Case No: LM-2018-000138
SCCO reference: SC-2020-APP-000829

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
Strand, London WC2A 2LL
Date: 14/06/2021

Before:

COSTS JUDGE LEONARD

- -

Between:

GREGOR FISKEN LIMITED **Claimant**

- and –

MR BERNARD CARL **Defendant**

- -
- -

Stephen Innes (instructed by **Rosenblatt**) for the **Claimant**
Philip Shepherd QC (instructed by **Charles Russell Speechlys LLP**) for the **Defendant**

Hearing date: 29 March 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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COSTS JUDGE LEONARD

Costs Judge Leonard:

1. I have four applications before me. They are:

   (a) An application by the Defendant (the paying party) dated 23 December 2020, for a general extension of time to serve Points of Dispute to the Claimant's bill of costs (an alternative to the stay referred to at (c) below).

   (b) An application by the Defendant dated 11 January 2021, to set aside a Default Costs Certificate obtained by the Claimant on 27 November 2020.

   (c) An application by the Claimant dated 5 March 2021, seeking that the Court remedy any error in respect of serving the Bill of Costs and/or for an order pursuant to CPR 6.15(2) and CPR 6.27 that service of the Claimant's Bill of Costs on the Defendant on 29 October 2020 be deemed good service of the Notice of Commencement and Bill of Costs (the application is also framed as an application for relief from sanction arising from any error in serving the bill).

   (d) An application by the Defendant dated 18 March 2021, seeking a stay of the detailed assessment pending determination of the Defendant's pending appeal to the Court of Appeal from the judgment and order which provide for the Defendant to pay the Claimant's costs.

2. I should mention that Practice Direction 47 paragraph 2 provides for any application for the stay of detailed assessment proceedings pending appeal to be made either to the court whose order is being appealed or to the court which will hear the appeal. The Defendant did apply (on 23 December 2020) to the Court of Appeal, and the Court of Appeal responded by telling the Defendant to apply to the SCCO.

3. At the hearing of these applications it was common ground that the Defendant's application to set aside the Default Costs Certificate should be considered first, along with the Claimant's application to remedy any defects in the service of the bill. As Mr Innes for the Claimant put it, unless the Default Costs Certificate is set aside the applications for an extension of time for Points of Dispute and for a stay of the detailed assessment are redundant, and in considering the application to set aside the Default Costs Certificate it is also necessary to consider the Claimant's application in relation to service.

4. The following provisions of the Civil Procedure Rules and Practice Directions are relevant. CPR 47.6:

   > "(1) Detailed assessment proceedings are commenced by the receiving party serving on the paying party –
   >
   > (a) notice of commencement in the relevant practice form;
   >
   > (b) a copy or copies of the bill of costs…

> … (2) The receiving party must also serve a copy of the notice of commencement, the bill and, if required by Practice Direction 47, the breakdown on any other relevant persons specified in Practice Direction 47."
>
> (3) A person on whom a copy of the notice of commencement is served under paragraph (2) is a party to the detailed assessment proceedings (in addition to the paying party and the receiving party)."

5. CPR 47.9:

> "(1) The paying party and any other party to the detailed assessment proceedings may dispute any item in the bill of costs by serving points of dispute on –
>
> (a) the receiving party; and
> (b) every other party to the detailed assessment proceedings.
>
> (2) The period for serving points of dispute is 21 days after the date of service of the notice of commencement…
>
> (4) The receiving party may file a request for a default costs certificate if –
> (a) the period set out in paragraph (2) for serving points of dispute has expired; and
> (b) the receiving party has not been served with any points of dispute…"

6. CPR 47.12:

> "(1) The court will set aside a default costs certificate if the receiving party was not entitled to it.
>
> (2) In any other case, the court may set aside or vary a default costs certificate if it appears to the court that there is some good reason why the detailed assessment proceedings should continue."

7. Practice Direction 47, paragraph 11.1:

> "A court officer may set aside a default costs certificate at the request of the receiving party under rule 47.12…"

8. A "court officer" is defined at CPR 2.3 as a member of the court staff.

9. CPR 6.20, dealing with the service of documents other than a claim form, provides at 6.20(1)(d) for service by fax or other means of electronic communication in accordance with Practice Direction 6A, which makes the following provisions at paragraphs 4.1 and 4.2:

> "…where a document is to be served by fax or other electronic means –
>
> … the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving… that the party to be served or the solicitor is willing to accept service by fax or other electronic

> means; and… the fax number, e-mail address or other electronic identification to which it must be sent…
>
> … Where a party intends to serve a document by electronic means (other than by fax) that party must first ask the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means (for example, the format in which documents are to be sent and the maximum size of attachments that may be received)."

10. CPR 6.23 (6) provides:

> "Where a party indicates in accordance with Practice Direction 6A that they will accept service by electronic means other than fax, the e-mail address or electronic identification given by that party will be deemed to be at the address for service."

11. CPR 6.27 applies CPR 6.15 to any document in the proceedings. CPR 6.15(2) reads:

> "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."

12. CPR 6.23(2) provides that after proceedings have started, a party's address for service must (for present purposes) be the business address of the solicitor acting for the party to be served.

