



Neutral Citation Number: [2021] EWHC 1205 (QB)

Appeal Number: QA-2021-000012
Case No: QB-2019-000043/46/48/49/50/51
SCCO Ref: SC-2020-BTP-001249

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/05/2021

Before :

MR JUSTICE FOXTON

Between :

**SERBIAN ORTHODOX CHURCH - SERBIAN
PATRIARCHY**

Appellant

- and -

KESAR & CO

Respondent

Kevin Latham (instructed by **Francisco Rodriguez of DWF Costs Ltd**) for the **Appellant**
Andrew Hogan instructed by the **Respondent**

Hearing date: **29 April 2021**
Draft judgment circulated: **05 May 2021**

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HONOURABLE MR JUSTICE FOXTON

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand down is deemed to be 13 May 2021 at 10:00 am.

MR JUSTICE FOXTON :

1. This is an appeal brought by the Appellant against the decision of Senior Master Gordon-Saker of 23 December 2020 setting aside a Default Costs Certificate (“DCC”) made by the Court on 16 November 2020 in respect of the Respondent’s (“Kesar’s”) liability under a wasted costs order.
2. The appeal was very well-argued by Mr Latham and Mr Hogan, and I am grateful to them for the high quality of their submissions.

A THE FACTS

The background

3. By way of brief summary of the background:
 - i) Various individuals, represented by Kesar, issued proceedings against the Appellant relating to allegations of abuse alleged to have been carried out by clergy of the Serbian Orthodox faith in Bosnia-Herzegovina, Croatia and Serbia on various dates over the period from 1998 to 2014.
 - ii) On 17 January 2014, Master Cook ruled that the court had no jurisdiction to try those claims, that the claim forms had not been properly served and that they had been brought against the wrong party. That judgment was very critical of the conduct of Mr Kesar (the principal of Kesar), referring to his “complete disregard of the Civil Procedure Rules”, the absence of compliance with CPR 22 so far as the statements of truth were concerned and the fact that Mr Kesar “appears to have had no proper understanding of the effect of Rule 7.5”. Having regard to what Master Cook described as “the wholesale failures by the claimants’ solicitors to comply with the provisions of the CPR”, “the wholesale failure to comply with the provisions of CPR 22 in regard to the statements of truth” and the “complete misunderstanding of the rules relating to service”, Master Cook ordered that costs be paid on an indemnity basis. He also directed that Kesar show cause why it should not be subject to a wasted costs order.
 - iii) Following a hearing on 20 May 2020 to address that issue, on 13 August 2020 Master Cook handed down a judgment ordering Kesar to pay the wasted costs on an indemnity basis.
4. On 17 September 2020, Mr Donnelly of the Appellant’s solicitors indicated that the Appellant was happy to receive service of documents by email if Kesar confirmed its readiness to do so. On 18 September 2020, Mr Kesar replied:

“I am happy to accept service by email as [long as] this is reciprocated”.

Mr Donnelly replied:

“No problem. Yes I’m happy to agree that moving forwards service of documents by email between us is accepted”.
5. These exchanges were conducted using Kesar’s email mkesar@kesar.co.uk (“the short email”). It would appear that Kesar had at some stage used another email address –

mkesar@kesarandcosolicitors.co.uk (“the long email”). On 15 October 2020, the Appellant sent its notice of commencement and accompanying bill of costs, in the sum of £222,256.85, to the long email address. Kesar had put in place arrangements for all emails sent to the long email address to be immediately and automatically forwarded to the short email address, which duly received these documents at or around the time of despatch. If this constituted valid service, then Kesar had until 9 November 2020 to file Points of Dispute. No such document was filed, and by a letter sent on 12 November and received by the court on 13 November 2020, the Appellant sought a DCC in the amount of £222,256.85. The DCC was entered by the court on 16 November 2020. On 25 November 2020, Kesar applied to set aside the DCC.

The hearing before Senior Master Gordon-Saker

6. In its evidence filed for the hearing before Senior Master Gordon-Saker, Kesar took two points:
 - i) That there had been no agreement to accept service by email.
 - ii) That the Court should exercise its discretion under CPRr.47.12(2) to set aside the DCC because there was “good reason” to do so (an application which it was common ground before the Senior Master and before me involved the application of the three-stage test in Denton and others v TH White Ltd [2014] EWCA Civ 906).
7. However, at the start of the hearing, Mr Patel, who appeared for Kesar at that hearing, took a new point – that an email sent to the long form email address did not involve service at an email address at which Kesar had agreed to be served, and for that reason, did not constitute valid service for the purposes of CPR 6.20 and Practice Direction 6A. Mr Latham was offered the opportunity to request an adjournment of the hearing, but having had a brief opportunity to take instructions, he informed the court that the Appellant was content for the hearing to continue.
8. In the event, Senior Master Gordon-Saker:
 - i) rejected Kesar’s argument (which was not seriously pursued at the hearing) that there had been no agreement to accept service by email;
 - ii) accepted Kesar’s argument that sending an email to the long form email address, which had then been automatically and instantly forwarded to the short form email address, did not constitute valid service; and
 - iii) confirmed that he would not have been satisfied, had the issue arisen for determination, that Kesar had shown “good reason” for setting the DCC aside.
9. The Appellant now appeals the Senior Master’s conclusion at ii). In addition, it argued that it was and is open to the court to waive any defect in service under CPR 3.10 or make an order under CPR 6.27 that the documents had been validly served. In addition to resisting the appeal, Kesar contends that these further arguments are not open to the Appellant because they were not raised before the Senior Master. Finally, Kesar contends that the Senior Master took account of an irrelevant consideration (namely Mr Kesar’s failure to be candid as to the agreement for service by email in his evidence in

support of the set-aside application) in reaching his decision that no “good reason” to set aside the DCC had been made out, and that I should, if necessary, hold that the DCC should have been set aside on that basis.

