Neutral Citation Number: [2024] EWHC 1933 (Ch)

Case No: BL-2023-000969

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30 July 2024

Before :

MASTER BRIGHTWELL

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Between :

(1) KATHERINE PLAYFAIR **(2) ADRIAN CHARLES PLAYFAIR LOTT** **(3) STEPHEN LAWRENCE PARKER LOTT** **(4) DAVID HOWARD NELSON** **(5) ROGER JAMES PARKER** **(6) ANDREW MURROUGH BAMBER** **(7) STEPHEN HOWARD WOOLFE**	**Claimants**
- and -	
(1) PANNELLS LLP (FORMERLY PKF (UK) LLP) **(2) BDO LLP** **(3) ERIC WARDLE** **(4) NEW WALKER REALISATIONS (FORMERLY HARVEY INGRAM LLP)** **(5) SHAKESPEARE MARTINEAU LLP**	**Defendants**

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Michael Furness KC and Joseph Steadman (instructed by **Stevens & Bolton LLP**) for the **Claimants**
Ben Smiley (instructed by **Stephenson Harwood LLP**) for the **First to Third Defendants**
Niamh O'Reilly (instructed by **RPC LLP**) for the **Fourth and Fifth Defendants**

Hearing date: 29 April 2024

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Approved Judgment

This judgment will be handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on Tuesday 30 July 2024

Master Brightwell:

1. This is an application issued on 13 October 2023 and made pursuant to CPR r 7.6 to extend the time for service of the claim form in these proceedings, which was issued on 16 June 2023. The application was thus made within the four-month period specified by CPR r 7.5 for service of a claim form within the jurisdiction. The application sought an extension to 16 January 2024. In the event the application did not come on for hearing until well after that date, on 29 April 2024, and the claim form has still not been served. The claimants accordingly seek an order extending time for service until after this judgment has been handed down.

2. The claimants are the beneficiaries and (as at the date the claim was issued) the trustees of three family trusts established by the late William Parker, in his lifetime in 1961 and 1967, and by his will following his death in 1985, which settlements were restructured in 2008. Before the 2008 restructuring, the first to third claimants had a number of distinct interests in the funds of the three trusts, whether reversionary (vested or contingent) or a life or absolute interest. By virtue of the restructuring they resettled their interests, in the case of some funds first taking an appointment for the purpose of doing so.

3. The claimants allege negligence on the part of the defendant advisers, who advised in 2007 to 2008 in relation to the restructuring. The first defendant ("PKF") was a limited liability partnership of chartered accountants, and the second defendant ("BDO") is its successor practice. The third defendant, Mr Eric Wardle, is said to have been the individual at PKF responsible for services provided to the beneficiaries and trustees of the trusts. The fourth defendant ("Harvey Ingram") was a limited liability partnership of solicitors, and the fifth defendant ("Shakespeare Martineau") is its successor practice.

4. The seventh claimant, Mr Stephen Woolfe, was the solicitor at Harvey Ingram, and later Shakespeare Martineau, who advised in relation to the trusts. He was a trustee of the trusts until 5 December 2023, which explains why he was named as a claimant when the claim form was issued. By a separate application issued on 22 April 2024, the claimants seek to remove Mr Woolfe as a claimant and add him as a sixth defendant and to substitute the new trustee of the trusts as a claimant.

5. The brief details of claim provided in the claim form state as follows:

> 'The Claimants' claims are for damages for negligence arising out of and/or in connection with
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> (i) advice provided to the First and Third Claimants and the trustees of the William Parker 1961 Settlement, the William Parker 1967 Settlement

and the William Parker Will Trust (the current trustees being the Fourth to Seventh Claimants) leading to the execution of documents described as "Deeds of Variation" dated 19 June 2008 by the First to Third Claimants and the said Trustees;

(ii) the drafting of the said Deeds of Variation dated 19 June 2008;

(iii) advice provided to the First to Third Claimants and the trustees of the William Parker 1961 Settlement leading to the execution of Deeds of Appointment dated 19 June 2008 by the said Trustees and the establishment of the Kate Playfair 2008 Settlement, the Adrian Lott 2008 Settlement and the Stephen Lott 2008 Settlement by the First to Third Claimants respectively and the transfer of property by them to the trustees of those Settlements, and the drafting of the said 2008 Settlements.'

6. The first witness statement of Mr James Lister, the claimants' solicitor, in support of the application says this about the issues to have arisen with the restructuring in 2008.

'(a) Firstly, it was carried out on the basis of an incorrect analysis by the Defendants of the First to Third Claimants' interests in the Family Trusts. In particular, the restructuring was premised upon the understanding that the First to Third Claimants held reversionary interests in the various trusts and their sub-funds, whereas as a matter of fact, the interests were (depending upon which trust is in question) either absolute or interest in possession. Consequently, the Deeds of Variation and other documents which were executed in 2008 were, on one analysis, ineffective; and

(b) Secondly, if the Deeds of Variation and other documents were not, as a matter of construction, ineffective; then the resettlement of the Family Trusts in 2008 would give rise to an exposure to both CGT and IHT which was neither foreseen (certainly in respect of the IHT exposure) nor would the liability have arisen if the 2008 restructuring had not taken place at all.'

7. Draft particulars of claim have more recently been prepared, following the provision by Shakespeare Martineau after the application had been issued of documentation relating to the restructuring. These particulars allege that incorrect advice was provided by both sets of defendants as to the fiscal consequences of the deeds entered into on 19 June 2008, and that they failed to advise that the first to third claimants would have been fiscally better off by doing nothing with their interests in the family trusts. It is also alleged that the resettlement of what were recited to be vested reversionary interests, where there was no such interest, was a nullity.

8. The claimants plead that they became aware of the alleged negligence of the defendants only after October 2021, and that they are thus entitled to rely on the provisions of section 14A of the Limitation Act 1980, which extends the starting date for reckoning the period of limitation to the earliest date on which a claimant or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action. This is subject to the 15-year longstop provisions in section 14B of the 1980 Act, which the claimants plead expired no earlier than 19 June 2023, 15 years after the deeds giving effect to the 2008 restructuring were made. The claim form was issued on 16 June 2023.

9. The BDO defendants' position is that the claim against them is time barred in any event as PKF provided no advice after 26 March 2008, but that is not a point to be determined on the present application.