13. CPR 42.2 deals with what happens if the solicitor ceases to act:

> "(1) This rule applies where… a party for whom a solicitor is acting wants to change his solicitor… or… a party, after having conducted the claim by a solicitor, intends to act in person.
> (2) Where this rule applies, the party or his solicitor (where one is acting) must –
> (a) file notice of the change; and
> (b) serve notice of the change on every other party and… on the former solicitor.
> (3) The notice must state the party's new address for service.
> (4) The notice filed at court must state that notice has been served as required by paragraph (2)(b).
> (5) … where a party has changed his solicitor or intends to act in person, the former solicitor will be considered to be the party's solicitor unless and until… notice is filed and served in accordance with paragraph (2)…"

14. CPR 3.10:

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

15. The provisions for obtaining and setting aside a default judgment have also been referred to on this application. The pertinent provisions are as follows. At CPR 12.3:

> "(1) The claimant may obtain judgment in default of an acknowledgment of service only if at the date on which judgment is entered–
>
> (a) the defendant has not filed an acknowledgment of service or a defence to the claim (or any part of the claim); and
>
> (b) the relevant time for doing so has expired.
>
> (2) Judgment in default of defence may be obtained only –
>
> (a) where an acknowledgement of service has been filed but at the date on which judgment is entered a defence has not been filed…"

16. CPR 13.2:

> "The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because–
>
> (a) in the case of a judgment in default of an acknowledgment of service, any of the conditions in rule 12.3(1) … was not satisfied;
>
> (b) in the case of a judgment in default of a defence, any of the conditions in rule 12.3(2) … was not satisfied…"

The Procedural History

17. On 23 July 2018 the Claimant issued proceedings against the Defendant, a US resident domiciled in Washington DC, for an alleged breach of contract arising from a purchase agreement entered into between the parties on or around 18 October 2017 for the purchase of a 1962 Ferrari 250 GTO. The car had been delivered without its original gearbox. The Claimant sought an order that the Defendant secure delivery up of the gearbox.

18. The proceedings were defended and a counterclaim was pursued for declaratory relief including a declaration that the Claimant was liable to pay the Defendant a fee of US $500,000.00 for the gearbox.

19. Trial took place between 5 and 10 December 2019 before HHJ Pearce, who gave judgment for the Claimant. Following a consequentials hearing on 29 June 2020, the Defendant was ordered to pay the Claimant's costs to 2 January 2019 on the standard basis and from 2 January 2019 onwards on the indemnity basis, to be assessed if not agreed.

20. The Defendant was ordered to pay £200,000 on account of the Claimant's costs (he has to date, I am told, paid a total of £230,000 on account). The court's order also recorded

the undertaking of the Claimant to keep the gearbox secure pending the Defendant's appeal. A stay of detailed assessment pending appeal was refused.

21. On 25 August 2020 the Defendant applied to the Court of Appeal for permission to appeal the judgment and order of HHJ Pearce. The Court of Appeal granted permission to appeal on 18 November 2020. The Appeal hearing was heard on 19 and 20 May 2021. I understand that judgment is awaited, or I would have been informed of the outcome.

22. The Defendant had, in the proceedings before HHJ Pearce, been represented by Davis Woolfe. On 25 August 2020 (the same day as the application for permission to appeal) Ms Gemma Dreyfuss at Davis Woolfe sent an email to the Claimant's solicitor, Mr Simon Walton of Rosenblatt. The email, which appears to have been copied to the Claimant, said:

> "I am writing to confirm that we, Davis Woolfe, are no longer acting in respect of any matters concerning Mr Bernard Carl. Mr Carl has instructed a direct access barrister, Mr Shepherd QC of XXIV Old Buildings… As the main proceedings are no longer active, there is no need to file a Notice of Change… Please kindly send any future correspondence to Mr Carl (copied) direct, using the following email address…"

23. Some correspondence followed between Rosenblatt and the Defendant which makes it clear that he did receive communications sent to the specified email address.

24. On 29 October 2020 MRN Solicitors ("MRN"), the Claimant's costs representatives, sent a Notice of Commencement and a Bill of Costs totalling £510,743.61, by email to the Defendant at the email address given by Davis Woolfe. Both the covering letter and the Notice of Commencement identified the date for service of points of dispute as 23 November.

25. MRN also sent a hard copy of the documents to 46 Chester Square, London, SW1W 9EA. It was common ground, at the hearing of these applications, that that property is owned by the Defendant, but does not qualify as his address for service. Nothing was served upon Davis Woolfe.

26. There was no response from the Defendant, and on 27 November 2020 the Claimant obtained a Default Costs Certificate for £510,889.61. In the meantime, on 25 November, Charles Russell Speechlys LLP ("CRS") wrote to Rosenblatt notifying them that they were now acting for the Defendant, enclosing a notice of change of solicitor and advising that Males LJ had granted permission to appeal on 18 November. CRS requested copies of any documentation served upon the Defendant following the consequentials hearing in June, including any bill of costs, and for information about the time needed to respond. CRS also suggested a stay of detailed assessment proceedings pending the outcome of the appeal, to avoid incurring unnecessary costs.

