey J sitting in the TCC.

32. Accordingly, unlike the present case where the Claimant sought to rely upon a form of service which did not provide original uncopied documents, the claimant in **Hill** was trying to do precisely the opposite, and to avoid the sending of a copy being regarded as service. Further, no question arose as to whether the claim form, if indeed it had been issued, had been out of time or incorrectly served otherwise, requiring any discretion under **CPR 6.15**, **6.16**, or **7.6(3).** The court addressed, inter alia, a submission advanced by the defendant's counsel seeking to say that no indication had been given in the **Cranfield** case as to whether first or second generation copies could not amount to the "original claim form", and, in the process of indulging the claimant and ruling that there had not been effective service, Ramsey J said this of the judgment of Dyson LJ

> "45. In my judgment the statement in Murphy within the judgment in Cranfield v Bridgegrove must be given great weight in the context of this case which concerns the question of what is properly required for service of a claim form within the jurisdiction. In my judgment under the CPR what is required, as a general rule, is service of a hard copy document as issued and sealed by the court and a photocopy of that document is not sufficient. When a claim form is issued there is an original sealed claim form retained by the court and original sealed claim forms provided so that one can be retained by the claimant and one or more can be served on the defendants. As stated in Cranfield v Bridgegrove at [87] the only flaw in the process was that "a copy of the issued claim form" rather than "the original document itself" was received. In that case the copy was a faxed copy of the original claim form."
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> 46. It is evident from the judgment of Dyson LJ that a copy of the claim form was not sufficient and that what was required was a document originally issued and sealed by the court. For those reasons, in this case the photocopy of the claim form which was sent by Document Exchange to Birketts on 23 January 2013 was not the document required for service to be achieved under CPR 6.3. In order to effect proper service by that means I consider that a claim form, as issued and sealed by the court and as an original document would have had to have been enclosed with Prettys' letter."

33. Although there was no application for any discretion from the court, Ramsey J went on to say this, as is relied upon by the Respondent in the current appeal:

> 47. "In this case, unlike most cases, it is the claimant who is contending that there was not proper service of the claim form whilst the defendants are contending that there was. In most cases the position is reversed and in those circumstances CPR 3.10 may apply so that any error of procedure does not invalidate any step taken in the proceedings unless the court so orders or, as in the case of Murphy in **Cranfield v Bridgegrove**, the court may decide to exercise its discretion to dispense with service of the claim form under what is now CPR 6.16. Equally, where, as in this case, a defendant becomes aware that a claim form has been issued the defendant can serve a notice requiring service under CPR 7.7 so as to obtain a remedy. In the present case none of the provisions apply or were sought to be applied"

34. These are the only authorities to which the court has been referred which address the form of the documentary material to be served. I have already made mention of a series of cases which were concerned with the interplay of various discretionary powers where there had been some sort of deficiency in service. The first of these was a case called **Vinos v Marks and Spencer PLC (8th June 2000, Court of Appeal**). This was a claim arising out of an injury at work where, because of ongoing investigations and negotiations are the claim was only just issued in time before limitation period expiry. However the claim form was served nine days late, as a result of oversight, and the claimant failed to persuade the court that it had a discretion to extend time after the event, because of the restrictive nature of **CPR 7.6(3)** which only allowed extension once the period had expired if it could be established that the claimant had taken all reasonable steps to comply. In the lower court it had been held that if discretion had been available, because of the absence of prejudice, it would have been applied in favour of the claimant. The Court of Appeal, when faced with an argument that a discretion existed under **CPR 3.10**, (or **CPR 3.1(2) (a))** considered in conjunction with the overriding objective to deal with cases justly (**CPR 1.2**) where what was being asked was to correct an error of procedure, (or extend time) held that the general discretion could not enable the court to do what was specifically forbidden by other rules. May LJ said:

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

35. The availability of discretion was considered again a few weeks later in **Godwin v Swindon Borough Council [2001] EWCA 1478**. In this case involving an injury at work, the claim had been issued within time (just) and subsequently there had been two separate extensions of time for the service of the claim form. When it was served in the proper form the dates provided by the deemed service provisions meant that the claimant's solicitors were out of time by one day. However it could be proved that the necessary documentation had been received by the defendant's solicitors within time. The claimant tried to argue that the deemed provision was rebuttable, but his fallback position was the availability of a discretion vested in the court to dispense with service under **CPR 6.9** (**6.16**). The court disagreed. In paragraph 51 May LJ said:

> "In my judgment Mr Regan was initially correct in not seeking in the alternative to recover his client's position by applying for an order dispensing with service under rule 6.1 or 6.9. In short, I would resolve the palpable disagreement between Douglas Brown J in *Infantino v. McLean* and McCombe J. in *Anderton v. Clwyd* in favour of McCombe J. essentially for the reasons which he gave. The heart of the matter, in my view, is that a person who has by mistake failed to serve the claim form within the time period permitted by rule 7.5(2) in substance needs an extension of time to do so. If an application for an extension is not made before the current time period has expired, rule 7.6(3) prescribes the only circumstances in which the court has power to grant such an extension. Just as *Vinos v. Marks & Spencer* decides that the general words of rule 3.10 cannot extend to enable the court to do what rule 7.6(3) specifically forbids, I do not consider that rule 6.1(b) or 6.9 can extend to enable the court to dispense with service when what would be done is in substance that which rule 7.6(3) forbids. If rule 6.9 did so extend, it would be tantamount to giving the court a discretionary power to dispense with statutory limitation provisions."