B WAS SERVICE EFFECTED IN COMPLIANCE WITH CPR 6.20 AND PRACTICE DIRECTION 6A?

The relevant provisions of the CPR

10. CPR 6.20 provides that “a document may be served by any of the following methods:
 - (d) fax or any other means of electronic communication in accordance with Practice Direction 6A”.
11. Practice Direction 6A provided:

“... Where a document is to be served by ... electronic means

 - (i) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving -
 - (a) that the party to be served or the solicitor is willing to accept service by fax or other electronic means; and
 - (b) the fax number, e-mail address or other electronic identification to which it must be sent”.

(emphasis added).
12. The short issue of construction which arises is whether documents which are addressed to an email address which had not been the subject of a service agreement, but which are automatically and instantaneously forwarded to another email address which has, meet the requirements of Practice Direction 6A.
13. Before answering that question, it is helpful to look at some of the other provisions which address the service of documents under the CPR.
14. First, the CPR contains provisions relating both to the service of claim forms (or originating process) and service of other documents. Part II of CPR 6 addresses “Service of the Claim Form in the jurisdiction” and Part III “Service of Documents other than the Claim Form in the United Kingdom”. Many of the provisions relating to service of claim forms in Part II are reflected in Part III, sometimes with variations:
 - i) CPR 6.20 on “methods of service” in Part III is largely the same as CPR 6.3 in Part II, save for the places at which the documents can be “left”.
 - ii) CPR 6.26 on deemed service in Part III largely tracks CPR 6.14 read with CPR 7.5(1)) in Part II, but whereas CPR 6.14 always provides for deemed service two business days after the completion of the relevant step, CPR 6.26 has shorter periods for some forms of service.

- iii) CPR 6.27 in Part III (service by an alternative method or at an alternative place) simply adopts CPR 6.15;
 - iv) CPR 6.28 in Part III (dispensing with service) does not expressly require any particular quality of reason for doing so, where CPR 6.16, addressing claim forms, requires “exceptional circumstances”.
15. Second, various methods of service are permitted:
- i) So far as claim forms are concerned, CPR 6.3(1) provides for personal service, first class post, leaving the claim form at a specified place or “fax or other means of electronic communication”. CPR 6.7 provides for service on a solicitor and CPR 6.11 for service by a contractually agreed method.
 - ii) So far as other documents are concerned, in lieu of the provision for service by leaving documents at one of the specified places, there is a reference in CPR 6.20 to service at the address which a party to litigation is obliged to give for service of documents in CPR 6.23. There is no equivalent of CPR 6.11.
16. Third, both Parts II and III make provision for “deemed service”. In Part II, CPR 6.14 provides for deemed service on the second business day after the completion of the step identified in CPR 7.5(1):
- i) Where service is effected by first class post or using a delivery service provider, the posting of the letter, or leaving the letter with, delivering the letter to or collection of the letter by the service provider.
 - ii) Where service is effected by delivery or leaving the document at the relevant place, when it is so delivered or left.
 - iii) When personal service is effected, by “leaving it” with the relevant person.
 - iv) Where service is effected by fax, “completing the transmission of the fax”.
 - v) When service is effected by another “electronic method”, “sending the email or other electronic transmission”.
- (emphasis added). There are similar provisions in Part III, with the same steps to be completed before service is deemed to have occurred.
17. In some cases, time begins to run from a step which is entirely concerned with what the party serving does, rather than events at the “receiving” end: posting a letter, getting the letter to the service provider, sending the email. In other cases, the definition necessarily involves some activity at the destination: for example, leaving a document at a place or with a person. In Godwin v Swindon BC [2001] EWCA Civ 641, [55], Rimer LJ noted this difference between the methods of service provided for under the CPR.

The effect of “deemed service” under the CPR

18. In support of his submissions, Mr Hogan relied on two authorities addressing the effect of these “deeming” provisions. In the first, Godwin v Swindon BC [2001] EWCA Civ

641, the claimant had served the claim form by post shortly before its expiry. The claim form was received by the defendant prior to expiry, but the deemed date of receipt under the-then CPR 6.7(1) was after the expiry date. May LJ (Sir Anthony May) noted at [5]:

“The essential submission on behalf of the defendant, which succeeded before the district judge, is that, where service is effected by one of the means provided for in the table to rule 6.7(1), it is deemed to have been effected on the day provided in the second column in the table whenever in fact the document may have reached its destination or come to the attention of the receiving party .. The claimant's essential submission is that the deemed day of service in the table is rebuttable if evidence proves that service was actually effected on a different day”.

19. May LJ held that the deeming provisions could not be rebutted, either by evidence that service had been effected on an earlier day, or on a later day (and by implication not at all). He noted at [46]

“It is a fiction in the sense that you do not look to the day on which the document actually arrived, be it earlier or later than the date to be derived from the table.”

That fiction was “not rebuttable by evidence”. That conclusion promoted the object of certainty which the provisions on the date of deemed service were intended to achieve (May LJ referring at [20] to “a strong general argument in favour of Mr Edwards's submission that rule 6.7(1) should be interpreted as providing for certainty”). May LJ also noted at [49] that in those cases in which the claim form had not in fact reached the person to be served within the required time or at all, the court had power to extend time under CPR 3.1(2), and to set aside any default judgment obtained under CPR 13.2 and 13.3(1), and that the “deemed” service provisions did not preclude the argument that the defendant had not received the document in that context.

