NEUTRAL CITATION NO: [2018] EWHC 4002 (Comm)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
LONDON CIRCUIT COMMERCIAL COURT

The Rolls Building, Fetter Lane, London

Date: 28 August 2018

Before :

HHJ WORSTER
(sitting as a Judge of the High Court)

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Between :

(1) Peter Kersten	**Claimants**
(2) Seyed Ali Fazeli	
(3) Malcom Vaughan	
(4) Kevin Washbourne	
(5) Kourosh Manoucheri	
- and -	
Stephen Graham Purvis	**Defendant**

- -
- -

Matthew Parker (instructed by **Gibson and Co**) for the **Claimants**
Bobby Friedman (instructed by **TT Law**) for the **Defendant**

Hearing date: 4 July 2018
Draft Judgment: 10 August 2018

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Judgment Approved by the court for handing down (subject to editorial corrections)

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HHJ WORSTER :

1. **Introduction**

There are two applications before me. The first is the Defendant's application of 16 February 2018 to set aside a judgment entered in default of an acknowledgement of service on 18 January 2018. That is a judgment for £1,258,535.21. The application to set aside is made under CPR Part 13.2 and CPR Part 13.3. The second is the Claimants' cross application of 2 March 2018 for a validation order pursuant to CPR Part 6.15(2). There are 4 issues:

(1) Was the Claim Form validly served?

(2) If not, should an order be made validating service? (CPR Part 6.15(2)

If the answer to (1) and (2) is no, the Claimant accepts that judgment should be set aside.

(3) If the Claim Form was validly served, should judgment be set aside because it was obtained by request and not by application? (CPR Part 12.4)

(4) If judgment is not set aside under CPR Part 13.2, should it be set aside under CPR Part 13.3?

2. **Valid Service?**

The bulk of the evidence before me goes to the first issue, which sub-divides into three:

(i) Did the Defendant ("Mr Purvis") send the 5th Claimant ("Mr Manoucheri") a letter or letters nominating solicitors for service pursuant to CPR Part 6.7?

(ii) Did Mr Manoucheri receive those letters (or either of them)?

(iii) Has Mr Purvis satisfied the requirements of CPR Part 6.7?

Neither party suggests that I hear oral evidence. The issues are to be determined on the available written evidence and submissions. References in this judgment to page numbers are to the page numbers of the hearing bundles (unless otherwise provided).

3. The parties to these proceedings were parties to a share sale agreement made on 23 September 2016. The Defendant was the majority shareholder in SGP Technology Group Ltd, and he sold a block of his shares to a group of 9 investors for a total of £2.36M. The Claimants are 5 of that group of 9. Between them they paid £1.24M for their shares. The 5th Claimant, Mr Manoucheri, is an Independent Financial Advisor, and as such he played a part in setting up this agreement. He also bought a small number of shares in SGP for £10,000. He has represented the Claimants in these proceedings, and it is common ground that he had authority to act on behalf of them all.

4. The Claimants became dissatisfied about the truth and accuracy of representations Mr Purvis made to them about SGP, and have brought proceedings for misrepresentation,

including fraudulent misrepresentation, and breach of warranty. A copy of the Claim Form is at page 65 of the bundle. It makes claims for (1) rescission of the share sale agreement; (2) restitution of the £1.24M that the Claimants paid for their shares; (3) damages at common law and pursuant to the 1967 Act; (4) (as an alternative to rescission) damages for breach of warranty; and (5) interest. The details of the allegations made and Mr Purvis' response to them are not of direct relevance to these applications, for the Claimants accept for the purposes of CPR Part 13.3 that the Defendant has a real prospect of successfully defending the various claims they make.

5. The only terms of the share sale agreement which are of relevance to these applications are as follows:

> *6 Limitations on Claims*
>
> *6.2 The Seller shall not be liable for a Claim unless notice in writing of the Claim summarising the nature of the Claim (insofar as it is known to the Buyers) and, as far as reasonably practicable, the amount claimed, has been given by or on behalf of the Buyers to the Seller on or before 12 months of Completion.*
>
> *6.3 The Seller shall not be liable for a Claim unless proceedings before the Courts of England and Wales in respect of it shall have been commenced by being both issued and validly served on the Seller within three months of the date of notification pursuant to clause 6.2.*

6. Pausing there, completion was on 23 September 2016, so the letter of claim had to be given to Mr Purvis by 23 September 2017, and proceedings issued and validly served on Mr Purvis within 3 months after that.

> *12. Notices*
>
> *12.1 A notice given to a party under or in connection with this agreement shall be in writing and shall be delivered by hand, or sent by pre-paid first class post or another next working day delivery service, in each case to that party's address as set out in this agreement (or to such other address as that party may notify to the other party in accordance with this agreement).*
>
> *12.2 Delivery of a notice is deemed to have taken place (provided that all other requirements in this clause 12 have been satisfied) if delivered by hand, at the time the notice is left at the address, or if sent by post on the second Business Day after posting …*
>
> *12.3 This clause 12 does not apply to the service of any proceedings or other documents in any legal action.*

7. The address Mr Purvis gave in the share sale agreement was West Grange Hall, Scots Gap, Northumberland NE61 4EQ. That is his home address. As its name suggests, the property is a Hall. The entrance from the road is gated; see the photograph at [392]. Once through the gates, there is a drive which leads to the Hall [402]. Behind one of the gates is a post box, shown in the photograph at [393]. On the top of the post box are the following instructions [51]:

MAIL DELIVERY

WEST GRANGE HALL	*THIS BOX*
WEST GRANGE FLAT	*FRONT (BROWN) DOOR*
WEST GRANGE COTTAGE	*THIS BOX*
WEST GRANGE STABLES	*SOUTH ENTRANCE*

DO NOT deliver mail for West Grange Hall via the main brown door. This is the Flat entrance.

There are then some instructions about where to find West Grange Bungalow and The Old Nursery

8. The whereabouts and existence of this post box may not be readily apparent to the casual visitor, but the evidence before me was that the post is delivered to this post box by the Royal Mail. That much is plain from the fact that when a process server instructed by the Claimants looked inside that post box on 2 October 2017 he found a number of letters which had been posted to Mr Purvis at his home address, including 2 letters from Gibson and Co, the Claimant's solicitors. One of those letters was Gibson and Co's letter of 27 September 2017; see the photograph at [396]; a copy of the letter itself and the enclosures is at [176] and following. The other was posted on 25 September 2017 [395], and is likely to be Gibson and Co's letter of that date, a copy of which is at [164]. That is also the effect of a letter sent by a Mrs Pierpoint to Gibson and Co on 23 September 2017 [113] (see paragraph 12 below).