Background to the application

10. In October 2021, the first claimant suffered a serious accident, which prompted her to instruct Womble Bond Dickinson ("WBD") to provide advice on her affairs, including in relation to her interests under the family trusts. This led to advice being sought by her and by the second and third claimants on the question whether an application under the Variation of Trusts Act 1958 should be considered. WBD and counsel then, by December 2022, identified problems in the restructuring work carried out in 2008.

11. Mr Lister explains that it was only on 16 May 2023 that the claimants were informed that they may have a claim in negligence in relation to the tax advice given in 2007 to 2008, and/or the drafting then carried out. The claimants have waived privilege in advice received by them in the period up to May 2023 in order to demonstrate this. It appears that Ms Georgia Bedworth, who was counsel instructed on behalf of the first claimant, advised her solicitor at WBD on that date that the parties' interests under the trusts and the tax consequences of entering into the 2008 deeds did not appear to have been understood. She said, 'I just flag this because if Kate has suffered loss as a result of negligent advice…any claim would need to be issued by the 15th anniversary of the negligent act because of the 15 year longstop in the Limitation Act 1980 s. 14B. If the negligence was advising Kate to enter into the deed, the period expires in June this year.' Mr Piers Feltham gave similar advice to the trustees two days later, on 18 May 2023. He asked Mr Woolfe to search his files and a request for documents was made of BDO a few days later.

12. WBD then took carriage of ensuring that the claim form was prepared and issued, on 16 June 2023. As Mr Furness KC put it at the hearing, the claimants joined all and sundry to the claim because it was not clear at that stage who

had given the allegedly negligent advice. Mr Woolfe was at that point indicating that tax advice in 2008 had been given by PKF, but Shakespeare Martineau was included as a defendant as the claimants did not know whether that was correct. In the event, and having prepared draft particulars of claim, the claimants wish to pursue the claim against all named defendants. The claimants rely on the fact that, Mr Woolfe having initially indicated that he suspected that Shakespeare Martineau's documents had been destroyed, when later produced they demonstrated that he (Mr Woolfe) had drafted the 2008 deeds and provided some advice in relation to them.

13. WBD had identified that acting for the claimants put them in a position of conflict given that the firm frequently acts for insurers. They then conducted an exercise to find a suitable replacement firm. Stevens & Bolton was identified as such and, after a call on 21 July 2023, was informed on 25 July 2023 that it was to be instructed. Mr Lister indicates that he received initial paperwork on 3 August 2023, following which the claimants had to comply with regulatory requirements and give authority to Stevens & Bolton to act, who, in turn, had to review the papers. Further requests for documentation were made of Shakespeare Martineau and BDO on 4 October 2023.

14. The application for an extension of time for service of the claim form was issued on Friday 13 October 2023 (the last working day before the claim form expired), and provided to the defendants with a copy of the claim form, but not by way of service. The claimants' position is that it would not have been appropriate to serve defendants against whom it may not have been possible to proceed.

15. The claimants' position is that they were unable to identify the correct defendants before the expiry of the claim form, or to particularise what is a complex claim, and through no fault of their own have been hampered by the defendants in obtaining relevant documentation and were forced to change solicitors after the claim form had been issued. They submit that there is accordingly a good reason for the inability to serve. There is no prejudice to the defendants, because they were provided with the issued claim form on 16 October 2023, after this application had been issued. It would thus be unjust to refuse to permit the claimants to continue their claim.

The legal framework

16. The starting point for the consideration of any application to extend time for service of a claim form must now be the judgment of Carr LJ (as she then was) in *ST v BAI (SA) (trading as Brittany Ferries)* [2022] EWCA Civ 1037, at [60]–[65]:

‘60. The Appellant's application for an extension of time was made prospectively, under CPR 7.6(2). As such, it is, strictly speaking, inapposite to speak of a “failure” to serve a claim form within time. Rather, the Appellant needed a (prospective) extension of time in which to serve.

61. CPR 7.6(2) has been examined in a number of well-known cases, including *Hashtroodi*; *Collier v Williams* [2006] EWCA Civ 20, [2006] 1 WLR 1945; *Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203, [2008] 1 WLR 806 (“*Hoddinott*”); *FG Hawkes (Western) Ltd v Beli Shipping Co Ltd* [2009] EWHC 1740 (Comm), [2009] All ER D 207; *Cecil*; *Al-Zahra (PVT) Hospital and Others v DDM* [2019] EWCA Civ 1103, [2019] 6 WLUK 444 (“*Al-Zahra*”); and, most recently, *Qatar Investment & Projects Holding Co v Phoenix Ancient Art SA* [2022] EWCA Civ 422, [2022] 3 WLUK 432 (“*Qatar*”).

62. For ease of reference, I summarise the relevant general principles as follows:

i) The defendant has a right to be sued (if at all) by means of originating process issued within the statutory period of limitation and served within the period of its initial validity of service. It follows that a departure from this starting point needs to be justified;

ii) The reason for the inability to serve within time is a highly material factor. The better the reason, the more likely it is that an extension will be granted. Incompetence or oversight by the claimant or waiting some other development (such as funding) may not amount to a good reason. Further, what may be a sufficient reason for an extension of time for service of particulars of claim is not necessarily a sufficient reason for an extension for service of the claim form;

iii) Where there is no good reason for the need for an extension, the court still retains a discretion to grant an extension of time but is not likely to do so;

iv) Whether the limitation period has or may have expired since the commencement of proceedings is an important consideration. If a limitation defence will or may be prejudiced by the granting of an extension of time, the claimant should have to show at the very least that they have taken reasonable steps (but not *all* reasonable steps) to serve within time;

v) The discretionary power to extend time prospectively must be exercised in accordance with the overriding objective.