27. Rosenblatt responded on 27 November and CRS received a copy of the Default Costs Certificate on 1 December. There followed correspondence in which CRS argued that the Claimant had not been entitled to the Default Costs Certificate, and Rosenblatt maintained that it had. On 2 December 2020, CRS wrote to Rosenblatt seeking agreement to the setting aside of the Default Costs Certificate and confirmation that the

time for filing the Defendant's points of dispute would run for 21 days from the date of their letter, failing which an application to set aside would be made under CPR 47.12(1). Rosenblatt replied on 3 December by email and letter stating that the Claimant had been entitled to the Default Costs Certificate, but agreeing to set it aside on the basis that the Defendant would serve Points of Dispute by 4pm on 23 December 2020.

28. On Monday 7 December, CRS by email acknowledged Rosenblatt's communications of 3 December and again sought agreement to a stay of the detailed assessment proceedings pending the hearing of the appeal. Points of Dispute were not served. CRS, on 10 December 2020, wrote to Rosenblatt again seeking agreement to a stay the detailed assessment proceedings pending the hearing of the appeal. The Defendant's position has consistently been, since then, that there should be such a stay.

29. On 8 December 2020 MRN wrote to the SCCO on behalf of the Claimant, requesting that the Default Costs Certificate be set aside. On 18 December someone at the SCCO advised MRN by telephone to the effect that a consent order would be needed. Due to an oversight, this was not communicated to CRS until 6 January 2021. Rosenblatt then explained what had happened and, on the basis that the Defendant had not (and had never intended to) serve points of dispute by 23 December, stated that the Claimant was no longer willing to agree to set aside the Default Costs Certificate.

30. Each party has (in a large body of argumentative, recriminatory witness evidence) criticised the other over this correspondence. As far as I can see, they were so at cross-purposes as to never really reach agreement. In their letter of 2 December 2020 CRS maintained the position that the Defendant was entitled to have the Default Costs Certificate set aside and sought confirmation not only that the Claimant would agree to that, but also that the Claimant acknowledge that the Defendant would have 21 days to serve Points of Dispute. Given their consistent position that their client was entitled to have the Default Costs Certificate set aside as of right, that was a concession: if they could show that the bill was not properly served, time would not start to run until it was served. The point was, as Rosenblatt themselves said, to save the time and cost attendant on an application: CRS did not say that they might not seek to extend the 21-day period or continue attempt to agree a stay.

31. Rosenblatt read into CRS's letter of 2 December 2020 as confirming that points of dispute would be served within 21 days, but it did not really say that, and any misapprehension should have been cleared up within two working days, when in CRS's email of 7 December, they repeated their request that the Claimant agree to an extension of time for points of dispute until the appeal had been determined.

32. In short, as I read the correspondence, Rosenblatt was prepared to set aside the Default Costs Certificate expressly on the basis that points of dispute would be served by 23 December, but CRS had not specifically agreed to that. Rosenblatt hardened its position after the 23 December passed without points of dispute, and CRS continued to press for a stay to which Rosenblatt would not agree.

33. Having failed to elicit agreement to a stay of the detailed assessment proceedings from either Rosenblatt or MRN, on 23 December 2020 CRS made is application to the Court of Appeal for a stay pending the determination of the appeal, and on the same date applied to the SCCO for a stay pending the determination of that application. On 20 January 2021 a Master of the Court of Appeal sent a message to CRS to the effect that

any application for a stay should be made to the SCCO. In the meantime the Defendant made its 11 January application to set aside the Default Costs Certificate. The Claimant's application of 5 March and the Defendant's further application of 18 March followed.

The Defendant's Submissions

34. Mr Shepherd for the Defendant says that the Claimant made three errors in purporting to serve the notice of commencement of detailed assessment proceedings. The first was in attempting service upon the Defendant himself, when the right course of action was to serve upon Davis Woolfe, who were still on the record as his solicitors. Both Davis Woolfe and Rosenblatt had overlooked CPR 42.2, and that as a matter of general law the handing down of a judgment does not end the authority of the solicitors for a defendant (*Lady de la Pole v. Dick* (1885) 29 Ch. D. 351). The Claimant now accepts that attempting service other than on Davis Woolfe was an error.

35. The second error was that, in attempting to serve the Notice of Commencement upon the Defendant personally by email, the Claimant did not in any event comply with either of the mandatory requirements of Practice Direction 6A. The Defendant had never, as required by paragraph 4.1 of the Practice Direction, indicated that he was willing to accept service by email; the most that can be said is that Davis Woolfe volunteered his email address for the purposes of correspondence. Nor did the Claimant make the enquiries required by paragraph 4.2.

36. The third error was to post hard copies of the Notice of Commencement and supporting documents to an address which was not a valid address for service.

37. The Claimant's application for the court to make an order remedying these failures is, says Mr Shepherd, a collateral attack upon the mandatory provisions of CPR 47.12(1). That rule provides that if a party is not entitled to a Default Costs Certificate, the court will set it aside. It is not open to the Claimant to introduce an element of discretion into a mandatory rule.

38. Even if such discretion existed, the application retrospectively to validate the failure to serve the Notice of Commencement in accordance with the Rules must, argues Mr Shepherd, fail. The Claimant is constrained to apply retrospectively even though it is faced with the decision of the Supreme Court in *Barton v Wright Hassall LLP* [2018] UKSC 12 (21 February 2018) refusing to validate invalid email service by a litigant in person, by making a retrospective order for service by alternative means.