9. Mr Manoucheri carries on business as KSM Associates Independent Financial Advisers Ltd from a 2nd floor office at 6 Beaumont Street, in Hexham. That is also the registered office of RSK Enterprise Ltd, a company which sells children's clothing. Mr Manoucheri is a Director of RSK, which is run by his daughter. RSK trades from shop premises at 6A Beaumont Street in Hexham, which is on the ground floor of the same building as KSM's offices. In his 2nd witness statement of 19 June 2018, Mr Manoucheri explains that access to his office is through a red door at street level and then up some stairs to the second floor, whereas his daughter's shop has a separate blue door. He produces a Google Street View from April 2017 to illustrate what he says.

10. On 12 September 2017 the Claimants instructed Gibson and Co to act for them. Gibson and Co were conscious of the 12 month contractual limitation period, and on 21 September 2017 they wrote to Mr Purvis setting out the relevant details of the claim. There is a copy of the letter at [149]. It is marked "By Hand". A process server was instructed to attend West Grange Hall to serve it the same day. He went down the drive and knocked on the front door of the Hall, but no one answered. Having tried to find someone to speak to he put the envelope addressed to Mr Purvis through the letterbox in the main brown door, which was the only letterbox to the Hall [348]. He did not see the post box behind the gate.

11. There is a dispute between the parties as to whether the brown door was in fact the door to the Hall at the material time, or whether it was the door to the Flat. It is not necessary to determine that issue. Nor is strictly necessary to determine the issue of whether the notice of the claim was given by the Claimants in accordance with the share sale agreement on this application; no doubt that will be an issue in the proceedings in due course. The relevance of the difficulties in serving Mr Purvis with a copy of the letter of claim to this application is in what it says about the attitude of Mr Purvis to the service of documents upon him, and the likely reaction of Mr Manoucheri to receiving a letter nominating solicitors to accept service of a claim.

12. On 26 September 2017 Gibson and Co received a letter, which they were required to sign for [113]. The letter came from Mrs AT Pierpoint of West Grange Flat. It said this:

> *Dear Gibson and Co* *23rd September 2017*
>
> *Please find enclosed a letter which was pushed through my door. I have made it very clear to the numerous thugs you keep sending that there are four properties here and mine is WEST GRANGE FLAT and not WEST GRANGE HALL.*
>
> *I have only opened the document to find your address and return this to you as it seems important. I have not passed it on and have returned it instead. Do not send any future correspondence to me, it will be returned to you in future. The mail arrangements here are very clear, the main post box makes it very simple as to where post should be left for each of the 4 properties, if your company are not able to follow simple instructions that the Royal Mail and every delivery driver manage on a daily basis then you have a serious problem Yours [etc]*

13. At paragraph 18 of his 1st witness statement in support of the application to set aside judgment, Mr Purvis says that he did not receive the letter of claim because it was delivered to the wrong address. He exhibits a copy of Mrs Pierpoint's letter, and says this:

> *It can be seen that the person it was delivered to, my neighbour, Mrs Pierpoint, sent it back to the Claimants' solicitors on 23 September 2017 with a covering letter …*
>
> *No further attempt to send a claim notification in compliance with the requirement of the SSPA appears to have been made prior to the expiry of the deadline for doing so.*

14. Mr Parker draws attention to the fact that Mrs Pierpoint apparently waited until the 12 month contractual limitation period had expired before sending the letter of claim back to Gibson and Co, and took the trouble to send it signed for, paying for that service, so that its return was documented. She also makes a point of saying in her covering letter that she has not passed the letter on, although (as she says) it "looked important".

15. I do not have the benefit of seeing and hearing the witnesses give evidence, or of having their evidence tested by cross examination, but the deliberate actions of Mrs

Pierpoint in returning the letter of claim, and Mr Purvis's evidence about the matter, are matters from which I can properly draw inferences. I note the following:

(1) Firstly, whilst in his first witness statement Mr Purvis identifies Mrs Pierpoint as his neighbour, he omits to say that she is also his Aunt, and that she works for one of his businesses.

(2) Secondly, whilst I can see that anyone would get annoyed about post being wrongly delivered to their address when it should be delivered to your neighbour (and for the purposes of this application I accept that the postal arrangements set out on the top of the post box are followed by the Royal Mail and were established before this dispute arose) if you receive what appears to be an important letter for your nephew, who lives in the same building as you do, the obvious thing to do is to give it to him, or put it in his post box at the end of your drive. On the face of it that would be easier than going to the lengths Mrs Pierpoint went to.

(3) Thirdly, it is apparent from the witness statement of Mr Turnbull, the solicitor acting for Mr Purvis, made on 15 May 2018, that on 27 September 2017 Mr Purvis contacted him in relation to this matter. They met the next day. Mr Turnbull's witness statement is his response to a number of specific questions which the Claimants' solicitors had asked him about his firm's instructions and his communications with his client. He is careful not to waive privilege. Mr Friedman submits that the statement is answering the questions posed, rather than providing a comprehensive account, and that I should be careful not to read too much into the way the evidence is framed.

16. At paragraph 4 Mr Turnbull says this [487]:

> *At that meeting he explained his understanding that the Claimants may have attempted to serve him with some papers. However rather than using the mail box for his residential address they had incorrectly served papers on an adjoining property. Mr Purvis did not have a copy of whatever documentation had been incorrectly served. In the circumstances my initial advice centred on the approach the courts take to contractual limitation periods.*
> *I explained … that the Claimants/Gibson and Co would not lightly accept they had failed to satisfy a warranty notification obligation given that would potentially bar a subsequent warranty claim.*

17. Mr Purvis was no doubt aware of the provisions of clause 6 of the share sale agreement, and given his admitted experience of business and the law, it is likely that he would have had a good idea of the significance of the failure to give him a letter of claim by 23rd of September 2017. Mr Turnbull's evidence supports the conclusion that Mr Purvis knew what the Claimants' letter was. Mr Parker points out that he also appeared to know that it came from Gibson and Co.

18. I am satisfied that Mr Purvis received or knew of the letter of 21 September 2018. The evidence I have leads me to conclude that the letter was returned to Gibson and Co by Mrs Pierpoint with a view to assisting his case on that issue. It is possible that Mrs Pierpoint acted entirely on her own initiative, and only mentioned the matter to Mr

Purvis generally or after the event. But it is more likely that she acted with the involvement and/or knowledge of Mr Purvis. The content of the letter of 23 September 2017, the deliberate method of return, and the failure of Mr Purvis to identify Mrs Pierpoint as his Aunt, all tend to suggest that was the case.

19. There then followed a number of letters from Gibson and Co to Mr Purvis at the Hall (2 of which were photographed in the post box), and further visits by a second process server. On 7 October 2017, unable to find Mr Purvis to serve personally, the process server taped a letter to a Range Rover which was parked in the drive outside the Hall [414], the brown door [410] and another door to the Hall [411]. Gibson and Co also tried to e mail Mr Purvis at the business e mail he had used last on 21 September 2017. None of those e mails bounced back (although there is no positive evidence that they in fact came to Mr Purvis's attention). On the evidence I have, I find it hard to believe that Mr Purvis did not know that Gibson and Co were keen to make contact with him about this claim. He did not reply to any of their letters or contact them. That is consistent with Mr Purvis understanding that his interests were best served by maintaining a silence and "keeping his head down".