36. Accordingly whilst this rule appeared to serve the claimant a great injustice, its application was upheld: there was no discretion. A party who chose to issue so near the end of a limitation period had to accept the risk of procedural calamity through service failure.

37. In **Kaur v CTP Coil Ltd (Court of Appeal 10th July 2000)**, a similar situation arose as to that in the case of **Vinos**. There had been solicitor error in not serving a claim form in respect of work-related injury in time for two individuals. Significant problems had been experienced in preparing the necessary particulars which had to be served with the claim form, and it was argued initially that this could be taken into account on an interpretation of **CPR 7.6(3).** Alternatively, and perhaps with more enthusiasm, it was submitted that the court had discretions under **CPR 3.9** and **3.10** to address the failure. The Court of Appeal disagreed, applying the ratio in **Vinos**, and stating that there was no material difference between **CPR 3.9** and **3.10** for these purposes. If the claimants did not come within **CPR 7.63**, there was no other discretion available them.

38. In **Elmes v Hygrade(Court of Appeal 24th January 2000)**, another personal injury claim, the claimant's solicitor made the mistake of serving the proceedings on the defendants insurer rather than the defendant. On this occasion, in addition to arguing the general discretion under **CPR 3.10**, the claimant relied upon **CPR 6.8** (now **6.15**) for a direction of service by an alternative method, submitting that the words "*good reason*" gave the court a discretion so to do. This would comply with the application of the overriding objective. However the court disagreed, finding that the power under **CPR 6.8** was prospective, rather than retrospective, and in any event following **Vinos** and **Kaur CPR 3.10** could not trump the restrictive parameters of **CPR 7.6 (3).**

39. The seminal case in this short series of authorities was **Anderton v Clwyd County Council [2002] EWCA Civ 933**. Again, the court was concerned with a series of conjoined cases most of which raised the question as to whether or not a deemed service date was rebuttable by evidence of actual service, (ie the point raised in **Godwin**) and in particular if this was prevented as a finding on interpretation of the rules, whether there was a denial of access to justice in breach of article 6. There was

no real consideration of broader discretions available under other rules, or different circumstances of service failure. The court upheld the approach in Godwin because there was **no** service at all where a claimant was caught by the deemed service provisions and that CPR **6.9** (**6.16**) was prospective rather than retrospective. However the case is important in two respects. First of all for the stricture applicable to those who leave service until the last minute:

> "2. The consequences of failure to comply with the rules governing service of a claim form are extremely serious for a claimant and for his legal advisers. The situation becomes fraught with procedural perils when a claimant or his solicitor leaves the service of a claim form, which has been issued just before the end of the relevant statutory limitation period, until the last day or two of the period of 4 months allowed for service by rule 7.5(2) or, even worse, almost to the end of an extension of time granted by the court. If the claim form is then served by first class post, by fax or in another manner permitted by the CPR there is high risk, demonstrated by **Godwin** and by the cases under appeal**,** of a successful application by the defendant to strike out the claim on the ground of non-compliance with the rules **and** of the cause of action then being statute barred. The risks never need to be run: they can easily be avoided by progressing the proceedings in accordance with the spirit and letter of the CPR. Now that the disputed interpretations of the CPR have been resolved by **Godwin** and by this judgment, there will be very few (if any) acceptable excuses for future failures to observe the rules for service of a claim form. The courts will be entitled to adopt a strict approach, even though the consequences may sometimes appear to be harsh in individual cases."

40. Further, and perhaps more apposite to the case in question, is the qualifying exception to the existence of a discretion to dispense with service, i.e. how "*exceptional circumstances*" might apply in the context of those who had actually make an ineffective attempt to serve the claim form, thus making further service unnecessary:

> "56. In our judgment there is a sensible and relevant distinction, which was not analysed or recognised in **Godwin,** between two different kinds of case.
>
> 57. First, an application by a claimant, who has not even attempted to serve a claim form in time by one of the methods permitted by rule 6.2, for an order retrospectively dispensing with service under rule 6.9. The claimant still needs to serve the claim form in order to comply with the rules and to bring it to the attention of the defendant. That case is clearly caught by **Godwin** as an attempt to circumvent the limitations in rule 7.6(3) on the grant of extensions of time for service of the claim form.
>
> 58. Second, an application by a claimant, who has in fact already made an ineffective attempt in time to serve a claim form by one of the methods allowed by rule 6.2, for an order dispensing with service of the claim form. The ground of the application is that the defendant does not dispute that he or his legal adviser has in fact received, and had his attention drawn to, the claim form by a permitted method of service within the period of 4 months, or an extension thereof. In the circumstances of the second case the claimant does not need to serve the claim form on the defendant in order to bring it to his attention, but he has failed to comply with the rules for service of the claim form. His case is not that he needs to obtain permission to serve the defendant out of time in accordance with the rules, but rather that he should be excused altogether from the need to prove service of the claim form in accordance with the rules. The basis of his application to dispense with service is that there is no point in requiring him go through the motions of a second attempt to complete in law what he has already achieved in fact. The defendant accepts that he has received the claim form before the end of the period for service of the claim form. Apart from losing the opportunity to take advantage of the point that service was not in time in accordance with the rules, the defendant

