Case No: F02YM752

IN THE COUNTY COURT AT MANCHESTER

On Appeal from District Judge Matharu

Neutral Citation Number:[2022] EWHC 1636 (QB)

Manchester Civil Justice Centre

1 Bridge Street West

Manchester

M60 9DJ

Date: 24 June 2022

Before:

His Honour Judge Pearce

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Between:

(1) **DR SANJAY PITALIA** (2) **DR SHIKHA PITALIA**	Appellants/ Claimants
- and –	
NHS COMMISSIONING BOARD	Respondent/ Defendant

- -

MR TIMOTHY TROTMAN (who did not appear below) **(**instructed by **Acklam Bond)** for the **Appellants**

MR AIDAN REAY (instructed by **Hill Dickinson LLP**) for the **Respondent**

Hearing date: 24 May 2022

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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.

Introduction

1.This is my judgment on an appeal from an order of District Judge Matharu dated 27 August 2021, in which she dismissed an application by the Appellants dated 17 January 2020 as amended pursuant to an order of District Judge Matharu dated 7 August 2020. In its amended form, the application sought:

a.an order that service has been affected whether by rectification of the Claim Form under CPR3.10 or by permitting service of the Claim Form under CPR6.15 or by dispensing with the need for service of the Claim Form under CPR 6.16; or

b.an order that time for service be extended.

Having dismissed the application, the Judge granted the Respondent’s application dated 24 January 2020 to strike out the claim.

2.The appeal proceeds under CPR Part 52 by way of review rather than rehearing. Whilst the proper ambit of the role of this court on appeal has not been the subject of disagreement between the parties, I bear in mind the helpful consideration of the nature of such review by the authors of the White Book at paragraph 52.21.1.

3.At the hearing of the appeal on 24 May 2022, I had the benefit of written submission from both parties and heard oral submission from counsel. I am grateful to them for the assistance that they provided on an issue that is not wholly straightforward. At the conclusion of the hearing, I reserved judgment.

4.In this judgment, I refer to the Claimant/Appellants as the Appellants and the Defendant/Respondent as the Respondent.

Background

5.The Appellants are doctors who operated as general practitioners in Newton–le–Willows in 2007, the Appellants were operating from premises on Broad Street, but they identified the need for alternative premises. Following negotiations with the Respondent, it was agreed that the Appellants would move to new premises on Belvedere Street. The Appellants contend that an agreement was reached as to the relevant rental payments and the payment of a grant. In the event, the Appellants contend that the Respondent has not made the payments that it is contractually bound to make, and they sue for the sums that they say are due to them pursuant to that agreement.

6.The Claim Form was issued on 2 August 2019, following the attendance of a junior member of staff of the Appellant's solicitors to the County Court in Preston. The witness evidence relied upon in support of the application states that, when the Appellant's solicitors were preparing documents for service, they discovered that they had not received a copy of the notice of issue of the sealed Claim Form from the court. They therefore served an unsealed version of the claim form that had been amended together with particulars of claim, a schedule of loss and the response pack under cover of a letter 27 November 2019.

7.On 10 December 2019, the Respondent contacted the Appellants' solicitor by email stating that either proceedings had not been issued or, if they had been, the original sealed Claim Form had not been served on the Respondent. Either way, the Respondent asserted that the claim had not been effectively served. By email to the court dated 12 December 2019, the Respondent's solicitor stated that good service had not been effected therefore the Respondent did not propose to file an Acknowledgement of Service.

8.A copy of the sealed Claim Form in its unamended version was sent to the Respondent's solicitors by letter dated 7 January 2020. The Respondent's solicitor replied by letter dated 16 January 2020, pointing out that the Claim Form had been issued on 12 August 2019 and therefore should have been served by 12 December 2019, and that in any event the documents served was a copy of the sealed Claim Form rather than the original. The Respondent intimated an intention to apply to strike out the claim.

9.On or around 17 January 2020, the Appellant's solicitors sent a further Claim Form, sealed but this time as amended on 26 November 2019 and again on 17 January 2020.

10.The Respondent filed an Acknowledgment of Service under cover of a letter dated 21 January 2020. The Respondent made clear in the letter that it contested the Appellant's intimated application to regularise service and stated that it intended to apply to strike out the Claim Form. However, in the

relevant box on the Acknowledgment of Service, the Respondent ticked the box stating, “I intend to defend all of this claim” but not the box stating, “I intend to contest jurisdiction.”