20. The next piece of the evidence concerns the letters which Mr Purvis says he sent to Mr Manoucheri. At paragraph 5 of his 1st witness statement [4] he says this:

> *In around November 2017 I learned, via one of the other parties to the SSPA, i.e. one of the nine investors who, with others, appears to recognise there is no basis for any of the alleged claims against me, that the Claimants had indicated an intention to issue court proceedings against me*.

Pausing there, it is most unlikely that Mr Purvis had not received any of the letters which had been sent to him by Gibson and Co at the Hall in September 2017. Anyone reading those letters would understand that court proceedings were in the offing.

21. Mr Purvis continues:

> *I was mindful that I had planned to be away from home for much of the end of 2017 and the beginning of 2018. An e mail to my father sent on 12 December 2017 details my anticipated movements at that time (although in the end I spent less time at home during that period than I'd envisaged). I therefore took the step of nominating my solicitors to accept service of any claim, which notification I sent to the Fifth Claimant on 22 November 2017.*

22. A copy of the letter is at [50]. It indicates that it is addressed to Mr Manoucheri of KSM Associates Ltd at 6 Beaumont Street in Hexham, and is sent by 1st class post. The letter says this:

> ***This is an important document. You should seek legal advice on its content***
>
> *I am writing to you in your capacity as the representative of the majority shareholders in [the company]. You have, by email, on a number of occasions intimated your intention to commence legal proceedings against me.*

> *You are hereby served formal notice in accordance with s6.7 of the Civil Procedure rules that any documents, and indeed any correspondence, is to be served on my solicitors.*

He then gives the name of Mr Turnbull's firm and its address, and ends with this:

> *TT Law are both instructed to act on my behalf and authorised to accept service*

It is signed by Mr Purvis and gives his private email address.

23. Mr Manoucheri's evidence is that he did not receive this letter. He says that had he received it he would have been delighted. That is evidence as yet untested by cross examination, but I find it hard to see what possible reason he could have for saying he had not receive this letter, when in fact he had. The solicitors acting on his behalf had taken elaborate steps to try to serve Mr Purvis with a letter of claim, and had sent letters to his address all of which went unanswered. Having not been able to find Mr Purvis to serve personally, they knew from Mrs Pierpoint's letter that there was a potential problem demonstrating that the letter of claim had been properly served. They had a 3-month period to issue and validly serve proceedings, failing which there would be a further potential limitation defence. I regard Mr Manoucheri's evidence on this point as convincing.

24. Why should Mr Purvis nominate solicitors to accept service? Why would he wish to make it easier for the Claimants to serve him? It is not an easy fit with his conduct to this point. He explains his thinking at paragraph 7 of his statement [4-5]. He says that it was because of the problems with his post, and the frustration this caused his neighbours, and that he wanted to make sure that if proceedings were issued they would be sent to his solicitors rather than potentially get lost in being sent to his home address. That is an admirable sentiment, but somewhat surprising in the context of the evidence to this point.

25. At paragraph 8 he says this:

> *Having received no acknowledgment, far less a reply, as a further precaution I sent a second letter, in substantially the same terms as the first, dated 11 December 2017. I sent that letter by recorded delivery, albeit on the morning of 13 December 2017 .. and note that it was signed for on 16 December 2017.*

The second letter is at [52]. Mr Purvis exhibits the certificate of posting [53] which has the correct street number (6) and the postcode for Mr Manoucheri's office. He also exhibits the Royal Mail Proof of Delivery [54]. This indicates that the item numbered was delivered from the Hexham delivery office on 16/12/17 and signed for by "HHJJ", delivered at 12.17pm. There is a copy of the "signature" of whoever signed for the letter, but it is illegible.

26. This is by a long way the best point for the Defendant's case. It is good evidence that something was delivered to number 6 Beaumont Street at 12.17 on 16 December 2017. It was a Saturday. Mr Manoucheri's evidence is that he did not receive this letter either. In his 1st witness statement of 1 March 2018 he accepts that he has a

small staff, and that it is reasonable to assume that anything delivered to them would find its way to him. He does not recognise the signed for signature or the initials "HHJJ". At paragraph 18 he says that his office is not open on Saturdays, and that the door on the ground floor leading to his offices on the second floor would have been locked. He concludes that the letter could not have been physically delivered to him at his business address on that day [418].

27. What he does not say is that his daughter runs the shop on the ground floor at 6A Beaumont Street, that he is a Director and shareholder of the company which owns the business, and that the shop is open on a Saturday. It would have been better if he had volunteered that evidence, for just as Mr Purvis's omission to mention that Mrs Pierpoint is his Aunt gives rise to questions of credibility, so the failure to mention these relevant matters is something which Mr Manoucheri can be criticised for. His connection with the shop downstairs was uncovered by the Defendant's solicitors, and Mr Manoucheri had to make a second statement to deal with it. At [550] he explains that the shop and the office have different doors, that the shop is open on a Saturday, but that his office is closed. He confirms that when his office is closed the red door is locked, so that it is physically impossible to deliver a letter to his company at 6 Beaumont Street on a Saturday.

28. At paragraph 7 he says this:

> *I have enquired with my daughter about whether her shop was open on 16 December 2017 and she has confirmed to me that it was. She has also confirmed to me that she and my wife Sheila Manoucheri, were working that day and neither of them received or signed for a letter addressed to me. They do not know of anyone with the initials "HHJJ" either.*

29. Mr Friedman makes the point that there is no witness statement from Mr Manoucheri's wife or daughter to say that they did not receive any post to sign for that day. That goes to the weight of what they say, but only effects the outcome to a limited extent. For if the document delivered on 16 December 2017 was delivered to the shop at 6A, then it was not delivered to Mr Manoucheri directly or to number 6 - the address to which the letter was sent. The Defendant's case is that the probabilities are that if his wife or daughter had taken the document for him, they would have handed it on to him. I agree that is the likely course of events. Consequently what really matters in terms of the first hand evidence is the evidence of Mr Manoucheri, and he has said that he did not receive these letters.

30. Mr Parker accepts that it is a mystery. There are what Mr Friedman categorised as "conspiracy theories" to the effect that if something was delivered, it was an empty envelope, or some document other than the nomination letter. That would involve Mr Purvis in setting up a quite Machiavellian scheme designed to thwart the valid service of the proceedings at the Hall.

31. That is not to be dismissed without more. Mr Parker makes a number of points (the following is my summary):

    (1) If Mr Purvis really did intend to make the process of service simpler, and was concerned that his November letter had not been received, he could have e

mailed Mr Manoucheri, or copied it to Gibson and Co, whom he knew were acting for the Claimants. But he did neither.