> will not usually suffer prejudice as a result of the court dispensing with the formality of service of a document, which has already come into his hands before the end of the period for service. The claimant, on the other hand, will be prejudiced by the refusal of an order dispensing with service as, if he is still required to serve the claim form, he will be unable to do so because he cannot obtain an extension of time for service under rule 7.6(3).
>
> 59. In the exercise of the dispensing discretion it may also be legitimate to take into account other relevant circumstances, such as the explanation for late service, whether any criticism could be made of the claimant or his advisers in their conduct of the proceedings and any possible prejudice to the defendant on dispensing with service of the claim form."

41. In a later case applying some of this jurisprudence, **Kueniyah**, the Court of Appeal again addressed the question as to the extent of the discretion under **CPR 6.9** (**6.16**) and *exceptional circumstances*. The court referred to the distinction drawn between those cases where there had been no service at all (as in that case because the deemed service provisions would suggest that the claimant had been out of time) and those where there had been ineffective service (described by counsel in this case as mis-service). The case is helpful in inviting a simple approach, acknowledging the existence of a discretion which is likely to be more readily exercised in certain types of cases than others.

> "14. As Mr Birts QC, who appeared for the claimants with Mr Hill, pointed out, those decisions were all concerned with cases where the claim form had, in fact, been served within the four month period identified in r 7.5(2), but, because of the deeming provisions of r 6.7, service had to be treated as effected outside that period. However, in agreement with Crane J, we do not consider that that can make any difference to the applicability of the principles laid down in those cases to the present case. In this case, as in those cases, service of the claim form was not effected in accordance with CPR Part 6 within the time permitted, albeit that the defendant had in fact received the claim form (or a copy thereof) within that period. If anything, the claimant's position could be said to be a little weaker here, as in the earlier cases, the claim form was properly served within the four month period, but the claimant was caught by a deeming provision, whereas here the claimant had simply not served the claim form in a manner which complied with the requirements of the CPR within the permitted period. However, such fine distinctions should not, in our view, be drawn in this area, where simplicity, clarity and certainty are particularly desirable."

42. It is clear from the cases referred to above, that the senior courts have only considered the applicability of a broader discretion outside the service rules (Parts 6 and 7) in cases where there has been no service effected at all. In other words, **CPR 3.10** could not permit that which was disallowed by other rules, and the "exceptional" category significantly circumscribed by the Court of Appeal in **Anderton** dealt with the dispensing discretion only (**6.9[6.16]),** and further did not seek to define "ineffective" service, or mis-service as it has been described here. Insofar as guidance was given as to any qualifying exception in other cases, this was considered in the context of the dispensing provision in **CPR 6.9** (**6.16**) (**Anderton, Kuenoyiah**)

43. There were two more recent cases, referred to by the editors of the White Book in the commentary associated with **CPR 6.16** which merit mention, because they contain *obiter dicta* which is said by the Respondent to this appeal through counsel Mr Taylor, to be of relevance. The first is **Philips v Symes [2008] 1 WLR 180** the facts of which are relatively complex and do not require elucidation. However

during the course of the process for the service of a worldwide freezing order one of several defendants was served in Switzerland with a claim form issued out of the English High Court without the English translation of the provisions of the order (a mistake by the Swiss court). Whilst the principal issue was one of *lis pendens*, when considering whether service had been effected, or if it had not whether it could be dispensed with under **CPR 6.9**, the House of Lords appeared to acknowledge that **CPR 3.10** would have been an alternative way to correct an error of procedure. At paragraph 31 Lord Brown observed:

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

44. The second case is an unreported decision by Popplewell J in **Integral Petroleum SA v SCU Finanz AG [2014] EWHC 702** (Comm). It was in fact a decision in the commercial court involving a case concerned with an alleged breach of an international supply contract. The application before the court was to set aside a default judgment, but the question arose as to whether or not service of the claim form had been effective (this was not a case where any limitation issue was likely to arise) in the light of the service provisions and in particular service by e-mail. If this had not been achieved in accordance with the rules, then time would not have begun to run for service of the defence, allowing the default judgment be set aside. The court was referred to the **Philips** case and the decision of the House of Lords, in particular the judgment of Lord Brown. The issue was whether service failure in this context amounted to an error of procedure. Popplewell J said:

> 24. A number of observations fall to be made. First, these remarks about CPR 3.10 were not part of the ratio of the decision, which upheld the order dispensing with service under CPR 6.9, which it had been assumed in both courts below was necessary (see[34]). What was said about the effect of CPR 3.10 was no more than it was "at least arguable" that it applied. Nevertheless these were considered statements and the language in which they were expressed suggests more than mere arguability. ……
>
> 29. ……..Sixthly, Lord Brown's observations at [31] that CPR 3.10 was engaged were addressed to the position not only of Mrs Nussberger, on whom there had been service by a permitted method of a package of documents which included the German translation of the claim form and particulars of claim in both languages, but also to the position of Nefer, the third defendant, on whom there had been no service at all. In this he went further than the majority in ***The Goldean Mariner***, where there had at least been some service, of the acknowledgment of service form if not the writ. I have some difficulty in treating an "error of procedure" in CPR 3.10 as encompassing circumstances where there is no purported service of any document of any kind, particularly where CPR 3.10(a) automatically validates subsequent steps in the proceedings if CPR 3.10 is engaged. I would be inclined for my part to treat the remedy in such case as lying, if at all, with the discretionary power to dispense with service under CPR 6.9. Nevertheless the reference by Lord Brown in [31] to CPR 3.10(b) applying to the third defendant, Nefer, is indicative of the view of the Judicial Committee that CPR 3.10 is a beneficial provision to be given very wide effect indeed.

34. ……..Returning to the facts of the instant case, in my view the error of procedure in serving the Particulars of Claim by e-mail was a failure to comply with a rule or practice direction which falls within CPR 3.10. Accordingly under CPR 3.10(a) such service is a step which is to be treated as valid, so as to commence time running for the service of the defence, and disentitle SCU-Finaze in this case to bring itself within CPR 13.2. In reaching that conclusion I have taken into account the following considerations.

35. ***Phillips v Nussberger*** establishes that CPR 3.10 is to be construed as of wide effect so as to be available to be used beneficially wherever the defect has had no prejudicial effect on the other party. The instant case is a good example where such beneficial use is called for. Service by e-mail on Maitre Cohen was sufficient to bring the Particulars of Claim to his attention. He was SCU-Finanz's chosen lawyer appointed for the purpose of receiving the document. The document reached the appropriate destination in just the same way as if it had been sent by post to the Paris address given in the acknowledgement of service which would have constituted good service. He ought reasonably to have known, as a European accepting the burden of acting for a client in English High Court proceedings, that particulars of claim required to be answered by a defence, and that in default judgment might be entered. What was effected was purported service, not merely transmission for information only (cf ***Asia Pacific (HK) Ltd v Hanjin Shiping Co Ltd*** [2005] EWHC 2443 (Comm)).

45. In short Popplewell J was prepared to accept the wider jurisdiction available under **CPR 3.10** to correct a procedural error as an alternative to obtaining a discretionary order under **CPR 6.16**. The editors of the White Book at page 253 make specific reference to these two cases:

> However, in appropriate cases r.3.10 can be relied on to regard a procedural step in service of a claim form or other document as not invalidated, so that an order under r.6.16 need not be made. In Integral Petroleum SA v SCU-Finanz AG [2014] EWHC 702 (Comm) March 11, 2014 unrep. Poppelwell J, the judge, relying on the decision of the House of Lords in *Phillips v Nussberger* (reported sub nom Phillips & Another v Symes & Others (No.3) [2008] 1 W.L.R.180. Held that a failure to fulfill the conditions in Practice Direction 6A (because the email address of the EEA lawyer to whom the Particulars of Claim was transmitted was not contained in the Acknowledgement of Service nor was it on the writing paper of the lawyer and he had not indicated in writing that an email address might be used for service) was an error of procedure in serving the Particulars of Claim by email and was a failure to comply with a rule of Practice Direction which fell within CPR r.3.10. It should be noted, however, (1) that while the view that the failure of procedure in the *Phillips* case was within the CPR r.3.10 was very powerful obiter (the decision was in fact about whether in the circumstances the first instance judge was right to invoke not r.3.10 but the then r.6.9 (now r.6.16) to dispense with service), the judge, had difficulty with the view that an error of procedure in CPR r.3.10 could encompass circumstances where there is no purported service of any document of any kind. He reinforced this by stating I can envisage circumstances in which purported service by a method which is not permitted by the rules at all is sufficiently distant from what is required by the rules as arguably to fall outside CPR r.3.10. Moreover I should not be thought to be endorsing any proposition that CPR r.3.10 can be used as a matter of course to circumvent service out of the jurisdiction on a firm of solicitors or other lawyers as a matter of practical convenience without seeking an order for service by an alternative method. (2) The judge also opined that a narrower approach to CPR r.3.10 is justified when it is sought to be applied to the service of originating process, because such service is what establishes in personam jurisdiction over the defendant. (3) the logic of r.3.10(a) is that it treats as valid, steps which fall within the rule automatically without need of an order remedying the error under r.3.10(b).
> The decision in *Integral Petroleum SA* , together with the dicta in the *Phillips* case (see in particular Lord Brown at para.33) suggest that the question to be asked is whether the attempt to serve the Claim Form or other document was or was not ineffective so that it could be said that there has been an error of procedure within r.3.10(a) which does not invalidate the step taken in the proceedings, that is, in this case, attempted service. Read in that way, r.3.10 prevents triumph of form over substance and does not readily apply where there has been no attempt at a procedural step or such step is one which is not permitted by or within the rules at all where an order under r.6.16 might be appropriate.