20. Pill LJ agreed with these conclusions ([76]). Rimer J agreed that the “deeming provisions” precluded a claimant from seeking to establish that service was effected earlier than the deemed date (a claimant should not leave things so close to the wire), but believed it should be open to a defendant to adduce evidence to rebut the presumption of service ([64], [[70]). He noted at [55] that “whilst such cases may be exceptional, letters can go astray in the post or document exchange, and may either not arrive at all or may only arrive seriously late; and technological failures may result in faxes or e-mails not arriving.”
21. The view of the majority was affirmed by a subsequent Court of Appeal decision in Anderton v Clwyd CC [2002] EWCA Civ 933, after hearing further argument as to the effect of Article 6 of the ECHR. Lord Phillips MR at [36] explained:

“The aim of rule 6.7 is to achieve procedural certainty in the interests of both the claimant and of the defendant. ... The rules employ a carefully and clearly defined concept of the “service” of a document, which focuses on the stated consequences of the sending of the document by the claimant, rather than on evidence of the time of its actual receipt by the defendant. The objective is to minimise the unnecessary uncertainties, expense and delays in satellite litigation involving factual disputes and statutory discretions on purely procedural points.”

22. CPR 6.17.2(b) provides that a claimant who serves a claim form may not obtain judgment in default without filing a certificate of service. Under CPR 6.17(3), the certificate must state the category of address at which the claim form has been served, and a relevant date (in the case of service by email, the “date of sending the email or other electronic transmission”, emphasis added). CPR 6.29 contains a similar provision for those cases where a rule, practice direction or court order requires a certificate of service for some document other than a claim form. The prescribed form of certificate of service - form N215- requires the address where service was effected to be set out, including the “email address or other electronic identification”, and the document is to be supported by a statement of truth. In the case of service by email, it must be implicit in that statement of truth that the email has been sent to the email address at which the party to be served has agreed to accept service by email. Practice Direction 12PD.4 provides that before entering a default judgment, the court “must be satisfied that ... the particulars of claim have been served on the defendant (a certificate of service will be sufficient evidence)”. Until 30 June 2004, CPR 13.5 provided that a claimant who had entered a default judgment who had “good reason to believe that the particulars of claim did not reach the defendant before the claimant entered judgment” was obliged to file a request for the judgment to be set aside. However, this rule was removed by the Civil Procedure (Amendment) Rules 2004 (SI 2004/1306).
23. It is worth pausing to consider the effect of those provisions on the respective positions of (a) a claimant who has not adopted one of the stipulated means of effecting service but has achieved the intended result; and (b) a claimant who has adopted one of those means, but has not achieved the intended result:
- i) A claimant who has taken the steps it is for the claimant to take will benefit from the irrebuttable presumption of deemed service, whether those steps have been effective to achieve the intended result or not.
 - ii) Such a claimant is able to file a certificate of service in such a case, and to obtain default judgment.
 - iii) If the method chosen to effect service has not in fact brought the documents to the defendant’s attention, the defendant will need to apply to set aside any default judgment under CPR 13.2 and/or 13.3.
 - iv) Absent engagement from the defendant, a claimant who has used the wrong postal or email address will not know whether the document has in fact been brought to the defendant’s attention (as Rimer LJ noted in Godwin, [55], [63]).
 - v) Such a claimant is not in a position to establish deemed service (not having sent the document to the agreed email address) nor to prepare an accurate certificate of service (no email having been sent to the requisite email address).
 - vi) If the defendant treats service as valid and engages with the proceedings accordingly, any defect in service will have been waived.
 - vii) Absent this, however, there would be real difficulties if it could be the case that, for reasons which were unknown to the claimant, there had been valid service (e.g. because a wrongly addressed document had in fact been forwarded to the right address), yet the claimant could not, on the objective effect of the facts

known to it, establish deemed service or file a certificate of service because the communication had not been appropriately addressed.

The position under the RSC

24. An issue which bears some strong similarities to that raised by the present application arose under the Rules of the Supreme Court in Austin Rover Group Ltd v Crouch Butler Savage Associates [1986] 1 WLR 1102. The plaintiff posted a writ by first class post to an address which had been the defendant's principal place of business but, unbeknown to the plaintiff, the defendant had moved from that address some three months before. However, the defendant had placed a redirection order with the Post Office, who redirected the letter to the defendant's new address seven days before its expiry. One of the issues before the court was whether there had been effective service. The majority, May LJ (Sir John May) and Sir John Megaw, held that valid service had been effected. May LJ held at p.1111:

“In the context of the process of service of a writ, in my opinion the rules must be construed as involving both a server and the recipient. Service, even by post, cannot be completed until that which is being served, in this case the writ, is actually received or deemed to have been received under the rules. I do not, for my part, accept that the word ‘send’ where it appears in the Rules only comprehends the initial despatch. I think it must in the context mean the whole process of transmission from server to recipient. On that approach and construction, it is clear that there was valid service of the writ in this case”.