(2) When Mr Purvis met Mr Turnbull on 28 September 2017, Mr Turnbull confirms that the meeting included a discussion about nominating TT Law to accept service, and that this was in the context of Mr Purvis being absent from his home address for periods of time, including specifically on account of the state of his health. It would be wrong to read too much into what is not said by Mr Turnbull, but it is of note that he does not say that TT Law were in fact authorised to accept service. After that meeting, he heard no more from Mr Purvis until February 2018. If the intention was, whether in September, or November 2017, to authorise TT Law to accept service, we might expect evidence that TT Law knew that had been done. But there is no such evidence.

(3) Following on from that point, if TT Law were to be authorised, the normal practice would be for TT Law to contact Gibson and Co (or Mr Manoucheri) direct. That way there could be no doubt.

(4) Finally, there is no mention of these letters until February 2018, after judgment in default had been entered.

32. These are all good and logical points for the Claimants to make. The sending of these nomination letters does seem to be a radical change of stance on Mr Purvis's part. But as Mr Friedman submits, the evidence from the Post Office is good evidence that the letter of 16 December 2017 was sent; and if the December letter was sent, that tends to support Mr Purvis's case that the November letter was also sent. I have some reservations about that conclusion, but I have concluded that on the evidence I have, it is more likely than the alternative.

33. That said, Mr Manoucheri's evidence about not receiving the November or December nomination letters is convincing. Why fail to act on the November letter? Mr Friedman suggested that Mr Manoucheri may not have understood it. But it is not complicated, and it tells him to consult a lawyer. He had lawyers, and that is what he would have done. Might he have forgotten about it? That is highly unlikely. This was an important claim, and here was the answer to the problem of serving Mr Purvis and ensuring there were no further limitation problems. As Mr Manoucheri says in his witness statement, he would have been "delighted" to receive these letters.

34. In reply Mr Friedman put forward a further explanation for Mr Manoucheri failing to act on the letter delivered on 16 December 2017. It was that proceedings were issued on 18 December 2017 and posted to the Hall the same day by his solicitors. Contractual limitation ran out on 23 December 2017, and perhaps not fully appreciating the significance of this letter he just forgot about it until the issue was raised in correspondence between solicitors in the February of 2018. Whilst that is possible, once again I regard it as unlikely.

35. The December nomination letter was delivered on a Saturday when number 6 was in fact closed. It was signed for, but by someone whose signature is illegible, and whose initials are not recognised. I accept that the Post Office normally do deliver the post, and that here we have positive evidence of delivery, but I can only conclude that

something must have gone wrong. The Claimants' case for non-receipt is one I accept. That is the case whether it be the better argument or much better argument on the available material - which the Claimants say is the requisite test; see *Relfo v Varsani* [2011] 1 WLR 1402 @ [16], or on the balance of probabilities (more likely than not) which is the test Mr Friedman puts forward.

36. **CPR Part 6.7**
The relevant parts of the rule are as follows:

> *(1) ... where:*
>
> *(a) the defendant has given in writing the business address within the jurisdiction of a solicitor as an address at which the defendant may be served with the claim form;*
>
> *the claim form must be served at the business address of that solicitor.*

37. The essence of the Defendants case is that:

(i) "given" in this rule is to be equated with "served"; and

(ii) the nomination letters are "documents other than the Claim Form" for the purposes of rule 6.20, the effect of which is to apply the deeming provisions of rule 6.26 to a rule 6.7 nomination;

(iii) so that if Mr Purvis served in accordance with the methods of service set out in the table under rule 6.26, the nomination letters were deemed to be served even if they were not received.

38. Mr Friedman submitted that this approach to rule 6.7 accords with the policy of Part 6, which is to promote certainty, and that I should approach the construction of rule 6.7 as part of a code drafted with that aim in mind. At paragraph 36.1 of his skeleton argument he refers to the notes in the White Book at 6.3.1 which cite this passage from the Access to Justice – Final Report:

> *.. before any procedural step which depends on proper service of a document can take place, "the court would have to be satisfied that the method used either had put the recipient in a position to ascertain its contents or was reasonably likely to enable him to do so within any relevant time period".*

He also refers to the Glossary to the CPR noting that it defines service as:

> *Steps required by rules of court to bring documents used in court proceedings to a person's attention.*

He emphasises that service does not require that documents are in fact brought to a person's attention.

39. Mr Friedman also referred me to the decision of Plowman J in *Re 88, Berkeley Road* [1971] Ch 648 in support of his submission that "*given*" was to be equated with

"*served*". In his judgment at 652, Plowman J considered what was required to "*give .. in writing*" a notice to sever a joint tenancy for the purposes of section 36(2) of the Law of Property Act 1925 and what was required for the service of a notice pursuant to section 196 of that Act. The plaintiff sought to draw a distinction between a requirement that a notice be served and a requirement that it be given. Plowman J did not accept that there was such a distinction in the circumstances of that case; see 652G – 653A.

40. I accept that the purpose of the deeming provisions in Part 6 is to promote certainty. Apart from anything else, there is a need to have a date from which the timetable imposed by the rules will run. But whilst I see that from a Defendant's point of view, being able to assume that a rule 6.7 notice has been "given" on the next business day after posting gives the Defendant some certainty, it does not seem to me to be necessary for the operation of Part 6, nor is it desirable to construe Part 6.7 in that way.

41. The purpose of rule 6.7 (or certainly one of them) is to encourage the nomination of solicitors to accept service of a Claim Form, and thus to facilitate that process. The facts of this case are unusual, and may not be a good example of how the rule would work in practice, but here the interpretation of rule 6.7 which Mr Friedman argues for would give rise to a situation where a party is required to serve its proceedings on a solicitor it was not aware of. That is not consistent with the facilitation of the service of a Claim Form, and may have serious consequences for the purposes of limitation. The problem may be mitigated by the use of rule 6.15, but I am not persuaded that rule 6.7 should be interpreted in the "expansive" way Mr Friedman advocates because of the policy of certainty.

42. I accept Mr Parker's essential submission that a Claimant must have received a notice in writing that the Defendant has nominated a solicitor to accept service, in order to trigger the requirement in rule 6.7 for the claim form to be served upon that solicitor. My reasons are as follows:

    (1) Firstly the words of the rule itself. Rule 6.7 is not a rule which requires that a document be "served"; 6.7(1)(a) requires that an address is "given" in writing; 6.7(1)(b) requires notification in writing. Mr Parker draws my attention to the use of the word "give" in the near identical rule CPR Part 6.5(2) in the pre 2008 Rules, and in rule 6.23 of the current rules.

    (2) Secondly, whilst the rule does not say in terms that the address for service must be received by the claimant, the concept of giving someone a document suggests that it is received. There may be difficult factual issues about what amount to receipt, but there must be something which amounts to receiving it.

    (3) Thirdly (as I set out above) the construction put forward by the Defendant would have the effect of requiring the Claimant to serve proceedings on a solicitor when he was not aware of their nomination. That makes no sense, particularly where the rule is mandatory, and where non-compliance may cause problems, as here, for limitation.