46. The emphasis I have provided, as this I believe provides the key to the approach which must be taken in the present case, and I shall deal with this below under my discussion.

Respective arguments

47. Mr Wilkinson submits that once the judge had decided, as he believed he was obliged so to do on the basis of the **Hill Contractors** decision, that this is a case where no service had been affected at all, (judgment para 2 D) it was not open to him to apply any discretion. His powers were significantly circumscribed by the line of authorities beginning with **Vinos**, and whether this matter was approached from the position of a broader discretion under **CPR 3.10**, or the more limited and qualified discretions under **Part 6**, the fact remains that the Claimant has simply failed to serve in time, and would have no recourse to extension of time under 7.6 (3). What the Claimant is endeavouring to do is to circumvent those restrictive rules, and to use **CPR 3.10** as a trump card, something which she is not entitled to do on the basis of the reported cases. The fact that there is *obiter dicta* in other cases does not avail the claimant, because the ratio in **Vinos**, **Godwin** and **Anderton** is clear.

48. In this respect, he says, the judge was wrong in his interpretation of the discretionary rule under **CPR 3.10**. This is particularly so, because he did not dispense with the need for service of the original claim form, which would have been demonstrative of an exercise of the **6.16** discretion.

49. It does not matter, says Mr Wilkinson, that the rule may seem harsh and serve an injustice to the Claimant; in any event she has recourse to an action against her solicitors and will not lose out in the long run. Insofar as the commentary in the White book at page 253 and the cases therein referred to of **Integral Petroleum** and **Phillips** provide encouragement for the use of **CPR 3.10** in the circumstances, they are only *obiter* comments which have to be considered as a secondary to the authoritative rulings in the main line of cases.

50. Mr Wilkinson also provides another reason why **CPR 3.10** cannot avail the Claimant. He submits that the rule refers to failure to comply with rules or practice directions in relation to "*any step taken within the proceedings*" and insofar as the proceedings were not commenced until service has been effected, there could be no power of rectification. He relies in particular on the comment of Mr John Baldwin QC sitting as a deputy judge of the Chancery Division of the High Court in the recent case of **Dunbar Assets v PCP Premier Ltd [2015] EWHC 10** at paragraph 35 to the effect that without service the formal process of litigation does not begin.

51. Finally, he asserts that it is immaterial that the claim form may have come to the attention of the Defendant for all intents and purposes, and there is no further

information which would have been provided by the provision of an original as opposed to a copy claim form; the fact remains that the rules are there to be observed for the purposes of providing parties with certainty, and certainty cannot be achieved if there is a sporadic adherence only.

52. Mr Taylor, on behalf of the Respondent/Claimant, seeks to uphold the decision of the learned district judge; assuming that he had the power to correct what is said was a procedural error, this court should not interfere with the discretionary exercise of the power which was clearly within the generous ambit of his discretion.

53. Insofar as it is said that he made an error of law in exercising a power in the first place, it is submitted that the judge was clearly considering his discretion under **CPR 6.16** to dispense with service in conjunction with **3.10**, and when referring to a simple procedural error in paragraph 9 it is of no significance that he does not refer again to exceptional circumstances. Plainly the judge was regarding this as a case which was exceptional, because the service of the copy claim form served every single substantive litigation and procedural purpose other than actually being the original form itself.

54. He relied upon the comments of Lord Brown in the **Phillips** case to support his submission that if the corrective procedure under **CPR 3.10** is utilised, it may not even be necessary to declare service to have been valid and effective; there is a parallel between a claim form served in an incorrect language, which was not rule compliant in the strictest sense, and the claim form not served in its original uncopied existence, as happened here. Relying also on the decision of Popplewell J in the **Integral Petroleum** case, he reminds the court that **CPR 3.10** is a beneficial provision to be given wide effect. This is entirely in accordance with the overriding objective, and this court should have in mind, as encouraged by the editors of the White Book, to prevent a triumph of form over substance.

55. Insofar as it might be said that **CPR 3.10** can only apply to a step taken in the proceedings, he points out that proceedings begin with the issue of the claim form.

Discussion and determination

56. It is self evident that so much judicial time and energy has been spent in recent years on service issues, and the interpretation of CPR 6 and other related provisions, in those cases where service was being attempted or effected at the very last possible opportunity. The stakes are always high in such circumstances; the prospect of a claim becoming statute barred if a service mistake is corrected, or the loss of a limitation defence if such a mistake is tolerated, or a procedural point is not taken, are both plain. It is easy to imagine many everyday situations where service is not effected strictly in accordance with the rules (or as they are routinely interpreted) but this is

simply overlooked; or alternatively the parties can simply start again at a minimal expense. Such commonplace situations arise where there is plenty of time to spare.