25. Sir John Megaw held that “sending” or posting of the letter was not service in itself, but only an element in service (p.1118), there being no delivery unless the letter reaches the address. Reasoning from the fact that it was open to the defendant to prove that an appropriately addressed letter had not been delivered, he held that there was no need to interpret the rule as “indicating that the address of the current principal place of business at the time when it is posted must be accurately expressed on the writing on the envelope”. In reaching that conclusion, he referred to certain of the anomalies which would otherwise arise, which also featured in Mr Latham's argument in this case:

“It avoids a potential absurdity, or at best the highly unsatisfactory questions of degree which would arise if an envelope were to be posted with some possibly quite minor error in the address: for example, an error in the number of a building or in the spelling of the name of the street, which did not in fact prevent delivery through the postal service at the right address”.

26. Lloyd LJ dissented on this point and appealed in turn to what he regarded as the absurd consequences of the contrary argument which bore a strong resemblance to similar arguments raised by Mr Hogan in support of Kesar. At p.1116, he stated:

“It seems to me that ‘sending’ in Ord. 81, r.3(1)(c) bears what I would regard as its ordinary meaning, namely putting the document in the post. The only question which then arises is whether the document was sent to the firm at its principal place of business. The answer must be ‘no, it was sent to the firm at its previous place of business ...

The fact that a writ has arrived does not mean that it has been properly sent. Suppose, for example, the document had been accidentally dropped on the way to the post, picked up by a Stranger and delivered by hand. Nobody suggests, or could suggest, that that would have been good service”

27. While Austin Rover raised a very similar issue – indeed the present case might be thought to be an even stronger cases, given the automatic and instantaneous nature of the onwards transmission – the procedural context for that decision differs from the CPR in two important and interrelated respects.
28. First, the deeming provision in the RSC was rebuttable by contrary evidence, those provisions providing “unless the contrary is shown”: RSC Order 10 rule 1(3)(a) and 1(5). That qualification does not appear in the deeming provisions in the CPR.
29. Second, the courts interpreted the service regime generally on the basis that service required the document to come to the attention of the party to be served. In Forward v West Sussex County Council [1995] 1 WLR 1469, the claimant had done what it was required to do under the RSC and posted the writ to the defendant’s last known address, but the defendant no longer lived there, and the writ had not come to its attention. At p.1475, Sir Thomas Bingham MR defined the issue before the court as follows:

“Is service duly effected if the proceedings are duly sent by ordinary first-class post to the defendant at his usual or last known address and delivered at that address? The plaintiff argued that it is. If judgment were entered in default following such service and the defendant were able to show that he had never received the proceedings and so had no opportunity to defend, he would have strong grounds for asking that the judgment should be set aside. But that would not impugn the validity of the service as service only the fairness of allowing the judgment to stand. Counsel for the fourth defendant challenged this approach. It was a cardinal rule of procedure that a party should not in ordinary circumstances be answerable for a claim of which he had no notice. If he could show that the proceedings, although sent to and delivered to the last of his addresses known to the plaintiff, had not in fact come to his notice, then good service had not been effected. The real test was one of notice not delivery”.
30. Having considered various provisions of the RSC, including RSC Order 10(1)(a) and (3)(b), the Court upheld the defendant’s argument. Referring to “the salutary principle that proceedings must be brought to the actual notice of a defendant unless this is shown to be impracticable”, the Court held that alternatives to practical service were permitted because “they found a good working presumption (rebuttable, but still a good working presumption) that they will bring proceedings to the notice of the defendant”.
31. It is clear from the consideration given to the position of a defendant who does not in fact receive the document when it is deemed to receive it in Godwin and Anderton that this is no longer the position under the CPR which, in this respect, has adopted a more formalistic approach to identifying if and when service has been effected, the practical consequences of which can in appropriate cases be modified by relief available elsewhere in the CPR on a discretionary basis.
32. For these reasons, I have concluded that the decision in Austin Rover does not assist when considering the position under the CPR. I would note in any event that the Court

of Appeal has consistently warned against attempts to interpret the CPR by reference to pre-CPR authority. In Vinos v Marks & Spencer plc [2001] 3 All ER 784, 789, [17], May LJ stated

“Mr Lord, on behalf of the defendants, made written submissions and Mr Peirson made oral submissions by reference to what they submit the position would have been under the former Rules of the Supreme Court. In my judgment, these submissions are not in point. The Civil Procedure Rules are a new procedural code, and the question for this court in this case concerns the interpretation and application of the relevant provisions of the new procedural code as they stand untrammelled by the weight of authority that accumulated under the former Rules ... There is, in my judgment, no basis for supposing that rule 7.6 in particular was intended to replicate, or for that matter not to replicate, the provisions of former rules as they had been interpreted.”

33. Sir Thomas Bingham MR in Forward (at p.1475) had similarly refused to rely on authorities concerning another statutory regime because where “the court is required to construe a detailed statutory code it is in our view dangerous to seek to apply statements made with reference to different statutory codes”.

Analysis and conclusion

34. So far as the position under the CPR is concerned, the only authority considering a similar point to which I was referred was R (Davies) v Kingston upon Thames County Court [2014] EWHC 4589 (Admin). In that case, the claimant’s landlord served proceedings on the claimant at the property which it was known the claimant had vacated, on the basis that she believed that provision had been made for the redirection of the claimant’s post. A default judgment was entered and the claimant’s application to set it aside failed, and permission to appeal against that decision was refused. The claimant sought to challenge that decision by judicial review, and effectively had to establish a jurisdictional error in the narrow pre-Anisminic sense or a procedural irregularity of such a kind as to amount to a denial of a fair hearing. One argument advanced was that it had been an error of law to treat service as having been effected by the re-direction of the claimant’s mail. HHJ Lambert said he was “far from sure there is any error on the part of the judge at all” ([26]) because:

“the redirection does seem to be proper service. There is an ingenious argument but any purposive interpretation of the rules as to service shows it is a permissible means by which to serve someone”.