(4) Fourthly, there is nothing in rule 6.7 which expressly imports the deeming provisions. To do so requires what Mr Friedman described as an "expansive" reading of the rules. Such a reading is neither necessary nor appropriate.

(5) Fifthly, rule 6.20 (which Mr Friedman relies upon to apply the deeming provision of rule 6.26 to rule 6.7) is concerned with the service of documents other than the Claim Form. As I read the rule, it is not intended to apply to documents which do not themselves have to be served – and so would not apply to a rule 6.7 nomination.

(6) Finally, in the course of his oral submissions Mr Parker took me through the scheme of Part III of Part 6, which begins with rule 6.20 and includes the deeming provisions at 6.26. His submission was to the effect that this section of the rules operates once a claim has been made. He drew attention to the requirement that when a person becomes a party they must give an address, and it is that address to which documents must be posted or sent for the purposes of deemed service under rule 6.26. That analysis is consistent with the view of rule 6.7 as a provision to facilitate service, rather than as a rule which engages the service requirements of Part 6.

43. Mr Parker referred me to the decision in *Arkangelsky v Bank St Petersburg OJSC* [2013] EWHC (Comm) where the court rejected an argument that a Defendant had notified the Claimant of an address within the jurisdiction at which he could be served within a draft Tomlin Order. HHJ Mackie QC held that a nomination had not been given because the Tomlin Order had not been agreed. The point is a different one, but Mr Parker submits that it suggests a more restrictive approach to the construction of this rule than the one put forward on behalf of the Defendant.

44. Mr Parker submitted that *88 Berkeley Road* was not a case about the construction of the RSC, and in any event there was no question of service or giving notice being different in the circumstances of that case. I recognise the desirability for words like service and giving to mean the same thing in different rules and statutes, but given the increasingly complex nature of the rules about service in the CPR, the assistance I can get from the interpretation of these words in other circumstances must have limits. The words of the CPR are to be construed by reference to their ordinary and natural meaning and their purpose, and by reference to their context within (what I think can be properly described as) a code. The court must seek to give effect to the overriding objective when it interprets any rule. It is the use of these words in their context which lead me to conclude that there is a difference between service and giving for the purposes of CPR Part 6 (at least in a case such as this), and that the giving of an address in accordance with rule 6.7 requires that it be received.

45. It follows that I find that the Claim Form was validly served, because the rule 6.7 nomination was never received by the Claimant, or to put it another way, Mr Purvis did not "give" Mr Manoucheri an address for the service of the Claim Form.

46. **The Claimants' application for an order pursuant to CPR 6.15(2) validating service**

If the Claim Form was not validly served, the Claimants apply for an order pursuant to CPR Part 6.15 [123]. The application is supported by the witness statement of Mr Gibson which (amongst other things) sets out the steps taken to effect service of the Claim Form on Mr Purvis. If he has to rely upon a validation order, Mr Parker accepts that the judgment entered in default should be set aside, but resists the conclusion that the claim should be struck out.

47. The Claim Form was issued on 18 December 2017 [65] and posted to the Hall by first class post the same day [231]. The certificate of service is at [67]. The envelope was returned unopened. A copy of the Claim Form was also sent by e mail to an e mail address which Mr Purvis says he was no longer using. On 28 December 2017 the Particulars of Claim were posted to the Hall, again by first class post. The certificate of service is at [101]. Mr Gibson's evidence is that these were returned on 5-6 March 2018, and that the envelope had been opened [521].

48. The date for acknowledging service was 17 January 2018. There was no acknowledgment, and as a consequence judgment in default was taken the next day. Gibson and Co sent further letters to Mr Purvis at the Hall through the post on 16 and 18 January 2018 enclosing the certificates of service and the default judgment; [242] and [248]. The Claimants then applied for an interim charging order, which was granted on 30 January 2018, and served by post by Gibson and Co under cover of a letter of 2 February 2018. There was then an application to register a restriction on the title to the Hall at the Land Registry. That was issued on 3 February 2018 [103]. Mr Purvis says that he returned home on 9 February 2018 to find the notice from the Land Registry and immediately took steps to contact Mr Turnbull [487]. Mr Turnbull then wrote to Mr Gibson on 12 February 2018, and issued the application to set aside on 16 February 2018.

49. Mr Purvis's evidence is that he was not at the Hall at the material time, as his e mail to his father of 12 December 2017 anticipates. Mr Gibson accepts that the posted Claim Form was returned unopened. Mr Friedman submits that Mr Purvis cannot have read it, and that there is no good reason to validate the steps the Claimant had taken. Mr Parker does not accept that proposition and invites me to look more closely at the evidence.

50. CPR 6.15 provides as follows:

> *(1) Where it appears to the court that there is <u>a good reason</u> 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.*

[my underling]

51. This is an application under CPR Part 6.15(2). The leading authority is the decision of the Supreme Court in *Barton v Wright Hassall LLP* [2018] UKSC 22. The issue of what was a good reason was considered by Lord Clarke in the earlier case of *Abela v Baardarani* [2013] UKSC 44, but the principles are summarised by Lord Sumption in his judgment in *Barton* at [9]-[10]:

> *9. What constitutes "good reason" for validating the non-compliant service of a claim form is essentially a matter of factual evaluation, which does not lend itself to over-analysis or copious citation of authority…*
>
> *(1) The test is whether, "in all the circumstances, there is good reason to order that steps taken to bring the claim form to the attention of the defendant is good service" (para 33).*
>
> *(2) Service has a number of purposes, but the most important is to ensure that the contents of the document are brought to the attention of the person to be served (para 37). This is therefore a "critical factor". However, "the mere fact that the defendant learned of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under rule 6.15(2)" (para 36).*
>
> *(3) The question is whether there is good reason for the Court to validate the mode of service used, not whether the claimant had good reason to choose that mode.*
>
> *(4) Endorsing the view of the editors of Civil Procedure (2013), vol 1, para 6.15.5, Lord Clarke pointed out that the introduction of a power retrospectively to validate the non-compliant service of a claim form was a response to the decision of the Court of Appeal in Elmes v Hygrade Food Products plc [2001] EWCA Civ 121; (2001) CP Rep 71 that no such power existed under the rules as they then stood. The object was to open up the possibility that in appropriate cases a claimant may be enabled to escape the consequences for limitation when a claim form expires without having been validly served.*
>
> *10. This is not a complete statement of the principles on which the power under CPR rule 6.15(2) will be exercised. The facts are too varied to permit such a thing, and attempts to codify this jurisdiction are liable to ossify it in a way that is probably undesirable. But so far as they go, I see no reason to modify the view that this court took on any of these points in Abela v Baadarani. Nor have we been invited by the parties to do so. 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.*

52. It will be apparent from my discussion of the factual evidence that I regard Mr Purvis's approach to the question of service with considerable suspicion. He was aware of the Claimants' intention to bring a claim, and (on the evidence before me) I am satisfied that he received or at least was aware of the fact that the letter of claim had been sent. The one piece of evidence which must count in his favour is the sending of the nomination letters to Mr Manoucheri with details of an address for service. As I say, that is not an easy fit with the rest of the evidence, but I proceed on the basis that he sent those letters, for the reasons I have already given. That said, the evidence of the sending of letters by Gibson and Co to the Hall, the evidence of the visits by the process servers, and Mr Purvis's failures to respond lead me to conclude that he knew that proceedings were in the offing and that he was keeping his head down.