57. It is for this reason that a court, when faced with an application such as that before District Judge Benson, will have to hold the line between competing tensions; the need to ensure clarity and certainty in the rules so that the parties know where they stand, and the overriding objective, which includes not only the need to enforce compliance with rules, practice directions and orders, but also to deal with cases justly and fairly, and at proportionate cost. In many instances, it may occur to the court that a procedural default is so negligible and of such little consequence that to use that default as a stick with which to beat the litigant is a denial of justice. On the other hand a signal cannot be sent out that the rules are a distraction and for voluntary observance only.

58. I make it plain at the outset that I approach this case on the basis that if District Judge Benson had the discretion contended for, it was entirely properly exercised. Indeed it is difficult to imagine how he might have made any different order, bearing in mind the circumstances in which the form of service came to be challenged. Accordingly, I am satisfied that the decision made was one within the generous ambit of any discretion. The more difficult question for this appeal is whether such a discretionary power *existed* and its limits, whether under **CPR 6.16**, or **CPR 3.10**.

59. I have already made reference to the clear incongruity which arises from an interpretation of the rules which permits a digitally reproduced copy of the claim form to be served by fax, an option open in this case and in many others, whereas if solicitor service by DX or post is effected, what is required is the original form containing the sticker with a case number and the barcode above the date, and the seal, neither of which have passed through an electronic copying process.

60. In days gone by one might have expected to see an original typed writ on foolscap set out within very strict parameters. Happily, such requirements no longer pertain; it is plain from a review of the retained document on the court file that prior to any process which is undergone at issue, the bare claim form is almost certainly created as an online document which could be reproduced many times over at the press of a computer key. Doubtless it is the three versions of these which are either brought or sent to the court prior to issue.

61. What makes the document unique and "original", presumably, is the sticky label with the barcode, and a stamped seal. The court copy does not contain a seal, because it does not need to, although it has an original computer produced sticky label. Clearly the label is for information and computer processing purposes, and the barcode could be read whether the document is over-copied or not. Accordingly, for the purposes of endeavouring to understand this rule, and the way it has been interpreted by higher judicial authority, I am assuming that what is important is the

application of the seal, which on an uncopied version will appear in red or other coloured ink, but unless reproduced in colour, on the copy version will appear as grey or black.

62. It is accepted by both counsel, that notwithstanding the stricture of Dyson LJ in **Cranfield**, subsequently adopted by Ramsey J in **Hill**, that there is no specification in the rules as to the *form* which service must take, and in particular whether that seal referred to can be over-copied or must be transmitted in its original uncopied form. Because the parties are supplied with two sealed versions, (where there is only one defendant) it is not unreasonable to assume an expectation that one of these will be served on the defendant, and one retained by the claimant.

63. **CPR 2.6** is the rule which deals with court documents to be sealed. There are two noteworthy sub-rules. First, in **(2) (b)** it is stated that the court may place a seal on a document not only by hand but also by printing a facsimile or recreating it electronically. Clearly, this allows for bulk issue or online provision in some instances (for example PCOL). Second, in **(3)** it is stated that a document purporting to bear the court seal shall be admissible in evidence without further proof.

64. In commenting on these rules, the editors of the White Book suggests that electronic sealing is likely to be used far more widely in the future as the courts gain the benefit of information technology. In particular, at page 36 (2015 edition) of paragraph **2.6.3**, there is commentary on **(3)**:

> "The general rule is that a party wishing to rely on a document must adduce primary evidence of its contents. At common law, by way of exception to the general rule, the contents of most public documents could be proved by copies of various kinds on account of the inconvenience that would have been occasioned by production of the originals. This common law rule is declared in many specific contexts by statutes. Examples include the Senior Courts Act 1981 s.132, which states that any document purporting to be sealed or stamped by the Senior Courts shall be received in evidence in all parts of the United Kingdom without further proof. The County Courts Act 1984 s.134(2) was to similar effect, but limited to all parts of England and Wales, and has been omitted from that Act by the Civil Procedure (Modification of Enactments) Order 1998 (SI 1998/2940).
> Former RSC Ord.38 r.10(2) stated that every document purporting to be sealed with the seal of any office or department of the Supreme Court should be received in evidence without further proof. This sub-rule further stated that any document purporting to be so sealed and to be a copy of a document filed in, or issued out of, that office or department should be deemed to be an office copy of that document without further proof unless the contrary is shown. Rule 2.6(3) follows former RSC Ord.38 r.10(2) and declares that a sealed document is admissible in evidence without further proof in the courts to which the CPR. The effect of the Evidence Act 1845 s.1 is that, when a statute permits a document to be proved by certified or sealed copy, it is unnecessary to prove certification or sealing; the mere production of the copy suffices."

65. Of course, the fact that an official court sealed document can be proved in this manner, i.e. by production of the copy bearing the seal, does not mean that other service requirements are in some way obviated. It may be relevant, however, to note the primacy of <u>purpose</u> in this respect; there is a need to establish the involvement of the court process and in many instances it will not be proportionate to require this to be achieved by an unblemished, uncopied version, rather than by a perfectly good copy.