35. Those observations were tentative, and the judge reached his conclusion on the basis that the District Judge had found that the vacated property was the claimant’s last-known address, which was an issue of fact not reviewable on judicial review ([27]), and because any error did not rise to the level which justified a remedy in judicial review. The decision is, therefore, only of limited assistance.
36. I have concluded that the Senior Master was right, and valid service was not effected in this case. I have reached this conclusion for the following reasons:
- i) First, on the natural construction of Practice Direction 6A, it is the “sending” of the email to the agreed address which constitutes valid service. That the word

“sent” is concerned with the address used by the party effecting service is reinforced by the use of the same word in the provisions on deemed service and the certificate of service (which are necessarily premised on events within the claimant’s knowledge – something which steps taken to forward correspondence on from a postal or email address will not ordinarily be).

- ii) Second, that conclusion is more consistent with the provisions on deemed service in the CPR, with their focus on the steps taken to post a letter or send an email, which have been held, for reasons of certainty, to preclude proof of non-receipt for the purposes of establishing that service had not been validly effected. I note that in Austin Rover, Sir John Megaw had viewed the ability under the RSC of a defendant who had not received the document to establish that service had not been effected as supporting his conclusion that it should be possible to establish as a matter of fact that a misaddressed communication had reached the right destination. There is something in the converse proposition under the CPR.
- iii) Third, I am troubled by how the provisions on obtaining default judgment would operate if there could be valid service (by reason of the on-forwarding of the communication) but, on the objective facts known to the party serving, valid service had not been effected and a truthful certificate of service could not be filed.

37. Like Lloyd LJ in Austin Rover, I should not be taken as holding that any minor error in addressing a communication will involve a failure to effect service, and no doubt the fact that a communication did reach the intended destination may provide a practical indication of the materiality of the error. However, that could only be relevant to errors in a postal or courier address – emails are not so forgiving.

C SHOULD THE COURT VALIDATE SERVICE UNDER CPR 3.10 OR CPR 6.27?

Is this argument open to the Appellant?

38. If there has not otherwise been good service, Mr Latham contends that the Court has the power either to waive any procedural error in effecting service under CPR 3.10 or to declare under CPR 6.27 that sufficient steps had been taken to effect service.
39. In response, Mr Hogan contends that this argument is not open, because it was not raised before the Senior Master, and because the Appellant elected to proceed on the basis of those arguments raised before the Senior Master rather than seek to adjourn the hearing, after he was given the opportunity to make such an application.
40. I am satisfied that there is nothing in this argument. The Appellant’s decision to proceed, rather than seek an adjournment, might well be relevant to any attempt to raise new factual issues on appeal, but the arguments which Mr Latham seeks to advance do not involve any further factual issues beyond those already in play. The principles which determine whether the court should allow further arguments to be raised on appeal are set out by Haddon-Cave LJ in Singh v Dass [2019] EWCA Civ 360, [16]-[18]:

“[16] First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.

[17] Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial.

[18] Third, even where the point might be considered a ‘pure point of law’, the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs.”

41. Applying those principles, I am satisfied that the Appellant should be permitted to advance this argument. The point requires no further evidence, nor would it have affected the course of the hearing below. Mr Hogan was clearly ready to deal with the point, and Kesar had not acted to its detriment by reason of the fact that the point was not taken before the Senior Master. I would note that the argument arises because of a point which Kesar itself took for the first time at the hearing before the Senior Master.

The provisions relied upon

42. CPR 3.10 provides:

“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.”

43. CPR 6.15 provides:

“(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.

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

44. CPR 6.15 is given effect in relation to documents other than a claim form by CPR 6.27, which provides that “Rule 6.15 applies to any document in the proceedings as it applies to a claim form and reference to the defendant in that rule is modified accordingly.”

The authorities

45. There is a surprising amount of first instance authority (and a surprising dearth of appellate authority) on attempts to use CPR 3.10 to overcome a failure to achieve effective service under the CPR.
46. Those authorities begin with the decision of Popplewell J in Integral Petroleum SA v SCU-Finanz AG [2014] EWHC 702 (Comm). In that case, particulars of claim had been sent to the defendant by email in a case in which the defendant had not agreed to accept service by email. Relying on Phillips v Symes (No 3) [2008] 1 WLR 180, which contained remarks supportive of the view that CPR 3.10 might be relied upon to validate errors in serving originating process, Popplewell J held that there were no grounds for interpreting CPR 3.10 narrowly so that it did not apply to errors in the service of particulars of claim in proceedings which had been validly commenced ([25]), and that the decision in Phillips indicated that the Judicial Committee were “of the view ... that CPR 3.10 is a beneficial provision to be given very wide effect indeed” ([29]). At [34], he held that there had been an “error of procedure in serving the Particulars of Claim by e-mail”, the error involving non-compliance with Practice Direction 6A which, by virtue of CPR 3.10(a) was “treated as valid, so as to commence time running for the service of the defence and disentitle SCU-Finanz ... to bring itself within CPR 13.2”. Popplewell J held that CPR 3.10(a) had this effect automatically without the need for a court order ([27], [29]). Significantly, for present purposes, he observed at [37]:

“This case is not concerned with service of originating process but service of particulars of claim. To my mind this is a significant distinction. A narrower approach to CPR 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. ... [T]he effect to be given to CPR 3.10 is even wider when concerned with documents which are other than those by which the proceedings are commenced. What the rules are concerned with in relation to the service of such subsequent documents is simply bringing them to the attention of the other party in circumstances in which that other party knows or should realise that a step has been taken which may have procedural consequences. This contrasts with the service of originating process which fulfils other functions: it establishes in personam jurisdiction, and it is what engages a wide range of powers in the Court, such as those under s.37 of the Senior Courts Act 1981 and under an inherent jurisdiction. CPR 3.10 is particularly apposite for treating as valid a step whose whole function is to bring a document to the attention of the opposing party where such function has been fulfilled. It prevents a triumph of form over substance

47. Popplewell J’s judgment was followed by Sara Cockerill QC (as she then was) in Bank of Baroda v Nawany Marine Shipping FZE [2016] EWHC 3089 (Comm), in a case in which documents served on four defendants care of an agent for service included only one, rather than four, copies of the claim form. In Dory Acquisitions Designated Activity Company v Ionnais [2020] EWHC 240 (Comm), Bryan J considered defective service of a claim form, in which an unsealed claim form without a claim number had been served. He cited with approval Popplewell J’s summary of the legal principles, and on the facts of the case before him held that it was appropriate to rely on CPR 3.10 to validate the service of the claim form in that case.
48. However, in Piepenbrock v Associated Newspapers Limited [2020] EWHC 1708 (QB), Nicklen J held that CPR 3.10 could not be used to validate service of originating process

purportedly effected by email when there had been no agreement to accept service by this method. The Judge noted at [81] that the two Commercial Court decisions to which he was referred had been decided before the Supreme Court decision in Barton v Wright Hassall LLP [2018] UKSC 12 (which had re-emphasised the importance of formality and certainty in service), and that the comments made in relation to validating errors in relation to a claim form were strictly *obiter* (although query if that was the position in Bank of Baroda). While Nicklen J's judgment was principally directed to the service of originating process, his reasoning has implications for the service of other documents. Among his reasons for concluding that CPR 3.10 could not assist the claimant, summarised at [82(iii)], was that:

“if CPR 3.10 is given an interpretation that permits the Court, retrospectively, to validate service not in accordance with the CPR on the basis that there has been a ‘failure to comply with a rule’, then that would make CPR 6.15(2) redundant. That would be a surprising result as the terms of CPR 6.15(2) are of specific operation whereas CPR 3.10 is of general application.”

That reasoning would equally apply to CPR 6.27, which incorporates the terms of CPR 6.15.

49. In Ideal Shopping Direct Limited v Visa Europe Ltd [2020] EWHC 3399 (Ch), Morgan J had to consider a case in which a draft of the claim form, taken to court for sealing but not sealed, had been “served” on the defendant. The claimant sought to validate such service under CPR 3.10. Morgan J rejected that argument on the basis that it was well-established by authority that “Rule 3.10 is to be regarded as a general provision which does not prevail over the specific rules as to the time for, and manner of service, of a claim form” ([87]). At [92], the Judge held:

“Having considered the authorities, I conclude that I should follow the approach in Piepenbrock and hold that rule 3.10 does not enable me to find (under rule 3.10(a)) that there has, after all, been valid service on the Defendants or that I should make an order (under rule 3.10(b)) remedying the Claimants' error as to service. If it is not possible to distinguish Integral Petroleum or Bank of Baroda as to the scope of rule 3.10, then I would have to choose between those two decisions and the decision in Piepenbrock. I find the reasoning in Piepenbrock to be more persuasive and I would follow it.”

50. Finally in Boxwood Leisure Ltd v Gleeson Construction Services Ltd [2021] EWHC 947 (TCC), the claim form had been omitted from a service pack which included the particulars of claim, and as a result the claim form had expired before service. O'Farrell J reviewed the authorities, and summarised the principles as follows:

“46. Drawing together the principles that are relevant for determining the application before the court, they can be summarised as follows:

- i) If a claimant applies for an extension of time for service of the claim form and such application is made after the period for service specified in CPR 7.5(1), or after any alternative period for service ordered under CPR 7.6, the court's power to grant such extension is circumscribed by the conditions set out in CPR 7.6(3): Barton v Wright Hassall at [8] & [21]; Vinos v Marks & Spencer at [20] & [27].

- ii) The court has a wide, general power under CPR 3.10 to correct an error of procedure so that such error does not invalidate any step taken in the proceedings: Phillips v Nussberger at [30]-[32]; Steele v Mooney [19]-[20].
- iii) In the cases cited where the power under CPR 3.10 was exercised, there was a relevant, defective step that could be corrected: Steele v Mooney (defective wording of application for an extension of time); Phillips v Nussberger, Bank of Baroda, Dory (ineffective steps taken to serve the claim form on the defendants); Integral (defective service of particulars of claim). Doubts have been expressed as to whether CPR 3.10 could or would be used where no relevant procedural step was taken: Integral at [29]; Bank of Baroda at [17]; Dory at [76].
- iv) The court also has a wide, general power under CPR 3.9 to grant relief from any sanction imposed for a failure to comply with any rule, practice direction or court order: Denton v White [2014] 1 WLR 3926 at [23] – [36].
- v) A claimant is not entitled to rely on the wide, general powers under CPR 3.10 or CPR 3.9 to circumvent the specific conditions set out in CPR 7.6(3) for extending the period for service of a claim form: Vinos v Marks & Spencer plc at [20] & [27]; Kaur v CTP at [19]; Elmes v Hygrade at [13]; Godwin v Swindon BC at [50]; Steele v Mooney at [19] & [28]; Piepenbrock at [81] & [82]; Ideal v Visa at [92].”