> 63. Following up on the question of limitation, as noted in *Qatar* at [17(iv)] (and *Al-Zahra* at [52(3)]), it was stated in *Cecil* (at [55]) that a defendant's limitation defence should not be circumvented save in "exceptional circumstances". This is a phrase that needs to be approached with care; it is one about which the judge himself expressed reservations. At their outer limit, the words "exceptional circumstances" can be taken to mean "very rare" (or "very rare indeed"). In the present context, however, the phrase should not be taken to mean any more than its literal sense, namely "out of the ordinary". It means, as identified for example in *Hoddinott* at [52], that the actual or potential expiry of a limitation defence is a factor of considerable importance. The factors in favour of an extension of time will have to be, either separately or cumulatively, out of the ordinary. Only in this way can the phrase "exceptional circumstances" be reconciled with the primary guidance in *Hashtroodi* (at [18]) and [22]) that the discretion under CPR 7.6(2) is to be exercised in accordance with the overriding objective and in a "calibrated" way, as emphasised in *Qatar* at [17(iii)]. It is neither helpful nor necessary to go further in terms of guidance, by reference to a need for "powerful good reason", as the judge suggested, or otherwise.
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> 64. For the sake of completeness, such an approach is consistent with *Cecil,* properly understood. In *Cecil*, described by Rix LJ (at [98]) as "commercial litigation on a grand scale", it was held that the fact that an extension of time was needed to obtain funding (or rather because of a desire that funding be in place for the whole of the litigation so as to eliminate or minimise any risk to the claimants) was not a good reason. The writ could and should have been served with an application thereafter for a stay if necessary (see in particular [27b)], [28b)], [42], [43], [51], [96] and [97]). In what were obiter remarks addressing the relevance of limitation periods, Stanley Burnton LJ (at [48]) emphasised that there was no need for a claimant to establish that all reasonable steps had been taken. He referred to the comments of Rix LJ in *Aktas v Adepta* [2011] QB 894 at [91], where Rix LJ referred to the need for strict regulation of the period for service to avoid the statutory limitation period becoming "elastic at the whim or sloppiness of the claimant or his solicitors". None of this equates with a need for there to be "exceptional circumstances" in the sense of circumstances that are very rare.
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> 65. Finally, and self-evidently, the result of an application under CPR 7.6(2) in each case will be highly fact-specific. A comparison with the outcome on the facts of other cases is unlikely to be instructive.'

17. The focus is therefore on the reason why there has been an inability to serve in time, and whether that constitutes a good reason. In circumstances where it is

accepted that the limitation period for the claim has expired since the claim was issued, the claimant has to show that reasonable steps have been taken to serve the claim form within its period of validity. On this application, the particular question arises whether (a) these reasonable steps must (as the Shakespeare Martineau defendants submit) comprise at least some attempt to effect physical service of the claim form or whether some other steps towards ascertaining whether there is a good claim will suffice, and (b) in any event, did the claimants do enough to attempt to serve the claim form on the facts? It is clear that there was no impediment to the effecting of the mechanics of service in this case; the claimants rely instead on the inability in the time available to ascertain whether they had a good claim and, if so, against whom.

18. As to the importance of the assessment of the reason for the inability to serve, and the application of the overriding objective, I note what Dyson LJ said in *Collier v Williams* [2006] 1 WLR 1945 at [131]:

> '131 …It is true that in *Hashtroodi's* case [2004] 1 WLR 3206, para 18, the court said that the power in CPR r 7.6(2) had to be exercised in accordance with the overriding objective. But it went on to say that this means that it will always be relevant for the court to determine and evaluate the reason why the claimant did not serve the claim form within the specified period. That is the critical inquiry that the court must undertake in these cases. The strength or the weakness of the reason for the failure to serve is not one of a number of factors of roughly equal importance to be weighed in the balance. The exercise of going through the checklist of factors set out in CPR r 1.1(2) will often not be necessary. If, as in the present case, there is no reason to justify the failure to serve the claim form in time, it should normally not be necessary to go further. The facts of *Hashtroodi's* case itself illustrate the point….'

19. In *Hashtroodi's* case at [21], the court also said this:

> '21 It is easy enough to take the view that justice requires a short extension of time to be granted even where the reason for the failure to serve is the incompetence of the claimant's solicitor, especially if the claim is substantial. But it should not be overlooked that there is a three-year limitation period for personal injury claims, and a claimant has four months in which to serve his or her claim form. Moreover, the claim form does not have to contain full details of the claim. All that is required is a concise statement of the nature of the claim: see CPR r 16.2(1)(a). These are generous time-limits….'

20. The authorities concerning the application of the court's power to extend time for service of a claim form explain the importance of service of the claim form on the defendant, and in particular on the effect that this step has with regard

to the defendant to the claim. In *Phoenix Healthcare Distribution Ltd v Woodward* [2018] EWHC 2152 (Ch), HHJ Hodge QC said this:

> '189 First, and most fundamentally, it is the service of the claim form, and not of the particulars of claim, that engages the court's jurisdiction. Authority for that proposition is to be found in the judgments of both the majority and the minority in *Barton* [*v Wright Hassall LLP* [2018] 1 WLR 1119], and also in the judgment of Arnold J in *Personal Management Solutions Limited v Gee 7 Group Limited* [2016] EWHC 891 (Ch) at para 27. The question of whether an originating process has been properly served is not simply a technical question, but it goes to the root of the court's jurisdiction. I accept Mr Onslow's submission that it follows that it would rarely, if ever, be justifiable to delay service of a claim form until particulars have been settled, particularly where limitation is already in issue.'

21. In *City and General (Holborn) Ltd v Structure Tone Ltd* [2009] EWHC 2152 (TCC), Christopher Clarke J had said, at [38]:

> '38 The effect of extending the time for service of the claim forms will be to deprive the Defendants of a limitation defence which would be available to them if permission was refused and City was compelled to issue fresh proceedings; and would "*disturb a Defendant who is by now entitled to assume that his rights can no longer be disputed*". That is of particular significance in the present case where service of the claim forms was preceded by no letter before action or other intimation of suit. I accept that a claim had been made against the insurers to which they had responded in 2007. But there is no evidence that anything happened to move any claim forward after that.*'*

22. In *Hoddinott*, at [54], the Court of Appeal said the following in a judgment of the court delivered by Dyson LJ, setting out material considerations which apply whether or not limitation has expired:

> '54 It is tempting to ask: what is the point in refusing to extend the time for service if the claimant can issue fresh proceedings? But service of the claim form serves three purposes. The first is to notify the defendant that the claimant has embarked on the formal process of litigation and to inform him of the nature of the claim. The second is to enable the defendant to participate in the process and have some say in the way in which the claim is prosecuted: until he has been served, the defendant may know that proceedings are likely to be issued, but he does not know for certain and he can do nothing to move things along. The third is to enable the court to control the litigation process. If extensions of time for serving pleadings or taking other steps are justified, they will be granted

> by the court. But until the claim form is served, the court has no part to play in the proceedings. A key element of the Woolf reforms was to entrust the court with far more control over proceedings than it had exercised under the previous regime. The rules must be applied so as to give effect to the overriding objective: this includes dealing with a case so as to ensure so far as is practicable that cases are dealt with expeditiously and fairly: CPR r 1.1(2)(d). That is why the court is unlikely to grant an extension of time for service of the claim form under CPR r 7.6(2) if no good reason has been shown for the failure to serve within the four months' period.'