39. The Claimant does so even though there is no suggestion that the Defendant deliberately obstructed service as in *Abela v Baadarani* [2013] 1 WLR 2043. As Lord Sumption pointed out in *Barton* at paragraph 9 of his judgment:

> "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. This court recently considered the question in *Abela v Baadarani* [2013] 1 WLR 2043. That case was very different from the present one. The defendant, who was outside the jurisdiction, had deliberately obstructed service by declining to disclose an address at which service could be effected in accordance with the rules."

40. There is no suggestion that this Defendant has evaded service, still less that the Defendant is playing technical games. Nor was *Abela* concerned with CPR 47.12(1), where the Court must set aside a Default Costs Certificate that should not have been applied for. The Claimant seeks to retain the full benefit of the Default Costs Certificate even though there was no good reason for not serving correctly in the first place. There is no warrant for the Court to adopt such a course.

41. Although *Barton* was concerned whether the court should validate service under CPR 6.15(2) (relating to service of a Claim Form by an alternative method or alternative place, requiring good reason to authorise alternative service) the same principles must apply. The wording of CPR 47 makes it clear that a Notice of Commencement is in effect originating process: it starts the Detailed Assessment proceedings, and identifies the parties to those proceedings. CPR 3.10 does not assist the Claimant because service of the Notice of Commencement started the Detailed Assessment proceedings: it was not a step in those proceedings.

42. Lord Sumption at paragraph 9(2) of his judgment in *Barton* endorsed the earlier statement of principle by Lord Clarke in *Abela*:

> "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).

43. The same must apply here. The mere fact that the Defendant may have become aware of the Notice of Commencement cannot without more justify an order for validating improper service, still less retrospectively. This is, in fact, a stronger case than *Barton* because in that case the Court was not concerned with provisions where the failure to comply has a prescribed effect.

44. In *Barton* the Supreme Court declined to order that steps taken by a claimant to draw a claim form to the attention of the defendant by email should amount to good service despite the claimant (a litigant in person) having failed to obtain written permission for email service.

45. As Lord Sumption observes at paragraph 10 of his judgment,

> "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."

46. Here a key circumstance is the fact that the Court must set aside a Default Costs Certificate, by virtue of CPR 47.2(1). The Claimant falls at the first hurdle because no steps were taken to ensure that service of the Notice of Commencement was being undertaken in accordance with the Rules. No Default Costs Certificate ought to have been applied for and the certificate that the Claimant had signed to obtain it should not have been signed. There was no reason why the Notice of Commencement should not have been validly served. As Lord Sumption observes in *Barton* quoting Floyd LJ in the Court of Appeal at paragraph 14 of his judgment:

> "But he agreed with the judge that in circumstances where the claimant had done nothing at all other than attempt service in breach of the rules, and that through ignorance of what they were, there was no "good reason" to make the order."

47. The mere fact that the party mis-served is nonetheless on notice is a necessary condition of validation, but not in itself sufficient (paragraph 16):

> "Although the purpose of service is to bring the contents of the claim form to the attention of the defendant, the manner in which this is done is also important. Rules of court must identify some formal step which can be treated as making him aware of it. This is because a bright line rule is necessary in order to determine the exact point from which time runs for the taking of further steps or the entry of judgment in default of them…… For these reasons it has never been enough that the defendant should be aware of the contents of an originating document such as a claim form. Otherwise any unauthorised mode of service would be acceptable, notwithstanding that it fulfilled none of the other purposes of serving originating process".

48. This must also apply to the service of the Notice of Commencement in this case. Lord Briggs, at paragraph 33 of his (dissenting) judgment in *Barton* said:

> "I acknowledge that in the Abela case [2013] 1 WLR 2043, para 36, Lord Clarke JSC said:
>
> > '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).'
>
> I agree. First, that is not the end of the matter, for the reasons given above. The circumstances in which the failure to serve in accordance with the rules will need to be explained and considered. Secondly, mere knowledge of the existence and content of the claim form does not achieve the second general purpose, namely to bring home to the recipient that he is being served with, rather than just informed about, the claim form, with the important procedural consequences that follow. Thirdly, in the context of service by e-mail, the absence of, or limitations upon, the recipient's e-mail handling facilities may have proved a real hindrance to a prompt response."

49. This application seems to be aimed not only at relieving the Claimant from its own error, but in addition visiting a draconian order by way of a Default Costs Certificate for payment of over £500,000 on the Defendant. This is unattractive and would produce an unjust and disproportionate outcome. In addition to having received payment against costs of some £230,000, the Claimant holds a gearbox valued at over US $1 million. If the Defendant wins his appeal, the liability of the Claimant to the Defendant will exceed US $1.5 million.

50. Even if there is any place for service by alternative means and/or retrospective validation of service in cases concerned with CPR47.12(1) there is no reason, let alone a good reason, for retrospective validation of the failure to serve the Notice of Commencement on the solicitors who were still on the record at the time.

51. Rosenblatt cannot properly rely on the erroneous statement made by Davis Woolfe that as the proceedings had concluded, they were no longer on the record. Reliance on their opponent's mistaken view of the correct legal position cannot absolve them from their own responsibility any more than a litigant in person is excused by his own unfamiliarity with the Rules. As Lord Sumption observed in Barton at paragraph 18, "The rules provide a framework within which to balance the interest of both sides".