53. The question is whether there is a good reason to validate service. Of the factors identified by Lord Sumption in his judgment in *Barton* at [10], I am entirely satisfied that the Claimant took reasonable steps to serve Mr Purvis in accordance with the rules. Given that they were unaware of the nomination letters it is hard to see what more they could have done. The principal issue is whether (or not) Mr Purvis was aware of the contents of the Claim Form, and what prejudice he would suffer as a consequence of a retrospective validation.

54. In his oral submissions, Mr Parker made two particular points about the case Mr Purvis puts forward. Firstly in respect of his case that he did not receive and was not aware of the correspondence until 9 February 2018, Mr Parker drew attention to the limits to the evidence that Mr Purvis gave. In short it was that he was away a lot and that he was ill. What evidence was there that Mr Purvis was away from the Hall (or ill)? Aside from his evidence and the e mail to his father, there is no corroborative or documentary evidence of that. In the e mail he suggests that he will be home for a day before Christmas, then that he will spend the first week of January in London, and will be back after that. In his witness statement he says that he spent less time at home than that, but there is no detail, and he does not say when he was at the Hall.

55. Mr Parker's second point is to examine why the letters by which the Claim Form and the Particulars of Claim were posted to the Hall were returned through the post. The evidence is that the Royal Mail were perfectly capable of delivering letters to the appropriate mailbox at the Hall if correctly addressed; indeed the process server took photographs of some of the letters Gibson and Co had sent to Mr Purvis in the box behind the front gate. There is no suggestion that the letters by which the Claim Form and the Particulars of Claim were sent were not properly addressed. Yet of the 11 letters Gibson and Co sent to Mr Purvis at the Hall, only 3 were returned, including these two key letters. That is something of a coincidence in the circumstances of this case. That is not the only concerning feature. The three returned letters (the third being the letter serving the interim charging order) all bore the same stamp, which included the words "*... is not known at this address*" [241][308][545]. Mr Purvis was known at that address, and there is no satisfactory explanation for why such a stamp should have been applied to these three letters. In the circumstances of this case I infer that this is Mr Purvis, or someone on his behalf, playing games for the purpose of avoiding the service of key documents.

56. It is not possible to say that Mr Purvis actually read the Claim Form, for as Mr Friedman submitted, the letter was returned unopened, but I am satisfied that he knew that such a document would be served on him at the Hall and took steps to see that it was returned through the post when it was.

57. I accept Mr Parker's submission that Mr Purvis was "playing games with service". He referred me to the Court's policy of assisting Claimants seeking to serve evasive Defendants and submitted that if one party or the other is playing "technical games" then this will be a factor that counts against them in the CPR 6.15(2) analysis. He referred me to the following passage in the judgment of Lord Clarke in *Abela v Baadarani a*t [38] expressly approving the following passage from the judgment at first instance:

> *The purpose of service of proceedings, quite obviously, is to bring proceedings to the notice of a defendant. It is not about playing technical games. There is no doubt on the evidence that the defendant is fully aware of the proceedings which are sought to be brought against him, of the nature of the claims made against him and of the seriousness of the allegations.*

58. The particular significance of the service point in this case is that it has consequences for contractual limitation. In this case the contractual limitation period is 12 months, and it was accepted for the purposes of argument that (absent valid service) Mr Purvis had a contractual limitation defence to any subsequent warranty claim, although not to any claim made in fraud. That has a bearing on the Court's approach to an application under CPR Part 6.15(2).

59. The relevant principles were summarised by Popplewell J in *Societe Generale v Goldas Kuymculuk* [2017] EWHC 667 (Comm) at [49], as approved by the Court of Appeal at [2018] EWCA Civ 1093 per Longmore LJ at [24]-[30]. So far as relevant, these provide:

(a) Where relief under Rule 6.15 would, or might, deprive the defendant of an accrued limitation defence, the test remains whether there is a good reason to grant relief: Abela.

(b) However save in exceptional circumstances the good reason must impact on the expiry of the limitation period, for instance where the claimant can show that he is not culpable for the delay leading to it or was unaware of the claim until close to its expiry: Cecil at [108] and see Godwin at [50].

...

(d) Absent some good reason for the delay which has led to expiry of the limitation period, it is only in exceptional cases that relief should be granted under Rule 6.15 or 6.16; there is a distinction between cases in which there has been no attempt at service and those in which defective service has brought the claim form to the defendant's attention (Anderton at [56]-[58], Abela [36]), with relief being less readily granted in the former case, but even in the latter case exceptional circumstances are required: Kuenyehia at [26];

(e) Absent some good reason for the delay which has led to expiry of the limitation period, it is never a good reason that the claimant will be deprived of the opportunity to pursue its claim if relief is not granted; that is a barren factor

which is outweighed by the deprivation of the defendant's accrued limitation defence if relief is granted; that is so however meritorious the claim: the stronger the claim, the greater the weight to be attached to not depriving the defendant of his limitation defence: Cecil at [55], Aktas at [91].

60. This test will be met where a Defendant has evaded service or was "playing technical games": see the Court of Appeal in *Societe Generale* [2018] EWCA Civ 1093 at [28], citing the Supreme Court in *Abela* at [38]-[39].

61. In the event, it is not necessary to the outcome of the applications before me, but I would find that there is a good reason for making an order validating service, essentially for the reasons Mr Parker gives; see paragraph 51 of his skeleton argument.

(1) The Claimants were not aware of the nomination letters.

(2) They served at the address they reasonably understood to be the correct one.

(3) The fact that the Claimants were unaware of the proper address for service meets the higher threshold in *Societe Generale,* since it "impacts" on the Claimants' failure to serve the Claim Form before the expiry of the limitation period.

(4) Mr Purvis was playing games with service knowing full well that these proceedings were in the offing, and in an attempt to set up a limitation defence. It would be unjust to see those games succeed.

62. **Should the default judgment be set aside under CPR Part 13.2 because it was obtained by request and not by application**.

The Claim Form in this case not only makes claims for specified sums of money, it claims restitution and rescission of the Share Sale agreement (with an alternative of damages). CPR 12.4 provides that:

(1) Subject to paragraph (2) a claimant may obtain a default judgment by filing a request in the relevant practice form where the claim is for:

(a) a specified amount of money;
(b) an amount of money to be decided by the court;
(c) delivery of goods where the claim form gives the defendant the alternative of paying their value; or
(d) any combination of these remedies.