66. The rule which deals with personal service (**CPR 6.5**), as indicated, does not make any reference to a requirement to serve the original claim form, or how the claim form should be defined in its entity, nor is there any commentary to the rule to provide further elaboration. That does not mean to say that judicial interpretation in the cases referred to has no substance; quite the contrary. Whilst the rules provide a complete code for procedural requirements, there are bound to be lacunas, and from time to time judicial interpretation is necessary. For my part, particularly with the weight of judicial authority, I am not prepared to say that the original in uncopied form as stamped by the court is not required for service; I merely observe that this requirement whilst incongruous, appears to be borne out of tradition and expectation rather than rule stipulation, and at some point clarification may be required from the Civil Procedure Rules Committee. For the present, I am proceeding on the basis that the solicitor was in error, and *should* have served the original as defined.

67. A significant amount of discussion took place in the court below, as well as before me on the need to distinguish between mis-service and non-service. This is plainly necessary in those cases where a party seeks to avail itself of the discretionary indulgences under **6.15** and **6.16**, in the context of more complex service situations, and where there has been a genuine attempt to comply with the requirements even if there was a misunderstanding or error of judgment. The more obvious case of a failure to serve in time, (overlooking) or falling foul of the deeming provisions is easily understandable as a case of <u>non-service</u> because the rules are entirely prescriptive in setting the time limits.

68. Whilst there is no challenge as to the finding of District Judge Benson in paragraph 2 of his judgment, it seems to me that the present situation does not sit comfortably with those kinds of cases where the courts have been less than indulgent because time was allowed to expire before service (in other words the first category in the **Anderton** case [para 57]). Plainly the judge has come to his conclusion on the basis of the judgment of Ramsey J in **Hill Contractors**, but it seems to me that that case has to be put in context; there the judge was seeking to extract the claimant from a requirement to serve particulars of claim on the basis that a *copy* claim form only had been provided prior thereto and service had been unintended. It would have been manifestly unjust, and contrary to the overriding objective in the circumstances of that case to visit on the claimant the consequences of a time limit expiry when it was merely bringing an issued claim form to the attention of the defendant without going through a formal process.

69. Whilst those cases involving mis-service tend to relate to complications with the correct identity of a defendant, and the present situation cannot easily be associated with that, it seems to me that a "service form" failure if that is what happened in this case, does not lend itself comfortably to either category.

70. Nevertheless, it is not difficult to understand why the district judge felt himself bound by the dicta in the **Hill** case.

71. Although the judge did not proceed thereafter to deal with the numerous cases which I reviewed in this judgment, nevertheless he correctly identified what he described as the "obvious overlap" between the discretion under **CPR 6.16** and that under **CPR 3.10**. In my judgment, it is right that the court has not been asked to override a time limit however the purported failure of the claimant was to be described. It is noteworthy, insofar as any discretion under **CPR 3.10** is concerned, that in neither **Cranfield** nor the **Hill Contractors** case did the court exclude a power to correct the procedural mistake of form under **CPR 3.10**. It simply did not arise, because in **Hill** the claimant did not require the exercise of discretion under **CPR 3.10** (although it was acknowledged as being available in the converse situation by Ramsey J) and in the **Cranfield** case the court was making its observations as to the form requirement (original not copy) in a hypothetical situation. Dyson LJ did not give any guidance as to how the court might exercise discretion in such circumstances, notwithstanding his exhortation for stricter rule compliance and warning of less indulgence in the future.

72. For this reason, I do not believe that either of these two cases provides particular assistance in approaching the present case however one describes the perceived failure of Messrs Hattons and Mr Bond.

73. I now turn to the line of cases beginning with **Vinos** which dealt mainly with the discretionary powers under the predecessors to **CPR 6.15** and **6.16**. It seems to me that all these cases deal for the most part with the same principle, and that is that the general power under **CPR 3.10** cannot enable the court to do that which is prevented or not permitted under other rules. Furthermore, where the rules provide very restrictive qualifications as the exercise of the discretion, (as in the case **6.15**, namely "good reason", **6.16**, "exceptional circumstances" and **7.63**, "all reasonable steps taken to comply") those qualifications cannot be bypassed by seeking to invoke a more general discretion.

74. It is there that a point of distinction lies with the present case. There was no time limit involved, nor had there been a misunderstanding of the deemed service provisions. The error was not one of *substance* but of *form*. In fact with at least a week to spare before the expiry of the four months for service, it would have been open to the Claimant to correct this error, and equally it would have been open to the Defendant to point out that the served claim form, whilst bearing the court's seal and the issue details, nevertheless appears to have been over copied. In either respect the "correct" documentation could have been provided without any other infringement. I am quite sure, as I have already stated, that the Defendants' solicitors chose not to do so because they hoped to take a procedural advantage when it was too late for the Claimant to do anything about it.