52. If through its own error the Claimant has not validly served the Defendant it can come as no surprise that a debarring order obtained on the basis of such error is set aside. It is one thing to validate an error that does not cause substantial prejudice to the other side – it is quite another to do so when the consequences are so one sided and are founded on an unforced error.

53. The only proper orders that can be made in the circumstances, says Mr Shepherd, are to set aside the Default Costs Certificate that was premised on valid service which had not taken place, and to dismiss the Claimant's application for substituted service. If it became known that Default Costs Certificates obtained in this manner would still be retrospectively validated, the result would be a serious subversion of the Rules.

The Claimant's Submissions

54. A number of the submissions made by Mr Innes on behalf of the Claimant refer to the court's discretion under CPR47.12(2). I do not need to address those submissions, as the Defendant's case is based entirely on CPR47(12)(1).

55. Mr Innes submits that by giving the Defendant's email address to the Claimant on 25 August 2020, Davis Woolfe indicated that the Defendant would accept service by electronic means and so satisfied the requirements of CPR 6.23(6) and of paragraph 4.1 of Practice Direction 6A. (It is accepted that the Claimant did not comply with the requirements of paragraph 4.2). If compliance with paragraph 4.1 is not accepted, then pursuant to CPR 3.10 neither procedural defect invalidated service. Alternatively, pursuant to CPR 6.15, read together with CPR 6.27, the court should order that the steps already taken to bring the bill of costs to the Defendant's attention constituted good service.

56. The application of CPR 3.10 to errors in service was considered by Popplewell J in *Integral Petroleum SA v SCU Finanz* [2014] EWHC 702 (Comm). That case concerned service of Particulars of Claim. They were sent by email to the defendant's solicitor,

without compliance with the conditions in Practice Direction 6A. The defendant applied to set aside default judgment under CPR 13.2 obtained by the claimant, on the basis that no defence had been served. Popplewell J judge held, at paragraph 34, that:

> "… the error of procedure in serving the Particulars of Claim by e-mail was a failure to comply with a rule or practice direction which falls within CPR 3.10. Accordingly under CPR 3.10(a) such service is a step which is to be treated as valid, so as to commence time running for the service of the defence, and disentitle [the Defendant] in this case to bring itself within CPR 13.2.

57. His reasoning included (at paragraphs 35 and 37) that CPR 3.10 is to be construed as of wide effect so as to be available to be used beneficially wherever the defect has had no prejudicial effect on the other party; that this is even more so where concerned with documents other than those by which proceedings are commenced so as to establish the jurisdiction of the court; and that the rules in relation to the service of such subsequent documents are simply concerned with bringing them to the attention of the other party in circumstances in which that other party knows or should realise that a step has been taken which may have procedural consequences.

58. In the present case, the Defendant has not asserted that the email of 29 October 2020 sending him the Bill of Costs (or indeed the letter of the same date) did not come to his attention. It was sent using precisely the method which he, through Davis Woolfe, had requested. This should be treated as valid service under CPR 3.10.

59. Alternatively the Claimant relies on CPR 6.15 and CPR 6.27. In *Abela* the Supreme Court held (at page 346) that there was good reason to order that steps taken to bring the claim form to the attention of the defendant constituted good service. The claimant had delivered an untranslated copy of a claim form to the defendant's lawyer in Beirut, rather than at the address specified by an order for service out of the jurisdiction. The Court held that the court should simply ask itself whether, in all the circumstances of the particular case, there is a good reason to make the order sought (paragraph 35). The mere fact that the defendant learned of the existence and content of the claim form could not, without more, constitute a good reason to make an order under rule 6.15(2). On the other hand, the wording of the rule showed that it was a critical factor (paragraph 36). In that case, the defendant's refusal to cooperate by disclosing his address in the Lebanon was a highly relevant factor (paragraph 39)

60. In *Alli-Ballogan v On the Beach Limited* [2021] EWHC 83 (QB) [p371] Bourne J determined that there was a good reason to make an order under CPR 6.15 where a Part 20 Claim Form had been delivered to a Part 20 defendant's registered office (paragraph 6), which was said not to be an address at which it carried on business as required by CPR 6.3(1)(c). He held that the "critical factor" was present, that the Part 20 defendant learned of the existence and content of the claim form, and that additional factors were delay in the proceedings and the absence of prejudice.

61. In the present case, there is no dispute about the critical factor, that the Defendant learned of the existence and contents of the Bill of Costs. A further factor is that the method of sending the documents was the one which the Defendant had in fact requested through Davis Woolfe and that those solicitors had incorrectly represented that a Notice of Change was not required.

62. If necessary the Claimant asks the court to order, pursuant to CR 6.15, that sending the Bill of Costs to the Defendant by email on 29 October 2020 was good service. It would follow that the Bill of Costs was validly served, so that the Claimant was entitled to the Default Costs Certificate, so that CR 47.12(1) does not require that it be set aside.

63. Mr Innes accepted that there is a distinction to be drawn between the service of a Notice of Commencement, which does start distinct Detailed Assessment proceedings, and the service of other documents in the course of the litigation, but submitted that even if a Notice of Commencement is treated as "originating process" that does not, as Mr Shepherd submits, preclude the operation of CPR 3.10. In *Integral*, at paragraph 37 of his judgment, Popplewell J found that there is in *Phillips v Nussberger* [2008] UKHL 1 authority for the proposition that CPR 3.10 applies to the service of originating process, and that although a narrower approach is justified the rule is still to be given a wide effect.