(2) The claimant must make an application in accordance with Part 23 if he wishes to obtain a default judgment:

(a) on a claim which consists of or includes a claim for any other remedy; or
(b) where Rule 12.9 or Rule 12.10 so provides,

and where the defendant is an individual, the claimant must provide the defendant's date of birth (if known) in Part C of the application notice

(3) Where a claimant:

(a) claims any other remedy in his claim form in addition to those specified in paragraph 1; but
(b) abandons that claim in his request for judgment,

he may still obtain the default judgment by filing a request under paragraph (1).

63. The Claimants made a request for judgment on 17 January 2018, using practice form N225. In section D of the form they sought judgment for £1,240,000 plus interest, court fees and the costs of issue, being a total of £1,258,535.21. This was a mixed claim, and the request procedure under CPR Part 12.4(1) was not available unless the Claimants abandoned the other remedies in their request form. The request was e filed, and a copy of the electronic submission has been provided to me. The Filing Comments section includes the following:

For the purposes of Civil Procedure Rule 12.4(3) the Claimants do not abandon any claim other than their claim in restitution in this request for judgment.

64. That left the claim for rescission. The fact that the claim for restitution had been abandoned in such terms means that I cannot sensibly construe the request for a money judgment as an implicit abandonment of the claim for rescission. Mr Parker did not argue that I could. Mr Friedman submitted that the judgment obtained was irregular and is to be set aside as of right under CPR Part 13.2, relying upon the decision of HHJ Peter Coulson QC (as he then was) in *Intense Investments Limited v Development Ventures Limited* [2005] EWHC 1726 (TCC). Having set out the terms of CPR Part 12.4, HHJ Coulson QC says this:

15. It is plain that the philosophy behind Rule 12.4 is to ensure that default judgments are confined to relatively straightforward cases where the claim is for a specified sum of money or an amount of damages. As I have indicated, in the present case the claim form seeks a declaration; an account of all profits that have come into the hands of the first defendants; payment of any amount found due following the taking of that account; all proper accounts, inquiries and directions; delivery up and production of various record and invoice books; damages and interest. I think it is clear, therefore, that this is not a claim of the type envisaged by Rule 12.4(1). This is a claim for a wide range of remedies, some of which, such as the taking of an account, are reasonably unusual.

16. Accordingly, it seems to me that this claim did not and could not fall within Rule 12.4(1) and that meant that if the claimants were not abandoning any of these claims - and there was and is no indication that they are - the application for judgment should have been made under CPR Part 23. That, so it seems to me, is not just idle pedantry, because of course an application under Part 23 would have required the claimants to give notice to the first defendants of what they were seeking to do. Therefore, it seems to me there can be no doubt that the

claimants have gained an advantage in using what is effectively the wrong rule to obtain their default judgment.

17. I therefore conclude that the judgment is irregular and cannot be allowed to stand.

19. I should add that, in my view, whilst it is open to parties to litigation to try and utilize the CPR to improve their position in the proceedings and to maximize any advantage accruing to them, when they endeavour to do so they have to ensure that their own position is beyond criticism. Therefore, I do not criticize the claimants for seeking to enter judgment in default, but, because they have used the wrong rule and gained an unfair advantage in so doing, I think it is entirely appropriate for the court to find that they are not entitled to the judgment that they obtained. Therefore, I am bound to conclude that the judgment should be set aside as of right.

65. My reading of those paragraphs is that a money judgment obtained in a mixed claim by a request which does not comply with CPR Part 12.4(3) is irregular and is to be set aside "as of right". It is not clear from the report what the default judgment in *Intense* was for, but in his further written submissions Mr Parker makes the point that if the application had included judgment for a declaration and an account, HHJ Coulson QC would not have noted at [16] that "*there is and was no indication that the Claimants were abandoning their other claims*". That points to a judgment (and an application) for a money sum. That approach is supported by a consideration of the terms of the practice form N255 used in this case. It only provides for a request for a money judgment; there is no provision which allows a Claimant to ask for judgment for any other remedy. Nor, given the scheme of the rules, would there be a reason to draft a form which provided for anything other than a money judgment by request. Again, that points toward the request in *Intense* being simply for a money judgment, and to HHJ Coulson QC's judgment applying with full force to the position in this case.

66. However, the commentary to this rule in the White Book 2018 at 12.4.7 (at pages 519-520) appears to suggest something different. The editors discuss the position where a Claimant with a "mixed claim" makes a request for a judgment which falls within this rule without expressly abandoning the other claims in the request. There is then a reference to the decision in *Intense* in the following terms:

> *In Intense Investments … a default judgment obtained by request under r.12.4(1) for remedies which did not fall within that provision (in particular a declaration) and which therefore should have been sought by application in accordance with r.12.4(2), was set aside as irregular.*

That note appears to suggest that the judgment in *Intense* (and so presumably the request) was for remedies other than a sum of money and included a declaration. If that was the case then there would be a significant distinction between that case and this. I have concluded that cannot be right. The terms of the rule have not changed since 2005, and (as I say) there would be no reason to ever have drafted practice forms which provided for a request which went beyond a money judgment. In his further submissions Mr Parker accepts that the note is incorrect to that extent. Consequently,

whilst I have considered whether the decision in *Intense* can be sensibly distinguished from this case, I have concluded that it cannot, and that I should follow it.

67. The other authority of relevance is that of HHJ Birss QC (as he then was) in *Media CAT v A-H* [2010] EWPCC 017. The claims in that case included claims for injunctions. Requests for judgment under CPR Part 12.4(1) were made for an amount including costs, or an amount to be determined by the court and costs were made. They were considered by the Judge, who declined to give judgment even though the default was made out. At [42]-[43] he noted the terms of CPR Part 12.4(3) and concluded that the claims before him did not fall within CPR 12.4(1), and that notwithstanding the terms of the requests:

> *... a claimant who wished to abandon an injunction claim and so fall within rule 12.4(3) needs to use more direct and explicit language than that.*

He consequently declined to make an order. At [45] and following he noted the differences in the procedures, and at [47] concluded that in the circumstances of that case a default judgment arrived at without notice by means of an essentially administrative procedure, even one restricted to a financial claim was capable of working real injustice.

68. Mr Parker referred me to *Robins v Kordowski* [2011] EWHC 1912 (QB), a decision of Mr Justice Tugendhat. The issue in that case was whether, by making a rule 12.4(1) request in a mixed claim, a Claimant had irrevocably abandoned the other claims he made. At [55]-[59] Mr Justice Tugendhat held that they did not. Mr Parker submits that implicit in the decision at [59] and the apparent lack of challenge to the propriety of the money judgment obtained by request is that it was not liable to be set aside as of right. I accept that there may be inconsistencies between the logic of the decisions in *Intense* and *Media CAT* on the one hand and *Robins* on the other, but the issue in Robins was a different one, and I intend to follow *Intense*. The second part of Mr Parker's argument on this aspect of the case was that, whilst the wrong procedure had been followed, I should use the Court's power under CPR Part 3.10 and conclude that this was an error of procedure which did not invalidate a step taken in the proceedings. This issue was raised relatively late by the Defendant, but there is no evidence to suggest that this was an error; indeed the terms of the filing note would suggest that it as a deliberate decision to make the request without abandoning rescission. Given the terms of the judgments in *Intense* and *Media CAT* I take the view that this was an irregular judgment and is to be set aside as of right. Given the administrative nature of the request process, the court relies upon the parties to follow the rules. A failure to do so should not be overlooked.