23. Mr Smiley referred to the Pre-Action Protocol for Professional Negligence claims. Paragraph 4 of the protocol provides that:

> 'The protocol does not alter the statutory time limits for commencing court proceedings. A claimant is required to start proceedings within those time limits. However, the claimant can request and the parties can agree a standstill agreement to extend the period in which a limitation defence will not be pursued. Alternatively, a claimant may commence court proceedings and invite the professional to agree to an immediate stay of the proceedings to enable the protocol procedures to be followed before the case is pursued.'

24. It is clear from the authorities and from the Pre-Action Protocol that there are a number of ways in which a claimant can protect her position when the expiry of a limitation period is approaching. It has been pointed out that the claim form need only contain brief details of claim, and that an application can be made to extend time for service of the particulars of claim, which is subject to a less stringent test, and to the court's general case management powers: see *Phoenix Healthcare Distribution Ltd* at [190].

25. In *Hoddinott*, the court considered that the claimant's solicitor ought to have proceeded in this way, and not to have provided the defendant with a claim form by way of information only, applying without notice to extend time for its service on the grounds that it was not possible to produce particulars of claim in time. See at [41].

26. In *Phoenix Healthcare Distribution Ltd*, there were difficulties in finalising the particulars of claim, although in the event they were prepared before an invalid attempt was made to serve them together with the claim form, just before the expiry of the claim form. Master Bowles at first instance considered that the claimant's solicitors had behaved reasonably in waiting to finalise the particulars of claim, and took this into account when retrospectively validating the steps taken to serve the claim form during its period of validity, under CPR r 6.15(2). Overturning this decision on appeal, Judge Hodge did not consider

that it had been reasonable to await the completion of particulars of claim before attempting to serve the claim form, especially in circumstances where the relevant limitation period had already expired, see at [186]. His decision was upheld on further appeal to the Court of Appeal ([2019] EWCA Civ 985).

27. A case which was discussed in some detail at the hearing was the decision of the Court of Appeal in *Steele v Mooney* [2005] 1 WLR 2819. The decision was later summarised in *Cecil v Bayat* [2011] 1 WLR 3086 in the following way, at [46]:

> 'That was a case in which the claimant did not know whether she had a good cause of action against any of the defendants because she had not obtained an expert's report, and the expert's report had been delayed by the failure of one of the defendants to provide copies of his clinical notes. None of the defendants had objected to the extensions of time sought by the claimant, and the error in referring to service of the particulars of claim rather than the claim form in the application for an extension was obvious and had been realised by the defendants.'

28. In *Steele v Mooney*, an extension of time was thus sought both for service of the claim form and for the particulars of claim, but the claimant later realised that the order obtained had mistakenly referred only to the particulars of claim. The court made an order under CPR r 3.10 on the basis that there had been an error of procedure, retroactively rectifying the orders which had earlier been made so as to provide for an extension of time for service of the claim form as well as the particulars of claim and supporting documentation.

29. In *City and General (Holborn) Ltd*, Christopher Clarke J discussed *Steele v Mooney* in the following terms:

> '39 Further, City is not in the position of someone who could not, or could not properly, take the step of serving proceedings as was the case in *Steele*. They could easily have done so. In *Steele* the Claimant's solicitors did not know whether the Claimant had a claim with real prospects of success and, if so, against which Defendant, until they received an expert's report. That report was delayed because the First Defendant had not responded to proper requests for his clinical notes. Dyson LJ observed that the:
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> > "situation was quite different from that which often arises where the Claimant seeks an extension of time for service of the claim form because he or she wants further time to prepare a schedule of loss. In the present case, the outstanding information went to the very heart of the Claimant's case. Without the expert's report she did not know whether she had a viable case."

> The situation there appears to me to be markedly different. The solicitor could not properly file a statement of case in professional negligence, supported with a statement of truth, without a report which was delayed because of a failure of the First Defendant. A similar situation applied in *Imperial Cancer*. The present case is more closely analogous to *Hoddinott* where an extension was sought because the Claimants were not in a position to serve fully particularised particulars of claim.'

30. *Steele v Mooney* was considered further by the Court of Appeal in *Cecil v Bayat* [2011] 1 WLR 3086, where the claimant sought an extension of time because of delays in obtaining funding. Hamblen J granted the extension, relying on *Steele v Mooney* among other factors for the proposition that 'it was not sensible to serve the claim until it had been established that the claimant had a viable claim' (at [180]).

31. It is useful to consider in full the paragraphs of the judgment of Rix LJ in which he considered the decision in *Steele v Mooney*:

> '91 In these circumstances, can the claimants' reason for wanting successive extensions of time be described as a good reason? Since a limitation period expired in November 2008, during the period of the first extension (from September 2008 to March 2009), an especially good reason would, in my judgment, on Dyson LJ's calibrated approach, be required. The reports are not replete with examples, at any rate where the claimant has not established a real problem in carrying out service. The sole example relied on by the claimants is *Steele v Mooney* [2005] 1 WLR 2819.
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> 92 However, in that case there was no issue as to the exercise of discretion. The sole issue was as to whether the case should be regarded as a CPR r 7.6(3) case or a CPR r 7.6(2) case with the assistance of CPR r 3.10. The application to extend time to serve had in form been made out of time, but in practice had been made in time. What had gone wrong was that the application had by mistake referred to "particulars of claim and supporting documentation", without explicit reference to the claim form itself, whereas previous communications between claimant and defendants, requesting their consent to an extension of time by means of a consent order, had referred to "particulars of claim and supporting documentation, including the claim form". One defendant simply signed that consent order, another said it was willing to do so but pointed out that an extension of time for service of a claim form could not be dealt with by consent, and a third defendant did not respond. In the end the formal application had been made with its inadequate wording. It was only after the service period had passed that the mistake was picked up and rectified, but by then the claimant faced opposition because of the limited terms of

CPR r 7.6(3). Nevertheless, the claimant sought to get herself out of CPR r 7.6(3) and back within the broader discretion of CPR r 7.6(2) by invoking CPR r 3.10 which permits a judge to "remedy the error" where there has been an "error of procedure such as a failure to comply with a rule". Deputy District Judge Smith acceded to that application on the ground that the defective application had been a mistake which had not misled any of the parties, and that but for the formal error the application would not have been opposed and thus would in all probability have been granted by the court. On first appeal, Judge Rudd overturned that decision on the ground that CPR r 3.10's "error of procedure" could not cover such a case and therefore he was without jurisdiction to remedy the mistake. If, however, he had found here an "error of procedure", he would have agreed with the deputy judge's disposition. On second appeal, the sole issue was the width of CPR r 3.10. There was no attack on the discretion exercised by both courts below: para 35.