64. As for CPR 47.12(1), there are equally inflexible provisions for the setting aside of a default judgment to which a claimant was not entitled. That does not preclude the application of CPR 3.10, as in *Integral*.

Serbian Orthodox Church

65. Whilst I was in the course of preparing this judgment, Mr Justice Foxton handed down judgment in *Serbian Orthodox Church - Serbian Patriarchy v Kesar &* Co [2021] EWHC 1205 (QB). That case has issues in common with this one, and I will be referring to it in my conclusions, but the parties have requested that I complete this judgment without further submissions.

66. In *Serbian Orthodox Church* Foxton J allowed an appeal from an order of the Senior Costs Judge setting aside a Default Costs Certificate for the sum of £222,256.85. The Senior Costs Judge had set aside the certificate on the basis that, although the parties in that case had agreed to accept service by email, the notice of commencement of detailed assessment proceedings had been sent to an out-of-date email address and so had not been validly served on the paying party, a solicitor.

67. The solicitor had arranged for all emails sent to the old email address to be forwarded automatically and instantaneously to the current one, and he simply did not open the email serving the notice of commencement. Even so, Foxton J agreed with the Senior Costs Judge's conclusion that service had not been effected in compliance with CPR 6.20(1)(d) and practice Direction 6A. He was however persuaded (on a submission that had not been put to the Senior Costs Judge) that it was appropriate retrospectively to validate service of the notice of commencement under CPR 6.27.

68. In concluding that that service by email to the wrong email address could not be effective service, Foxton J undertook a thorough analysis of the provisions of the CPR for service by various methods, which it is not necessary to repeat here. More pertinent, for present purposes, are the following conclusions.

69. Foxton J found that CPR 3.10, as a provision of general application, must yield to the more specific provisions of the CPR as to service. Accordingly the receiving party could only validate the service of the notice of commencement if it could persuade the court to make an order under CPR 6.27.

70. In coming to that conclusion, he referred to a number of authorities. Those supporting the proposition that CPR 3.10 could remedy defective service included *Integral* and extended to *Bank of Baroda v Nawany Marine Shipping FZE* [2016] EWHC 3089 (Comm) and *Dory Acquisitions Designated Activity Company v Ionnais* [2020] EWHC 240 (Comm).

71. Those that did not included the judgments of O'Farrell J in *Boxwood Leisure Ltd v Gleeson Construction Services Ltd* [2021] EWHC 947 (TCC) and of Nicklen J in *Piepenbrock v Associated Newspapers Limited* [2020] EWHC 1708 (QB). Nicklen J found that CPR 3.10 could not be used to validate service of originating process purportedly effected by email, when there had been no agreement to accept service by that method.

72. At paragraph 82(iii) of his judgment in *Piepenbrock* Nicklen J had said:

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

73. Foxton J also referred to the judgment of Morgan J in *Ideal Shopping Direct Limited v Visa Europe Ltd* [2020] EWHC 3399 (Ch) ("Rule 3.10 is to be regarded as a general provision which does not prevail over the specific rules as to the time for, and manner of service, of a claim form").

74. Morgan J had found the reasoning in *Piepenbrock* to be more persuasive than that of the authorities which appeared to support a contrary finding. So did Foxton J. At paragraphs 51 and 52 of his judgment he set out his conclusions:

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

75. As to whether a notice of commencement of detailed assessment proceedings is, in effect, originating process, he said (at paragraph 56):

> "… I accept that the detailed assessment of costs is a distinct phase of the proceedings, with a distinct process for commencement. However, I do not accept that this is equivalent to the commencement of originating process. By the time costs are assessed, *in personam* jurisdiction over the defendant has long been established, and the defendant has been fully engaged in the proceedings. The commencement of "detailed assessment proceedings" is the next step in the proceedings, which a defendant against whom an adverse costs order has been made should be expecting…"

76. Foxton J's conclusion that there was good reason, as required by CPR 6.27, to order that the steps taken by the receiving party to serve notice of commencement constituted good service, was founded on these facts.

77. The notice of commencement and supporting documents had been sent to an email address which the solicitor had used, and which was set up not to notify senders that the email was no longer in use or to direct them to a different email address, but automatically to forward the documents to the right address. They were received through the agreed mechanism for service. Short of opening the email (which he did not do) it would not in fact have been possible for the solicitor to know whether the notice of commencement had reached the correct email box because it had been sent there directly or forwarded automatically.

78. The requisite documents not only reached the party to be served, but did so by service to an email address which was set up to receive electronic service of documents such as the notice of commencement, and which ought to have been monitored to that end. By reason of its arrival at that email address, the document reached the solicitor by a means from which, had the email been opened, it would have been obvious this was an attempt at formal service.

79. The only prejudice to the solicitor in validating service was that there had been a default assessment of his costs liability, unless he was able to show "good reason" (by reference to CPR 47.12) for setting the Default Costs Certificate aside.

Conclusions

80. Before summarising my conclusions I should mention that I am surprised to be told that MRN was given to understand by someone at the SCCO that a consent order would be needed to set aside the Default Costs Certificate. I have referred above to Practice Direction 47, paragraph 11.1, which provides that a court officer, meaning a member of court staff, may set aside a default costs certificate at the request of the receiving party.