69. **Should the judgment be set aside under CPR Part 13.3?**

CPR 13.3 provides that:

> *(1) In any other case, the court may set aside or vary a judgment entered under Part 12 if –*
>
> > *(a) The defendant has a real prospect of successfully defending the claim; or*

(b) It appears to the court that there is some other good reason why –
(i) The judgment should be set aside or varied; or
(ii) The defendant should be allowed to defend the claim.

(2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly.

70. The Court's power to set aside a default judgment pursuant to CPR 13.3 is discretionary. The conditions at (a) and (b) are necessary, but not necessarily sufficient for the exercise of the discretion, and the burden is on the Defendant to satisfy the court that there is good reason why a judgment regularly obtained should be set aside: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. Mr Parker submits that depriving a claimant of a regular judgment which the claimant has validly obtained is not something which the court will do lightly: *Regione Piemonte v Dexia Crediop Spa* at [33]. In addition to the requirements of the rule, an applicant must also satisfy the 3 stage *Denton* test for relief from sanction under CPR Part 3.9(1); see *Gentry v Miller* [2016] EWCA Civ 141 per Vos LJ at [23].

71. For the purposes of this application the Claimants concede that the Defendant has a real prospect of defending the claim. The focus of Mr Parker's submissions is as to the exercise of my discretion in circumstances where the default is a consequence of the deliberate or conscious decision of the Defendant.

72. At paragraph 57 of his skeleton argument, Mr Parker sets out a summary of the approach to the requirement that the application to set aside be made promptly, which I gratefully adopt.

(1) For the purpose of assessing promptness, time runs from when the defendant either received the judgment or had or could with reasonable diligence have obtained sufficient knowledge of it to enable it to apply to the court to set it aside: *Gentry v Miller* per Vos LJ at [33].

(2) The question of promptness in making the application arises both in considering the requirements of CPR r 13.3(2) and in considering all the circumstances under the third stage in Denton's case: *Gentry v Miller* at [24].

(3) Promptly in this context has been said to mean "*with alacrity*" or "*with all reasonable celerity in the circumstances*": *Regency Rolls Ltd v Carnall* [2000] EWCA Civ 379 *per* Simon Brown LJ at [45].

(4) The consideration of promptness is not a binary exercise in which a line is drawn between promptness and its absence; and the inquiry is not merely whether the application is prompt but how prompt it is: *Avanesov v Shymkentpivo* [2015] EWHC 394 (Comm) *per* Popplewell J at [59].

(5) Promptness is such an important factor because of the public interest in the finality of litigation, the need under the CPR to act expeditiously, and the requirement to have regard to the proper allocation of court resources: *Mullock v Price* [2009] EWCA Civ 1222 *per* Ward LJ at [28].

(6) If there has been a marked failure to act promptly, the court may be entitled to refuse to set aside a judgment even if the defendant shows a real prospect of succeeding at trial: *Standard Bank plc v Agrinvest International Inc* [2010] EWCA Civ 1400 *per* Moore-Bick LJ at [22].

73. The breach that the Court is considering for the purposes of the test under CPR 3.9(1) is the Defendant's default in failing to acknowledge service, not any subsequent delay in setting judgment aside: *Gentry v Miller* at [24]. Mr Parker submitted that where that breach is conscious or deliberate, that will be a good reason for not granting relief and refusing the application to set aside. He referred to *Avanesov v Shymkentpivo* [2015] EWHC 394 (Comm) per Popplewell J at [66]:

> *I have concluded that the failure to take prompt steps to set aside the judgments was the result of a decision to ignore the English proceedings until forced to engage by the second default judgment and the risk of enforcement, taken in the knowledge that my order of 31 July 2013 required any application to be made within 21 days. To set aside the judgments in those circumstances would be to condone and reward a deliberate failure to comply with the Court's order and its procedures. Not only is this the very antithesis of the efficient and proper conduct of litigation, but it flies in the face of the important public interest in litigants abiding by the Court's orders and procedures. The need to enforce the Court's orders and rules, and to encourage compliance, means that a party should not be lightly relieved of the consequences of a deliberate decision to flout the Court's orders and to ignore its procedures*.

74. Mr Friedman emphasised that this was a case where the other party accepted that there was a real prospect of success, that fraud was alleged, and that the claim for £1.24M. To deny a party the opportunity to have such a claim determined on its merits was a draconian step. To that point, I rather agree with him. But Mr Purvis must also satisfy the 3-stage *Denton* test.

75. As to the first stage, Mr Friedman accepts that the failure to acknowledge service in these circumstances is a serious and significant default. As to the second stage he submits that having sent the nomination letters, Mr Purvis had a "good reason" for failing to acknowledge service. That submission only goes so far, because (for the reasons I have set out) Mr Purvis' approach to service before and after sending those letters was that of a man playing games. Moreover, the evidence that he was not at the Hall when the letters of 16 and 18 January 2018 were delivered is a little hard to accept at face value. There is a surprising absence of material to support what he says in his witness statement – and the one document he does refer to (the e mail he sent his father) says that he was intending to return to the Hall in the second week in January. The evidence on "good reason" goes both ways.

76. But I have concluded that even in the absence of a good reason, this is a case where I should set aside the default judgment and give relief from sanctions under the third limb of *Denton*. This is a substantial claim, which includes allegations of fraud. The delay was not significant and the application to set aside was made promptly enough. Even discounting Mr Purvis's evidence of when he returned to the Hall, the period from the entry of judgment to the application to set aside was 4 weeks. It is not a case (such as *Gentry*) where a trial date was lost.

77. I recognise the force of what Mr Justice Popplewell says in *Avanesov* @ [66]. It may be poetic that a litigant who plays games with the rules falls foul of them and loses his opportunity to contest a claim he has been seeking to avoid being served with. But the finding that the nomination letters were sent means that this is not as clear a case as *Avanesov*. It would not be proportionate to shut the Defendant out from defending this claim. The Claimants have been put to significant expense, and if the issue were determined under this CPR Part 13.3 I would order that they be compensated for that by an order for costs on the indemnity basis payable immediately. They also lose the security of the interim charging order they obtained following the entry of judgment in default. I have considered whether it should be a condition of setting aside judgment that Mr Purvis provide security equivalent to the interim charging order. But that was not a matter which was argued before me, and in a case such as this it would not be appropriate to impose such a condition.