75. It seems to me, therefore, that the general power in **CPR 3.10** is designed to address a situation which fits entirely with these circumstances. The court is not being

asked to indulge a failure of the Claimant who has failed to adhere to strict time limits (even though it is close to the wire, so to speak) nor to bypass other strict procedural requirements which are clear and unequivocal. It is being asked to correct a perceived procedural error in respect of the form, or the *entity* as it might be described of the served document. In this respect the qualifying words in the rule are important "*which does not invalidate any step taken in the proceedings*". The purpose of service is to provide a defendant not only with all the necessary information about what is being claimed, but also an assurance that the claim has been properly issued within the jurisdiction, that service is being effected in time, and that the court has correctly processed the documentation, providing appropriate issue details. In every single respect this service purpose has been complied with; the only default is that in the possession of the Defendant there is a copy, rather than the original, which is precisely the same result which would have been achieved had the Claimant's solicitor elected to fax the documentation rather than to serve it by post or DX. In the experience of this court facsimile service is usually the preferred choice of service at the very last minute, which was not the case here.

76. It is primarily for this reason, in my judgment, that it was entirely appropriate for the learned district judge to regard himself as having a discretion to exercise. Although the reasoning in respect of the relationship with **CPR 6.16** is not clear, I am satisfied that it was not necessary for the judge to exercise any discretion under this rule. Quite simply it was exercising a **CPR 3.10** discretion and correcting an error of form and not substance. This is not the same situation which caused discomfort to Popplewell J in the **Integral Petroleum** case (paragraph 29) because it could not be said that there has been no purported service of any kind. In any event, his observation that **CPR 3.10** is a beneficial provision "*to be given very wide effect indeed*" is entirely apposite.

77. Whilst an editorial observation does not carry the same weight as judicial authority, it seems to me that the note in volume 1 of the 2015 edition of the White Book at page 253 (*supra*, para 45) correctly addresses the type of situation in which **CPR 3.10** can be used, and the broader base for the discretion than that which exists under **CPR 6.16**.

78. Accordingly, I disagree with the submissions advanced on behalf of the Appellant in this case that the learned district judge had no alternative but to strike this case out. Whilst it is unfortunate that he referred to the failure as "non-service", which may on one interpretation have given the impression that he was tying his hands, he correctly identified the situation as one where the error had been one of form and not substance. In this regard he was right to consider that **CPR 3.10** was an appropriate mechanism were any procedural defect had no prejudicial effect on other party (save by implication the loss of an opportunity to argue that has happened here, the removal of a potential limitation defence if the defaulting party finds himself in insuperable difficulties). Furthermore, in paragraph 7 of his judgment, he identifies the purposive nature of service and the provision to the Defendant of all that was required.

79. Of course I have already referred to the fact that the rules are purposive; as the Master of the Rolls said in the 18th implementation lecture on the Jackson Reforms, they exist as the handmaiden rather than the mistress of justice. A strict and punitive approach to non-rule adherence would render the overriding objective superfluous and represent a denial of justice.

80. Furthermore, an influencing factor in the conclusion which is reached is the present and future environment in which civil litigation is to be conducted. The Ministry of Justice and HMCTS is being encouraged to adopt an increasingly digitalised approach to processing cases. Soon court orders will be served electronically, with electronic versions of the seal or signature. A pilot scheme for online dispute resolution will soon be trialled in which determinations will be made in a completely paperless context. In my judgment it would be an anachronistic to persevere with a matrix of rules and requirements which belong to a more formal non-digital age. In so far as the rules may still by interpretation require this, the court should adopt a flexible approach to non-compliance, provided of course, the purpose behind the rule has been achieved.

81. This is not a case in which it would be appropriate to castigate the Appellant/Defendant for pursuing an argument based upon a requirement to promote form above substance, or indeed to have sought to take a procedural advantage by deliberately (as I believe to be the case) declining to point out the form failure to the Claimant when it could have been corrected. This is a cut-throat approach to litigation where the stakes are high, and it is exemplified by the fact that the Claimant tried to do likewise (proceeding to default judgment for lack of acknowledgement of service) and unfortunately it is ingrained in professional litigants these days because the stakes are high. This court merely expresses the hope that the kind of cooperation urged by the Court of Appeal in the recent relief from sanction landmark decisions will begin to seep through to every aspect of the procedural stages of the litigation, thus making far more efficient use of court resources, and limiting cost to the parties.

82. Thus I dismiss the appeal.

Costs Ground

83. An appeal was also pursued in relation to the judge's decision on costs, making an award of costs in the case in relation to the application before him. The Claimant had asked for her costs in any event. Of course whilst the learned district judge would have been entitled to award the Claimant those costs as she had succeeded on the discretionary application, nevertheless a significant factor was (on his finding) that there had been non-compliance with a rule requirement.

83. The court has had little or no argument in relation to this costs ground of appeal. It is right that unless the Defendant had protected its position in terms of Part 36 offers, an order of costs in the case is tantamount to granting the Claimant costs when liability is not in issue. However, the court had a wide discretion in relation to the award of costs, and whilst it would be open to him to have made an award reflecting the acknowledged failure on the part of the Claimant, in my judgment it could not be said that this decision was outside the generous ambit of the judge's costs discretion. Accordingly I dismiss this ground also.

Conclusion

84. I invite the parties to agree the final terms of any order. If it cannot be agreed, I will receive brief written submissions prior to formal handing down of this judgment.

His Honour Judge Graham Wood QC