93 Therefore the essential exercise of discretion had really been unopposed. The critical facts are explained in para 33, and were that the claimant could not know whether she had a viable claim without an export's report which could not be completed without disclosure of clinical notes which the first defendant (the only defendant ultimately served) had not provided although "proper requests" had been made for them. Therefore this was, au fond, a standard case where timely service had been delayed by matters outside her control. As Dyson LJ said [2005] 1 WLR 2819, at para 33:

> "The claimant had a good reason for not serving the claim form … The claimant's solicitors behaved sensibly and responsibly in not serving proceedings when they did not know whether the claimant had a claim which had real prospects of success against any, and if so which, of the three defendants. They could not responsibly proceed against any of the defendants without the report of an expert … The report was delayed because the first defendant himself had not responded to proper requests for his clinical notes. The situation was quite different from that which often arises where the claimant seeks an extension of time for service of the claim form because he or she wants further time to prepare a schedule of loss. In the present case, the outstanding information went to the very heart of the claimant's case."

94 In my judgment, *Steele v Mooney*, properly understood, is not a rare and exceptional case where a claimant was permitted to extend time for service because of a deliberate decision to keep her defendant in the dark as to her claim pending delayed service, but resolves itself into a standard

> case where a claimant has experienced difficulty in serving and needs the court's assistance. The defendant knew of the impending claim and had himself caused or materially contributed to the delay and the need for an extension of time in which to serve, and did not even dispute the ultimate issue of discretion. Professor Zuckerman's *Civil Procedure*, 2nd ed, para 4.150 does not treat *Steele v Mooney* as illustrating any wider principle.
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> 95 For these reasons I consider that the judge erred in principle in attaching importance to *Steele v Mooney* at the beginning of para 180 of his judgment, where he said:
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> > "In the unusual circumstances of the present case I therefore accept that the claimants have acted 'sensibly and responsibly' in not serving the claim form. In cases such as *Steele v Mooney* it was not sensible to serve the claim until it had been established that the claimant had a viable claim. In that case expert evidence was required for the claim to be viable. In the present case funding was required for the claim to be viable."'

32. I consider that the correct interpretation of *Steele v Mooney* is as set out in the decision of Rix LJ, above. This shows that the ratio of the case concerned the scope of CPR r 3.10, not the test to be applied when an application is made to extend time for service of the claim form. For the same reason he gave for allowing the appeal in the case, I do not consider that it establishes any general principle that a claimant who remains unsure whether he has a good claim is acting reasonably by failing to serve the claim form whilst further investigations are carried out. Each case will turn on its own facts and circumstances.

Discussion

33. In light of the authorities set out above, I consider that the relevant questions for the court on the facts of this application are (a) what is the reason for the claimed inability to serve the claim form in it, and how good a reason is it, and (b) have the claimants taken reasonable steps to serve the claim form within the period of validity of the claim form?

34. These questions must be considered in the light of the guidance summarised in *ST v BAI* as a whole, and they fall to be considered together. The second question arises because the period of limitation has expired, and is considered together with and not separately from the first question, in determining whether the application should be granted. In *ST v BAI*, at [87], Carr LJ treated the question whether reasonable steps had been taken to serve the claim form as part of the assessment of whether there was a good reason for the inability to serve the claim form.

35. There is also what was framed as a threshold question, namely whether the reasonable steps which must be taken within the period of validity of the claim form in a case where limitation has expired must relate to the physical act of effecting service. This could also be framed as a question whether the inability to serve the claim form must relate in some way to the mechanics of actually effecting service on the defendants. Ms O'Reilly submitted that a reading of *ST v BAI* suggests that the inability must be related to the act of service itself rather than to anything that might be done to prepare the documentation which would then fall to be served. Mr Smiley, on the other hand, accepted that something not directly related to the mechanics of service could suffice, although he strongly resisted the suggestion that the claimants in this case had taken reasonable steps to serve the claim form.

36. Rix LJ accepted in *Cecil v Bayat* at [94] that the relevant difficulty in service might result from a claimant's inability to ascertain in time whether a good claim exists. And, at [49], Stanley Burnton LJ indicated that it is "the general rule" that the good reason must be a difficulty in effecting service. As Mr Furness submitted, a difficulty in service may arise where the claimant is not ready to serve. I therefore consider that Mr Smiley was correct to make a concession in this regard.

37. Returning to the principal question, it seems to me that the position requires to be assessed on the footing that the claimants became aware that they had or might have a claim in negligence against one or more of those who advised on the restructuring of the settlements in 2007 to 2008 only around 16 May 2023. In response to the evidence filed by the defendants, Mr Lister has explained in his second witness statement what advice was received in the months leading up to May 2023. I accept in favour of the claimants that they were not in fact in a position to take further steps before then.

38. It is also clear that there was some further delay caused by the need to instruct new solicitors after WBD, who were still instructed when the claim form was issued, indicated that they could not continue to act because of the risk of conflict. Mr Lister explains that his firm was informed on 25 July 2023 that it was to be instructed, and that he received 'initial paperwork' on 3 August 2023. He then goes on at paragraph 45 of his first witness statement, in terms which I consider to be conspicuously vague as to timing and lacking in any particulars as to what precisely was being done and when:

> 'There followed a period in which the Claimants were required (as they would be in any case) to comply with regulatory requirements to formally engage my firm as clients. My firm was obviously then required to review the advice already provided and the details which were available of the underlying dispute from a standing start and over the summer holiday period. The process of reviewing the papers and (in particular) obtaining

> authority from all of the Claimants to my firm acting took several weeks, as (I understand) a number of the Claimants and their respective advisors were away over the summer period.'