11.The parties made a series of applications:

a.An application by the Appellants dated 17 January 2020 seeking “an order that service has been effective or an order that time full service be extended” (“the Appellants’ Original Application”);

b.An application by the Respondent dated 24 January 2020, seeking an order that the claim be struck out due to non-compliance with CPR 7.5 (“the Respondent’s First Application”)

c.An application by the Respondent dated 5 March 2020, seeking an order that, in the event that the Appellant’s application dated 17 January 2020 was granted, the time for filing the defence be extended until 28 days after the grant of the Appellant’s application (“the Respondent’s Second Application”);

d.An amended application by the Appellants, seeking relief as set out in paragraph 1 of this judgment (“the Appellant’s Amended Application”). It is the determination of this application which is the subject of the appeal.

12.In support of their applications, the Appellants relied on the evidence filed in support of the application, namely witness statements from Katherine Millray dated 17 January 2020 and 31 July 2020. Those statements both fail to comply with the requirement in paragraph 17.2 of CPR PD32 that there appear in the top right-hand corner details including the date upon which the statement was made. This rule has long been in force and there is no excuse for non-compliance. The Respondent relied on statements from Mr Richard Parker dated 24 January 2020 and 16 September 2020. Mr Parker’s statements comply with CPR PD32.

The Hearing of the Application before Judge Matharu

13.The applications referred to at paragraph 9 above were listed for hearing before Judge Matharu on 6 August 2020. Unfortunately, that hearing had to be adjourned and, following a period when the court file went missing, the case was eventually heard on 27 August 2021 when Judge Matharu dismissed the Appellants’ Amended Application and granted the Respondent’s First Application, striking out the claim. The Respondent’s Second Application for an extension of time for service of the Defence then became academic.

14.Much of the hearing before Judge Matharu was taken up with argument as to whether service of an unsealed and/or copy claim form amounted to good service and/or whether the court should exercise its power to regularise service by treating the failure to comply with the rules as an error that can and should be remedied under CPR 3.10, by deeming service to be effective, by dispensing with service or by retrospectively extending time for service. In each respect, the Judge found for the Respondent.

15.Those findings resolved the case in favour of the Respondent subject to the threshold issue raised by the Appellants at the hearing that it was not open to the Respondent to take the issue as to the adequacy of service. In summary, the argument advanced by the Appellants was that the Respondent had filed an Acknowledgement of Service but had not made an application under CPR 11.1 for an order declaring that the court had no jurisdiction and in consequence was to be treated as having accepted that the court had jurisdiction to try the claim pursuant to CPR 11.1(4). This issue was not raised in either the Original Application or the Amended Application and first appeared in the skeleton

argument of counsel for the Appellants served shortly before the hearing before Judge Matharu on 27 August 2021.

16.At paragraph 32 of her judgment, Judge Matharu identified the issue for determination as: "whether the failure on the part of the defendant to challenge jurisdiction and then not making an application under CPR 11 is effectively fatal to their challenges and they have deemed to have submitted to the jurisdiction." Having referred to the decision of Patten J in SMAY Investments v Sachdev [2003] EWHC 474, she further identified the issue in paragraph 33 as being "whether there are unequivocal, clear and express terms to abandon an intention to contest jurisdiction."

17.Judge Matharu referred to letters from the Respondent stated to be dated 12 November and 24 January (though probably in fact references to the email of 12 December 2019 and the letter of 16 January 2020 referred to above). She noted that this was not a case where the Respondent had submitted to the jurisdiction but rather had filed the Acknowledgement of Service and then lodged the application to strike out. As the Judge put it at paragraph 34, "the defendant has consistently made it clear that it proposed to take procedural steps, without prejudice to its jurisdictional challenge. There had been no waiver, express or implied, of its right to challenge jurisdiction."

18.She concluded on this issue at paragraph 38 of her judgment:

"In all the circumstances that I have identified, I do not accept the Claimant's submission that the Defendant's failure to tick box and do everything else required under CPR 11 precludes them from challenging jurisdiction. I have regard to page 70 of the main bundle, the email of 12 December to which I have already; 'As things stand, our position remains that these proceedings have not been effectively served. We await service.' It could not be any clearer. There are then further communications at page 79, page 94, page 147 and page 150. Thereafter, they made an application. I cannot go so far as to say that I should consider that it satisfies the specific provisions of CPR 11.4 but I do find … that this is not a matter or anything being 'equivocal' or in any way open to doubt. It is absolutely and clearly unequivocal that jurisdiction was being challenged."

The Appeal

19.The Appellants' grounds, as originally formulated, were seven in number and reflected the multitude of issue raised in front of Judge Matharu. By order of 8 February 2022, Her Honour Judge Claire Evans directed that the Appellants serve new grounds of appeal and a new skeleton argument, having regard to the judgment of the Court of Appel in Ideal Shopping Ltd v VISA Europe [2022] EWCA Civ 14, which she correctly identified as having dealt with some of the matters that were the subject of the original grounds, especially as to the status of an unsealed claim form.