81. In my view, the Default Costs Certificate should have been set aside when the SCCO received MRN's letter, and for the reasons I shall give, my view is that it would have been better if that had happened.

Whether the Claimant's Notice of Commencement was Validly Served

82. I have no doubt that all three of Mr Shepherd's criticisms of the Claimant's attempts at service are justified. In the circumstances all that the Claimant had to do, to effect service of the Notice of Commencement, was to send it and the appropriate supporting documents by DX or ordinary first class post to Davis Woolfe. Instead the Claimant attempted to serve upon the wrong person, by the wrong method, simultaneously serving by post to the wrong address. All of these errors could have been avoided with a little diligence.

83. The proposition that on 25 August 2020 Davis Woolfe, on the Defendant's behalf, authorised service upon the Defendant by email in accordance with CPR 6.23(6) and paragraph 4.1 of Practice Direction 6A seems to me plainly to be wrong. The email was copied to the Defendant, but does not purport to have been authorised by him. Assuming that it was authorised, it does no more than provide an address for correspondence which, unsurprisingly, he subsequently accepted. It does not mention service (and evidently Rosenblatt did not ask either Davis Woolfe or the Defendant about service, whether by email or any other method). Even if it had mentioned service, it could not have dispensed with the mandatory requirements of CPR 6.23 and CPR 42.2.

Whether the Notice of Commencement Should be Treated as Originating Process

84. Before Foxton J helpfully disposed of the question, I had already concluded that it cannot be right to treat a notice of commencement of detailed assessment proceedings as originating process. Commencing detailed assessment proceedings invokes the jurisdiction of what CPR 47 refers to as "the appropriate office", meaning the court which will deal with all aspects of the assessment proceedings (in this case, the SCCO). It does so however as a continuation of the existing proceedings, not as a new set of proceedings. If such were not the case, then Rosenblatt would have been right to take the view that for the purposes of the detailed assessment proceedings, Davis Woolfe was not on the court record for the Defendant.

Whether Service Can be Validated by CPR 3.10

85. Before I read the judgment of Foxton J in *Serbian Orthodox Church*, I had already concluded that it cannot be right to apply CPR 3.10 so as to validate service upon the wrong person by the wrong electronic method and physically at the wrong address. These defects in service are not minor or technical. Nor can they be said with certainty to have had no practical effect, given the possibility that service upon solicitors might have prompted a timelier response. Even solicitors who had declared themselves no longer to be acting might well have felt duty bound to offer the Defendant some guidance on the consequences of ignoring a Notice of Commencement.

86. I had in mind also that Popplewell J, at paragraph 36 of his judgment in *Integral*, accepted that purported "service" by a method which is not permitted by the rules at all could fall outside CPR 3.10 (and that ultimately he found that the balance of justice required in fact that the default judgment, in *Integral*, should be set aside). It seems to me that this is an example of a case where service has been attempted by a method not permitted by the rules: that is to say, upon the Defendant directly rather than upon his solicitors.

87. In the event, I have been greatly assisted by the thorough analysis and the findings of Foxton J in *Serbian Orthodox Church*. His conclusions are binding on me, and to the extent that they might be perceived as inconsistent with previous High Court decisions his analysis seems to me to be the most recent and complete. CPR 3.10 cannot validate service of the Claimant's Notice of Commencement. If it could, it would in my view be wrong, on the facts of this case, to apply it in that way.

The Effect of CPR 47.12(1)

88. I am not entirely convinced by Mr Innes' comparison between CPR 47.12(1) and the mandatory provisions of CPR 13 for setting aside a default judgment. The wording of CPR 13 is materially different from that of CPR 47.12(1), which is wider: the court will set aside a Default Costs Certificate where the receiving party was not entitled to it, whatever the reason for that may be.

89. The question of whether CPR 3.10 be applied so as to defeat the mandatory provisions of CPR47.12(1) has, given the conclusions I have reached, fallen away. As for whether CPR47.12(1) operates so as to prevent an order being made under CPR 6.27, for reasons I shall give, I do not need to decide that and I do not think that I should. Instead I will offer my conclusions on the assumption that it does not.

90. This leaves the question of whether there is good reason to make an order retrospectively authorising service under CPR 6.27. In my view, on balance, there is not. These are my reasons.

Whether the Claimant's Notice of Commencement Came to the Defendant's Attention

91. On the evidence I have seen, it must be right to conclude that it the Notice of Commencement and supporting documents sent to the Defendant by email, to a correspondence address given to the Claimant by his former solicitors and used by him in subsequent correspondence, came to his attention. The Notice of Commencement so received would have incorporated a warning about the time available to file Points of Dispute.

92. It would follow that this essential prerequisite to making an order retrospectively validating service can be taken to exist, but it is common ground that in itself it is not sufficient. I have to consider all the circumstances of this case and apply the other *Barton* criteria.

Whether the Claimant took Reasonable Steps to Effect Service

93. It seems to me to be evident that the Claimant has not taken reasonable steps to effect service in accordance with the rules. The provisions of the CPR for service upon a solicitor, for service by email and for service to the right postal address should be familiar to every solicitor who conducts litigation, and as I have said the multiple errors made in purporting to serve the Defendant could have been avoided with a little diligence.