39. There is no indication of any sense of urgency having informed matters from the time when the claim form had been issued until 4 October 2023, when a request was made of BDO and Shakespeare Martineau for documents, only seven working days before the claim form would expire. There is no indication of consideration having been given to the various steps which might be taken in order to protect the claimants' position, i.e. issuing and serving the claim and seeking (by consent or on application) a stay or an extension of time for filing and serving particulars of claim, or seeking a standstill agreement. No explanation is provided as to why a further request was made of BDO without BDO being informed even at that stage that a claim had been issued. In the absence of any satisfactory explanation why matters were left so late and without consideration being given to any course other than that which was in the event followed, I am unable to assume in the claimants' favour that there was a good reason for that course being taken. Especially in circumstances where the longstop limitation period had expired, the fact that work needed to be done in the summer holiday period is not by itself a factor pointing to a good reason, nor is any delay in the provision by the claimants of authority to their own solicitors. They either were, or ought to have been, advised of the need to proceed with alacrity in all the circumstances.

40. The claimants rely on three factors as to why the claim form could not have been served sooner, described as the Limitation Issue, the Complexity Issue and the Relevant Parties Issue. As I have indicated, I accept that the claimants became aware of the claim only in the weeks before the limitation period (on any view) came to an end. The Limitation Issue essentially means that the claimants did not have time to carry out the steps which a well-advised claimant would carry out before issuing and serving proceedings, if limitation were not an issue. I accept that the claimants did not have time to carry out all such steps.

41. On the Complexity Issue, Mr Lister contends that it was not possible in time for the claimants to ascertain the fiscal consequences of the 2008 restructuring and says that, having instructed Ensors accountants in July 2023, a preliminary analysis was provided on 6 October 2023. As to the Relevant Parties Issue, the claimants say that they did not know at the time when the application to extend time was made (and until later than that) who was responsible for the advice on the restructuring. The requests for documentation from Shakespeare Martineau on 30 May 2023 had elicited the response that the 2007-2008 file was likely to have been destroyed. BDO had been asked for documentation on 2 June 2023 (with no intimation of a claim) and had indicated that their files

would be reviewed but they had not produced anything. A further request was made of BDO (and Shakespeare Martineau) on 4 October 2023. Given the long passage of time, there can have been no guarantee that either firm was going to be able to assist further and there was real reason to believe that they would not be able to do so.

42. As the point was discussed at the hearing, I should say that I do not consider the correspondence with BDO after this application had been issued to be germane. BDO have declined voluntarily to disclose their working papers, consistent with the position almost invariably adopted by accountancy firms as to the ownership of such papers. Given the lateness of the request of BDO, this is not material to a consideration of the reasonableness of the steps taken by or on behalf of the claimants before this application was made.

43. If the Complexity Issue alone were the relevant consideration, it seems tolerably clear that difficulty in calculating tax losses would not have justified failing to serve the claim form. The cases discussed above, including *Hoddinott* and *Steele v Mooney*, suggest that a claimant wanting time to articulate her losses better should serve the claim form and seek an extension of time for serving particulars of claim. Mr Furness understandably placed most reliance on the Relevant Parties Issue as the reason why it would not, in the claimants' contention, have been appropriate for the claim form to have been served in or before October 2023.

44. I accept that the analysis, both as a matter of trust law and of tax law, is complex. That emerges most clearly from the draft particulars of claim. I was invited by Mr Furness to read them, and I have done so, although no detailed reference to them was made in written or oral submissions. It seems to me likely (and, as I say, without having received submissions on the point) that the analysis pleaded out in draft goes beyond that which counsel previously instructed in relation to the proposed variation had suggested. Nonetheless, the key complaint, that the beneficiaries had by the 2008 restructuring purported to resettle vested reversionary interests in more than one fund when such interests did not exist, and that the advisers had negligently failed to advise that the restructuring was in the event fiscally disadvantageous, was apparent by the time the claim form was issued. It seems that the existence of a tax loss emerged only in May 2023, around the time when Ms Bedworth first advised that there may be a claim in negligence. It was also apparent to the claimants that both Harvey Ingram and PKF had been giving relevant advice. Mr Lister says that at paragraph 28 of his first witness statement. He does so in support of the argument that the claimants did not know whom to sue. But, they knew enough to summarise their claim and to name the relevant defendants (or at least a list of those from which the correct defendants would be a subset) when drafting and issuing the claim form.

45. I do not consider that it was inevitable that relevant advice had been provided by both Harvey Ingram and PKF. It also seems tolerably clear to me that the claims and losses could not be particularised without further documentation of the kind which was requested from Shakespeare Martineau in June 2023 and not provided until after 16 October 2023. I also accept that the claimants were unable to be sure that they would wish to proceed against all defendants until after the claim form had expired, although as both Harvey Ingram and PKF appeared to have advised on the 2008 restructuring, it must have been reasonably likely that they would wish to do so. But did this mean that the claimants were actually unable to serve the claim form, one relevant question being whether there was an 'inability to serve', and, if so, whether there was a good reason for it?

46. The claimants knew when the claim form was issued that there were identified errors in the documents executed in 2008, and that there were or may be inheritance tax and, possibly, capital gains tax liabilities which might have been avoided if the restructuring had not taken place or if it had been structured differently. They knew that the targets of any claim would be the successor firms to PKF and Harvey Ingram, and perhaps individual partners of them, and they knew that those firms had advised on the relevant transactions, even though they did not know precisely what role each firm had played. As Mr Clifford of Ensors had advised on 9 May 2023 in the context of what reporting to HMRC may now be required, it appeared that there may be unanticipated historical tax consequences in each year following the 2008 restructuring. As Mr Smiley points out, Ensors had in fact carried out an analysis of the IHT liabilities, with input from Mr Feltham, and this was shared with the beneficiaries at the start of June 2023. Furthermore, a problem had been identified at the start of the year, and Mr Woolfe had indicated on 31 January 2023 (in an email to Ensors) that PKF had given relevant advice.