20.In response to this order, the Appellants amended their Grounds of Appeal, narrowing the points to three:

a."That the District Judge erred in law by not determining that the defendant had accepted jurisdiction and /or lost its right to challenge the validity of the claim form in all the circumstances, and, in particular in the circumstances that (a) the defendant had failed to use the procedure provided by CPR Part 11 and/or (b) the defendant's solicitors had filed under cover of a letter dated 21.1.20, an a acknowledgement of service with the box indicating an intention to defend the claim ticked but the box indicating an intention to contest jurisdiction not ticked and notwithstanding the said letter stated that it was being filed '…without prejudice to our position that the claim form has not been served'…"

b.“The District Judge erred in law and/or the exercise of her discretion under CPR 6.16 in failing to dispense with service of the claim form including by failing to find that the circumstance that the court had not sent out the sealed claim form to be exceptional within the meaning of CPR 6.16.”

c.“The District Judge erred in law and/or in the exercise of her discretion under CPR 7.6(3) by failing to extend time for service of the claim form until 9 January 2020 or such other time as the court should have been satisfied that the claim form was properly served including by failing to find that the circumstances in CPR 7.6(3)(b) and (c) had been made out.”

21.On 29 March 2022, Her Honour Judge Claire Evans granted permission on the first of these grounds, but refused permission on the second and third. Her decision to refuse permission on those later grounds was not the subject of a renewal application and therefore the appeal was limited to the question of the argument that the Respondent had accepted jurisdiction and/or lost the right challenge the validity of the Claim Form. Unless the Appellants succeed on this argument, it is common ground that the appeal must be dismissed on the basis of the other findings of Judge Matharu which have not been subject to challenge.

22.On 4 May 2022, the Respondent filed a Respondent’s Notice. It raises three points:

a.That the passage of the decision in Hoddinott v Persimmon Homes [2005] 1 WLR 806 on which the Appellants relied before Judge Matharu was obiter and should not be relied on and/or is no longer good law in light of the decision of the Supreme Court in Barton v Wright Hassall [2018] UKSC 12;

b.That the Respondent’s application of 24 January 2020 could and should have been treated as an application under CPR Part 11;

c.That, even if the application of 24 January 2020 was not treated as an application under CPR Part 11, the Respondent was entitled to make an application to strike out on the grounds of the inadequacy of service.

The Relevant Law

23.The obligation to serve the Claim Form appears in CPR 7.5(1):

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

The Rule goes on to set out the step required according to the method of service adopted.

24.CPR 7.6 sets out the court’s power to extend time for service of the Claim Form:

(1) The claimant may apply for an order extending the period for compliance with rule 7.5.

(2) The general rule is that an application to extend the time for compliance with rule 7.5 must be made –

(a) within the period specified by rule 7.5; or

(b) where an order has been made under this rule, within the period for service specified by that order.

(3) If the claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if –

(a) the court has failed to serve the claim form; or

(b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and

(c) in either case, the claimant has acted promptly in making the application.

(4) An application for an order extending the time for compliance with rule 7.5 –

(a) must be supported by evidence; and

(b) may be made without notice.

25.As I have indicated, whilst the Appellants originally challenged Judge Matharu's failure to exercise this power, they have not pursued that argument on appeal.

26.The Court's power to strike out a claim is one of the wide Case Management powers vested in it by CPR Part 3. The exercise of the power in the circumstances of this case is uncontroversial if the Court finds that the Respondent has not submitted to the jurisdiction in a way which bars it from seeking strike out of the claim.

27.The argument that the Respondent has submitted to the jurisdiction in a way which prevents it from making the application to strike out arises from the terms of CPR Part 11:

"Procedure for disputing the court's jurisdiction

(1) A defendant who wishes to –

(a) dispute the court's jurisdiction to try the claim; or

(b) argue that the court should not exercise its jurisdiction

may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.

(2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.

(3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.

(4) An application under this rule must –

(a) be made within 14 days after filing an acknowledgment of service; and

(b) be supported by evidence.

(5) If the defendant –

(a) files an acknowledgment of service; and

(b) does not make such an application within the period specified in paragraph (4),

he is to be treated as having accepted that the court has jurisdiction to try the claim…"

28.The proper interpretation of CPR 11(5) was considered by the Court of Appeal in Hoddinott. Dyson LJ speaking on behalf of the whole court said:

“27. In our judgment, the meaning of paragraph (5) is clear and unqualified. If the conditions stated in subparagraphs (a) and (b) are satisfied, then the defendant is treated as having accepted that ‘the court has jurisdiction to try the claim’. The conditions include that the defendant does not make an application for an order pursuant to CPR 11(1) within 14 days after filing an acknowledgment of service. An application to set aside an order extending the time for service made before the filing of an acknowledgement of service is not an application under CPR 11(1) nor is it an application made within 14 days after the filing of the acknowledgment of service. The district judge (rightly) did not hold that the application to set aside the order extending time for service was an application under CPR 11(1). Rather, he said that the earlier application to set aside the order rendered it unnecessary to make an application under CPR 11(1). But in our judgment, there is no warrant for holding that, if an application is made before the filing of an acknowledgment of service to set aside an order extending the time for service, this has the effect of disapplying the requirement for an application under CPR 11(1). There is no such express disapplication, nor does one arise by necessary implication.