Conclusion as to the proper approach

- 51. I must confess to having some difficulty with the suggestion that CPR 3.10 could be relied upon to validate a defect in service where, for example, service had been effected by email without permission to serve at that email address, in any case in which relief could not have been obtained under CPR 6.15. A particular difficulty with CPR 3.10 is that, if it is applicable to service errors, CPR 3.10(a) would appear automatically to validate service unless the Court ordered otherwise. That, with respect, is a surprising proposition, and an approach which requires the party seeking to validate service to seek and obtain an order from the court seems inherently more appropriate.
- 52. Further, the reasoning which commended itself to Nicklen J and Morgan J – that CPR 3.10 as a provision of general application must yield to the more specific provisions on service in, for example, CPR 6.15, 6.27 and CPR 7.6(3) – also commends itself to me, for conventional legal reasons and because it has strong support from the majority of the Supreme Court in Barton, [8] when addressing a similar argument as the interrelationship of CPR 3.9 and CPR 6.15. In these circumstances, I have concluded that if the Appellant is to validate the service of the notice of commencement, it must persuade the court to make an order under CPR 6.27.

When should the court make an order under CPR 6.27?

- 53. CPR 6.15(1), and hence CPR 6.27, requires “good reason” to be shown before ordering that the steps already taken constitute good service. In Barton,
 - i) At [9], Lord Sumption JSC referred to Lord Clarke JSC’s judgment in Abela v Baadrani [2013] UKSC 44, [38], and Lord Clarke’s approval of the statement

that “service has a number of purposes, but the most important is to ensure that the contents of the document are brought to the attention of the person to be served”. However, “the mere fact that the defendant learned of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under rule 6.15(2)” and “the question is whether there is good reason for the court to validate the mode of service used, not whether the claimant had good reason to choose that mode”.

- ii) At [10], he stated that “in the generality of cases, the main relevant factors are likely to be (i) whether the claimant has taken reasonable steps to effect service in accordance with the rules and (ii) whether the defendant or his solicitor was aware of the contents of the claim form at the time when it expired, and, I would add, (iii) what if any prejudice the defendant would suffer by the retrospective validation of a non-compliant service of the claim form, bearing in mind what he knew about its contents. None of these factors can be regarded as decisive in themselves. The weight to be attached to them will vary with all the circumstances”.
 - iii) At [16], he noted that “although the purpose of service is to bring the contents of the claim form to the attention of the defendant, the manner in which this is done is also important. Rules of court must identify some formal step which can be treated as making him aware of it. This is because a bright line rule is necessary in order to determine the exact point from which time runs for the taking of further steps or the entry of judgment in default of them.”
 - iv) At [17], he noted that there were “particular problems associated with electronic service, especially where it is sought to be effected on a solicitor” because “a solicitor's office must be properly set up to receive formal electronic communications such as claim forms” and “there must be arrangements in place to ensure that the arrival of electronic communications is monitored, that communications constituting formal steps in current litigation are identified, and their contents distributed to appropriate people within the firm”.
 - v) Finally, at [21], he noted that “the claimant need not necessarily demonstrate that there was no way in which he could have effected service according to the rules within the period of validity of the claim form.”
54. The criteria for making an order under CPR 6.15 were also considered by Popplewell J in Société Générale v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS [2017] EWHC 667 (Comm), [49]. He noted that the strength to be afforded to the fact that the document “served” came to the notice of the defendant “will depend upon the circumstances in which such knowledge is gained. It will be strongest where it has occurred through what the defendant knows to be an attempt at formal service. It may be weaker or even non-existent where the contents of the claim form become known through other means.”
55. It is clear that what constitutes “good reason” may vary with the context (e.g., what constitutes “good reason” in an ordinary service case may not constitute good reason in a Hague Service Convention case: see the authorities collected in M v N [2021] EWHC 360 (Comm)). I accept, therefore, that something incapable of constituting “good reason” for making an order under CPR 6.15 when there had been a failure to effect

service of originating process in accordance with the CPR might be capable of amounting to good reason for making an order under CPR 6.27 in respect of other documents (reflecting the significant difference between the two types of document identified by Popplewell J in Intergral, [37], and the fact that service of other types of document will not engage the limitation issues which may arise from the expiry of a claim form before service).

The position on the facts of this case

56. There was a dispute between Mr Latham and Mr Hogan as to whether the service of notice of commencement of costs assessment proceedings was to be equated with service of originating process for the purposes of CPR 6.15. Mr Hogan pointed to the fact that CPR 47.6 refers to “commencement of detailed assessment proceedings” and sets out how the “detailed assessment proceedings are commenced”. I accept that the detailed assessment of costs is a distinct phase of the proceedings, with a distinct process for commencement. However, I do not accept that this is equivalent to the commencement of originating process. By the time costs are assessed, in personam jurisdiction over the defendant has long been established, and the defendant has been fully engaged in the proceedings. The commencement of “detailed assessment proceedings” is the next step in the proceedings, which a defendant against whom an adverse costs order has been made should be expecting. I accept that the service of notice of commencement bears some resemblance to the commencement of a claim, in that a failure to respond in time can generate a default liability, but that is also true of a failure to serve a defence in response to particulars of claim. For these reasons, I have approached the Appellant’s application under CPR 6.15 on the basis that the particular considerations engaged by applications relating to the service of originating process do not apply.
57. I have been persuaded that there is “good” reason to order that the steps taken by the Appellant to serve notice of commencement constituted good service. I have reached that conclusion for the following reasons:
- i) It is clear on the evidence that the documents to be served were sent to an email address which Kesar had used, and which was set up not to notify senders that the email was no longer in use or to direct them to a different email address, but automatically to forward the documents to the address which was in use.
 - ii) The documents were received through the agreed mechanism for service, and, short of opening the email (which Mr Kesar did not do before the DCC was entered), it would not have been possible for Kesar to know whether the notice of commencement had reached that email box because it had been sent there directly or forwarded in accordance with the arrangements Mr Kesar had put into place.
 - iii) This was in a case in which the served documents not only reached the party to be served, but did so by service to an email address which was set up to receive electronic service of documents such as the notice of commencement, and which ought to have been monitored to that end.