47. By the time Stevens & Bolton were instructed, and probably some weeks before that, there appeared to be little prospect of Shakespeare Martineau or BDO voluntarily providing any further information which would assist in ascertaining whether the claim lay against one or both advisers, and to assist in enabling the claim to be particularised, unless some action was taken. Something therefore would have to be done. As a claim form had been issued, that could not include an application for disclosure before the start of proceedings under CPR r 31.16. But, as set out in the paragraph above, the parameters of any claim were tolerably clear even if it could not yet be particularised and even if it could not yet be confidently asserted that all defendants would be pursued.

48. The most obvious step to take in such circumstances would have been to write to the defendants in good time to seek an appropriate agreement in relation to

limitation. That could have been done before the claim form was issued, seeking a standstill agreement. Alternatively, an indication could have been given that a claim had been issued for limitation reasons, and seeking an agreement either that the claim be stayed, that there be an extension of time for particulars of claim, or that an order be made under CPR r 7.6(2), i.e. analogous to the position in *Steele v Mooney*. In the further alternative, the claim form could have been served, with an application then made for similar relief. It seems to me to be very relevant that Mr Feltham suggested on 18 May 2023 when writing to counsel for the other parties concerned with the proposed variation that the trustees might issue a protective claim form, or 'seek a limitation waiver'. I consider that it was clear at all material times from around the time the claim was issued, when the initial document requests had not produced sufficient documentation, that it would be unlikely that a fully particularised claim could be prepared and served within the validity of the claim form.

49. There was opportunity, as suggested by Mr Feltham, for a standstill agreement to be sought before the claim form was issued. Such agreements are frequently sought and obtained in circumstances where a claimant is unsure whether they have a good claim against a given proposed defendant. If the defendants had not agreed to a waiver of limitation, there was no reason to suppose the physical act of service of the claim form would have met any difficulty, and there was ample opportunity after the claim form was issued for the consent of the defendants to be sought to a stay of proceedings, or to an extension of time for service of the claim form (and/or the particulars of claim). Any of these steps would have ensured that the claimants' position was protected whilst respecting the clear statements in authority that the jurisdiction of the court is engaged by the service of the claim form and that a defendant has the right to be sued, if at all, within the statutory period of limitation. The agreement to a stay of proceedings by a defendant once served satisfies these policy considerations, as does a standstill agreement positively entered into by a defendant with knowledge of the proposed claim. It is certainly not the case that the only route open to a person in the position of the claimants is to apply for an order extending time for service of the claim form and thus extending its validity.

50. I agree with Ms O'Reilly that it is not simply a question of assessing where the balance of hardship lies. In *ST v BAI*, Carr LJ said at [90]–[91] that the Admiralty Registrar at first instance had been entitled to find that there was a "middling good" reason for the claim form not having been served in time, and in light of additional factors he was entitled to conclude that, in all the circumstances, it would be in accordance with justice and proportionality to allow the claim to go forward. The question of what justice requires in all the circumstances falls to be assessed by reference to all the relevant

considerations in the case law. As Carr LJ put it at [69], 'the exercise is essentially first to evaluate the reason, and then to put that reason into a wider context, which requires consideration of the overriding objective and the balance of hardship to the parties.'. It is clearly a relevant factor that, if limitation has expired and the court does not extend time for service of the claim form, then the claimants will lose the ability to pursue their claim. I also bear in mind, however, as Dyson LJ said in *Collier v Williams* at [131], that the strength or weakness of the reason for the failure to serve in time is not merely one of several factors of equal importance to be taken into account.

51. Mr Lister says in his second witness statement that it would be inequitable to deny the claimants the right to continue their claims against the defendants. He suggests that 'whether or not the extension of time relates to the Particulars of Claim only or to both the Claim Forn and the Particulars of Claim is simply academic. The position that the Defendants find themselves in would be precisely the same in either scenario [i.e. whether or not the claim form had been served in time, coupled with an application for an extension of time for service of particulars of claim]'. He also says this:

> '….It is simply a matter of unfortunate timing that Kate and the family were not considering the restructuring and the VTA application say, six months earlier. Had they done so, the claim would have been identified well in advance of the limitation period and issued (with full particulars) with no difficulty. Had that been the case, the Defendants would have found themselves in exactly the same position they are now, in terms of the availability of documents and witnesses. There is nothing to suggest that, had the claims been identified six months earlier, such that they were issued and served without difficulty, that the claimants would be in any different position to defend those claims than were they allowed to proceed now. Given that the Defendants do not find themselves in a position of any greater prejudice, the only party that truly suffers if the claim is not permitted to proceed are the Claimants, who lose the right to bring a potentially valuable claim against their former professional advisors.'

52. I cannot accept on the basis of the authorities set out above that this is the correct way in which to approach the application. It is, essentially, to suggest that one does so by balancing the hardship to each side in the scales. Mr Furness accepted that one does not simply balance hardship in this way, but submitted that the prejudice to each side is a key factor. This does not pay due regard to the importance of the service of legal process and of assessing the reasonableness of the steps taken to effect service of the claim form within its period of validity. And, in any event, the prejudice to the defendants if the application is granted (i.e. the loss of the right to plead limitation, if the claim

was not already time-barred before the claim form was issued) is far from illusory. It is the very mirror of the claim that the claimants wish to pursue.

53. Returning to the questions that must be asked in light of the discussion above, the failure to inform the BDO defendants of the claim until the last working day before the claim form expired perhaps creates a false impression that issuing the present application at the eleventh hour was all that could be done. As set out above, there were many weeks in which it was known that the relevant information was not yet available, and in which the informed consent of the defendants to an extension of time or a stay (or a suspension of limitation) could have been sought, and which could have fully taken account of the limits to the claimants' knowledge at that point.

54. Where the evidence does not explain why these obvious steps were not undertaken, and where (as I explain further below) I do not consider the defendants responsible for the position in which the claimants found themselves, I am unable to come to the view that there is a good reason for the failure to serve the claim form. I accept that the claimants' solicitors formed the view that they could not do so, and that this is not a case of pure oversight, but the assessment must be an objective one. In coming to this conclusion, I do not consider that reasonable steps were taken to serve the claim form. The claimants neither progressed the attempt to obtain documents with any appropriate speed, nor made any attempt at all to co-operate with the defendants in seeking a way forward whilst protecting the claimants' position. By no later than 21 July 2023, when Mr Lister spoke to someone on behalf of the claimants with a view to accepting instructions, and probably weeks earlier, the need for prompt action by new solicitors was or should have been apparent, WBD no longer being able to act. Almost nothing was then done before the claim form expired. Whether that was the fault of the claimants personally or the claimants' solicitors is not something I can determine, nor do I need to do so: either way the delay is attributable to the claimants.