94. Solicitors are officers of the court. They are expected to understand and to comply with the Civil Procedure Rules. Mr Shepherd makes a good point when he says that an order

under CPR 6.27, retrospectively authorising service on the facts of this case, would offer an indication that even for a solicitor, compliance with the rules is optional.

Prejudice to the Defendant

95. In *Serbian Orthodox Church* the error in sending served documents to an old email address was of no material effect: the solicitor who was to meet the costs received it at the correct address and simply failed to open it, just as he would have done if it had been sent directly. Under the circumstances it is unsurprising that Foxton J concluded that he would not be unfairly prejudiced, on the making of an order under CPR 6.27, by then having to show good reason to set aside his opponent's Default Costs Certificate.

96. This case seems to me to be very different. To rectify multiple, basic and avoidable procedural errors made by solicitors, so as to deprive the (then unrepresented) Defendant of the opportunity to dispute the Claimant's bill of costs, does not strike me as being in accordance with the overriding objective or with the proper administration of justice.

97. The Claimant's bill of costs exceeds £500,000. It is more than twice the size of the bill of costs in *Serbian Orthodox Church*. It is not untypical, even where some (or all) of the costs have been ordered on the indemnity basis, for bills of that size to be reduced by in the region of 20%, which in this case would be about £100,000. Whilst I do not wish to attach undue weight to evidence upon which I have heard no submissions, a copy of the Claimant's bill included in the hearing bundle seems to indicate that the Claimant's costs exceeded budget by a substantial amount.

98. In any event, there is good reason to suppose that applying CPR 36.27 so as to ensure that the Claimant escapes the consequences of its procedural failures, but the Defendant does not escape the consequences of his, would result in a significant windfall to the Claimant.

99. I have mentioned that the Claimant's application for retrospective validation of service was framed, in the alternative, as an application for relief from sanction. That was (rightly in my view) not pursued in submissions. I do not think that the provisions of CPR 3.9 apply. It is nonetheless useful, for the purposes of illustration, to observe that if they did apply the Claimant would have little prospect of establishing that the failures to observe the provisions of the CPR on service were not serious; that there was good reason for them; or that it would be just, in all the circumstances, to allow the Claimant to escape the consequences.

100. For the reasons I have given my conclusion is that the application under CPR 6.27 must be refused and the Default Costs Certificate set aside.

YA II PN Ltd v Frontera Resources Corporation

101. I have said that it is not necessary to make a finding on whether CPR47.12(1) operates so as to prevent an order being made under CPR 6.27. In fact it might engender some delay. That is because I have read the judgment of Mr Justice Butcher in *YA II PN Ltd v Frontera Resources Corporation* [2021] EWHC 1380 (Comm), handed down on 26 May 2021.

102. Butcher J, on making an order under CPR 6.15 retrospectively validating service of a claim form, came (by reference to *Dubai Financial Group LLC v National Private Air Transport Co (National Air Services) Ltd* [2016] EWCA Civ 71) to the conclusion that a judgment, entered when acknowledgement of service was not filed, must nonetheless be set aside and time allowed for acknowledgement.

103. Both judgments can be distinguished from this case in particular because they address provisions of CPR 6.15 specific to service of a claim form, but it does seem to me that *Dubai Financial Group LLC* offers some foundation for the conclusion that any order under CPR 6.27 retrospectively validating service of a Notice of Commencement must, if unfairness is to be avoided, also set aside any Default Costs Certificate and give time for Points of Dispute to be served.

104. This line of argument was evidently not raised in *Serbian Orthodox Church* and might well furnish an answer to Mr Shepherd's point about the effect of CPR 47.12(1). I could not, however, come to any firm conclusion on that without inviting further submissions. As I have said, it is not necessary for me to do so, and the parties have already made it clear that they would prefer to receive my judgment rather than make further submissions.

Extensions of Time and Stay

105. Given the conclusions I have reached the Defendant does not need an extension of time for service of Points of Dispute, which has not begun to run. As for the applications for a general extension of time and a stay of the detailed assessment pending appeal, the Defendant's appeal has now been heard. Only judgment is awaited.

106. Nonetheless it seems to me that the applications for a general extension or a stay pending the outcome of the appeal should be refused. A stay was refused by HHJ Pearce and to my mind an application should have been made to the Court of Appeal on 25 August 2020, whereupon it would have been considered and decided in November 2020, along with the application for permission to appeal. The Defendant left it too late to apply. Unless the parties now agree that there should be a stay pending the outcome of the appeal, and subject to any submissions I might hear, I will on handing down this judgment (or at a further hearing, if necessary) make an order setting a timetable within which a reasonable period will be provided for the preparation and service of Points of Dispute.

Summary of Conclusions

107. CPR 3.10 does not operate to validate service that does not comply with the rules. Nor would it be right, in all the circumstances, to make an order under CPR 6.27 retrospectively validating service upon the wrong person by the wrong means. The Claimant's application for retrospective validation is refused.

108. The Claimant was not entitled to the Default Costs Certificate, which must be set aside under CPR 47.12(1).

109. The applications for a general extension on time to serve Points of Dispute, and for a stay of the detailed assessment, are refused. The next step will be to set a timetable which will include an appropriate period for service of Points of Dispute.