- iv) By reason of its arrival at that email address, the document reached Kesar by a means from which, had the email been opened, it would have been obvious this was an attempt at formal service.
 - v) I accept that validating service involves prejudice to Kesar, but that prejudice is of a very different kind to, for example, loss of a limitation defence. The prejudice in question is that there has been a default assessment of its costs liability, unless it is able to show “good reason” for setting the DCC aside.
58. Unless, therefore, Kesar can persuade me that the Senior Master erred in concluding that it had failed to establish “good reason” for setting aside the DCC, the DCC will stand.

D DID THE MASTER ERR IN CONCLUDING THAT NO GOOD REASON HAD BEEN SHOWN FOR CONTINUING THE COSTS PROCEEDINGS UNDER CPR 47.12(2)?

59. That makes it necessary to consider Mr Hogan’s alternative argument that the Senior Master should have set aside the DCC on a discretionary basis in any event. Mr Hogan accepts that Senior Master Gordon-Saker properly directed himself as to the Denton test. He accepts that the Senior Master was entitled to find that:
- i) this was a significant default; and
 - ii) no good reason for the failure to act in time had been made out.
60. However, he suggests that the Senior Master had misapplied the third limb of the Denton test – the evaluation of all the circumstances of the case, so as to enable the court to deal with the application justly. On this issue, the question for me is not how I would apply the Denton criteria *de novo*, but whether the Senior Master exceeded “the generous ambit within which a reasonable disagreement is possible”, which would include taking account of an irrelevant factor, or failing to take account of a relevant one (for a recent statement of the principles in the same context see Michael Wilson & Partners Ltd v Sinclair and another [2020] Costs LR 387, [19]). Mr Hogan contends that the Senior Master did take account of an irrelevant consideration, in placing weight on what the Senior Master described as a lack of candour on Mr Kesar’s part in the witness statement made in support of the application.
61. To set that criticism in context, it is necessary to say a little more about why the Senior Master found that there was no good reason for the failure to serve Points of Dispute in time, and the specific context in which the Senior Master came to find that there had been insufficient candour on Mr Kesar’s part.
62. Mr Kesar’s witness statement stated that on 10 October 2020, a family member had had to isolate due to Covid infection, requiring him to work at home for 10 days. He referred to the fact that there was “some provision in place to work from home” but that there were no “adequate arrangements”, and that he had tried without success to access the firm’s servers. He also said that he used his personal email address but did not explain what arrangements had been put in place for his staff to access and forward emails to him. This evidence was vague, and as the Senior Master noted, someone in Mr Kesar’s position (with 25 staff working for him) ought to have been able to put in place

arrangements to ensure that email was monitored while he was working from home. In any event, Mr Kesar returned to the office on 26 October 2020. Mr Kesar's evidence offered no satisfactory explanation for his failure to deal with the Appellant's email after he had returned to the office.

63. What Mr Kesar did say is "the defendant's costs draftsman Mr Francesco Rodriguez served their bill of costs and notice of commencement by email on 15 October. He had not sought permission to serve his documents by email". That statement was made in support of an application notice, itself supported by a statement of truth from Mr Kesar, which asserted that "the Respondent was not asked if service by email was acceptable and the Respondent had not confirmed that he would accept service of the bill of costs by email". In the light of the email exchange at [3] above, the Senior Master was clearly surprised by the statements in the application notice and witness statement, which he described as "a failure to be as candid as he could have been". The Senior Master clearly viewed that failure not in isolation, but against the background of the prior criticisms made of Mr Kesar's conduct of the case in Master Cook's judgments, which required him to be "as candid as possible".
64. I am unable to accept the submission that it was not open to the Senior Master, at stage three of the Denton analysis, to have regard to Mr Kesar's failure to address the issue of agreement for service in a candid way, and in particular, before confirming the absence of an agreement to accept service by email by statements of truth, to have looked at the correspondence and drawn any relevant material to the court's attention. Nor can I accept the submission that it was not open to the Senior Master, in this context, to have regard to the prior failings on Mr Kesar's part. That argument was premised on the assertion that the assessment of costs was a new set of proceedings, and that any criticisms which might be made of Mr Kesar's conduct in the prior proceedings could not be relied upon in the assessment proceedings. However, at [56] I have already rejected the argument that the notice of commencement initiated a new set of legal proceedings, rather than a new phase of the proceedings commenced by the claim forms which Mr Kesar had issued.
65. In these circumstances, I do not think it can be said that the Senior Master misdirected himself in reaching this conclusion, or that he took account of an irrelevant matter in reaching his conclusion, and, accordingly, Kesar is unable to bring itself within the narrow scope for challenging the exercise of a procedural discretion on appeal.

E CONCLUSION

66. For these reasons, the Appellant's appeal succeeds, on an issue which was not advanced before the Senior Master (no doubt because the argument to which it was a response was first raised at that hearing).