55. I do not consider that the fact that a copy of the claim form was provided informally to BDO at the very last moment, when the application was issued, is significant in this case. Furthermore, I do not consider it to be material to the question whether reasonable steps were taken to serve the claim form. The time to inform the BDO defendants of the claim was well in advance of the expiry of the claim form. I note that in *Hoddinott*, where the judge below had failed to take into account the provision of the claim form to the defendant, the Court of Appeal said that it was the unusual combination of that fact and that limitation had not expired which led it to overturn the refusal of the District Judge to extend time for service of the claim form (see at [58]). By the same token, I do not think that the fact the claim form has not been served (or purportedly served) since 16 October 2023 is significant. I agree with Mr

Furness that, once this application had been issued and the claim form had expired, purported service of it would have had no effect.

56. Further, this case is distinguishable from *Steele v Mooney*. First, as Rix LJ said in *Cecil v Bayat*, and as discussed above, the Court of Appeal there was not strictly concerned with the question whether an extension of time for service of the claim form should be granted, but with the breadth of CPR r 3.10. Secondly, and connected to the first point, one of the defendants had consented to an extension of time for service of the claim form, another had not opposed it, and the other had simply not engaged with the question but had been invited to do so. A case where the defendant has consented in advance to an order extending time for service of the claim form is distinguishable. Such a defendant has made an informed decision to waive their right to be served within the period of validity of the claim form, just as does a defendant who enters into an agreement suspending time from running for limitation purposes. The assessment by the Deputy District Judge in *Steele v Mooney* of the reasonableness of the steps taken by the claimant must have been informed by the fact that all the defendants had been put on notice of the claim and asked for an extension, several weeks before the claim form expired, and that two had effectively consented (albeit not the one who was ultimately served).

57. The position is particularly stark as far as the BDO defendants are concerned. BDO responded to Shakespeare Martineau on or shortly before 9 August 2023, having been sent a request for files on 1 June 2023 (and followed up on 17 July 2023), indicating that no further insight into the advice given in 2007/08 was available. There was no further communication with them until 4 October 2023, when a short letter was written by Stevens & Bolton asking for all files and papers relating to the settlements. The letter concluded with the words, 'We would appreciate your response by matter of urgency in order for us to advise our clients accordingly'. No indication was given why the request was urgent, nor of what advice Stevens & Bolton had been instructed to provide, nor was any indication given that a claim form had been issued against BDO, which would expire seven working days later.

58. As regards the Shakespeare Martineau defendants, the position is not quite the same. Mr Woolfe was employed by the firm and, as he was named as a claimant, it is to be assumed that the fourth and fifth defendants knew that the claim form had been issued (and the evidence filed on their behalf does not suggest otherwise). Mr Woolfe of course continued to act as solicitor to the trustees in 2023. It is no doubt because of the short time before the expiry of limitation (on any view) that he was named as a claimant in the claim form prepared for issue by WBD, who cannot sensibly have been unaware of his conflict.

59. Mr Lister suggests in his second (responsive) witness statement that Mr Woolfe has contributed to the difficulties experienced by the claimants in formulating their claim, and in identifying the correct defendants. He says that Mr Woolfe's requests for disclosures (and his own searches) up until June 2023 were not as rigorous as might have been expected, had Mr Woolfe been disinterested in the outcome. Mr Lister also says that Mr Woolfe was, perhaps understandably, reluctant to accept that there might have been an error on his part and that he (i.e. incorrectly) recalled a tax exemption which would mean that there were no unanticipated tax liabilities.

60. Whilst it was said in Mr Lister's first witness statement, filed in support of the application, that Shakespeare Martineau had not provided relevant documentation, there was no suggestion in that document of any impropriety (whether deliberate or otherwise) by Mr Woolfe in relation to this claim, or that he had impeded the investigation of the claim. I agree with Ms O'Reilly that if this was to be said to be a relevant factor, it ought not to have been raised for the first time in reply evidence, such that Mr Woolfe had no opportunity to respond. Whilst the reply evidence strongly hints that Mr Woolfe was less helpful than he might have been in the early months of 2023, it would be quite a stretch to say that this led to a delay in the identification of a possible claim. The tax analysis was ongoing anyway and it is not said in terms that Ms Bedworth's advice in May 2023 was rendered possible by the belated availability of information which ought to have been provided earlier by Mr Woolfe. Furthermore, as soon as the possibility of a claim in professional negligence was suggested, it was obviously realised straightaway that both sets of defendants may be potentially liable, as both were named in the issued claim form.

61. But, in any event, Mr Woolfe's conduct does not affect the views I have expressed above about the reasonableness of the steps taken by the claimants. Even if the claimants had been made aware a little sooner of the claim, given the delays in obtaining documentation, it would still have been unlikely that they would have been sufficiently further forward in their understanding to enable a particularised claim to be served by mid-October 2023. They would most likely still have had to take some other step to protect their position before that could be done. Mr Woolfe's conduct is also irrelevant to consideration of what happened in the period after the claim form had been issued, which I consider to be a key period. There is no suggestion that, in that period, either his positive conduct or his inactivity was responsible for any delay between June and October 2023. There is accordingly no reason to treat the Shakespeare Martineau defendants differently when considering the extension of time application.

Conclusion

62. In the circumstances of this case, and for the reasons given above, I am unable to conclude that the claimants took reasonable steps to serve the claim form within the period of validity of the claim form. For the same reasons, I consider that even though there is a reason for the inability to serve the claim form in time, it is not a good reason. In line with the comments of Dyson LJ in *Collier v Williams*, I do not consider that it is necessary to go further. In particular, the overriding objective can only reinforce the need for claimants to make reasonable attempts to serve the claim form before it expires in claims where limitation has expired, especially the longstop limitation period. Fault for the inability to serve cannot be laid at the door of the defendants, and no hardship is prayed in aid beyond the inability to pursue the claim, albeit a claim of apparently significant value.

63. The application to extend time for service of the claim form is thus dismissed, and the application for substitution of parties therefore does not arise for determination.