28. In our view, a defendant is fixed with the consequences stated in paragraph (5) if the two stated conditions are satisfied…”

The Appellant’s Case

29.The Appellant’s primary argument is that, in formulating the test to be applied on the question of whether the Respondent should have been taken to have submitted to the Court’s jurisdiction in the manner that she did in paragraphs 32 and 33 of her judgment, that is to say in essence as whether the Respondent had unequivocally submitted to the jurisdiction, the District Judge failed to give effect to CPR Part 11 and failed to follow the judgment of the Court of Appeal in Hoddinott. The Respondent completed and served an Acknowledgement of Service but failed to make application to the court for an order declaring that it has no jurisdiction to try the claim or should not exercise any jurisdiction that it might have.

30.The judgment of the Court of Appeal in Hoddinott contains a clear statement of principle: a party who files an Acknowledgment of Service but does not apply under CPR 11.1 for an order declaring that the court has no jurisdiction or that the court should not exercise any jurisdiction which it may have is to be treated as accepting that the court has jurisdiction to try the claim. The Appellants reject the argument either that the decision of the Court of Appeal in Hoddinott is not binding on this court or that the later decision of the Supreme Court in Barton v Wright Hassall is inconsistent with Hoddinott and therefore expressly overrules it.

31.In so far as the District Judge looked more generally at the attitude taken by the Respondent to contesting jurisdiction, the Appellants contend that she erred and failed to give effect to the terms of CPR Part 11 as considered in Hoddinott.

32.As to the Respondent’s alternative argument that the application made on 24 January 2020 should be treated as an application under CPR Part 11, the Appellants say that this is inconsistent with either the terms of the application that was made and the evidence relied on in support of the application in Mr Parker’s first statement. Mr Trotman said that it was clear that the application was being made under CPR3.4(2)(c) and that “there is no room to pretend that the application was in fact made under CPR 11.”

33.Whilst the Appellants did not expressly make this point, it is clear from paragraph 38 of the judgment that the District Judge rejected the argument that the application satisfied the provision of

CPR 11.4. It is at least arguable in light of this that the District Judge should be treated as having found that the application could not properly be treated as an application under CPR 11.1.

The Respondent's Case

34.In seeking to defend the judgment below, the Respondent's primary challenge is as to the effect of the decision of the court of Appeal in Hoddinott in light of the judgment of the Supreme Court in Barton v Wright Hassall.

35.In order to consider the argument, it is necessary to look in a little more detail at the facts of Hoddinott. The claimants were farmers who sued the defendant for trespass to land and associated torts. The sequence of events in the litigation was as follows:

22.5.06	Claim Form issued
13.9.06	Claimants applied without notice for an extension of time to serve the Claim Form
13.9.06	District Judge Rowe granted an extension of time for service to 22.11.06 pursuant to CPR 7.6
2.10.06	Defendant applied to set aside the order of 13.9.06 extending time for service
21.11.06	Claim Form and Particulars of Claim were served
28.11.06	Defendant filed an Acknowledgement of Service indicating an intention to defend the claim but not indicating an intention to contest jurisdiction
30.1.07	District Judge Daniel heard the defendant's application to set aside the order of 13.9.06. He (a) set aside the order of 13.9.06 extending time for service; and (b) struck the claim out.

36.The Court of Appeal stated that three issues arose on the appeal:

a.Whether CPR 11 was engaged in a case of this kind: is its application limited to cases whether the "jurisdiction" in issue was the territorial jurisdiction of the court or does it apply more generally to the court's power or authority to try the claim?

b.Whether Part 11 was engaged on the facts of the case.

c.Whether the exercise by Judge Daniel of the discretion under CPR 7.6 pursuant to which he set aside the order of 13 September 2006 extending time for service was wrong.

37.The Court of Appeal held that Part 11 was engaged in these circumstances. The Court indicated that it would allow the appeal on the second issue, for the reasons set out in the judgment at paragraphs 28 and 29 cited above. It further indicated that it would allow the appeal on the third ground namely that Judge Daniel should not have set aside the order of 13 September 2006.

38.The Respondent's argues that the Court of Appeal, having concluded that the District Judge wrongly exercised his power to set aside the order of 13 September 2006, allowed the appeal on that ground. Accordingly, it was not necessary to determine the issue under CPR 11 and the Court of Appeal's reasoning is obiter.

39.As Mr Reay put it in oral argument, in determining the ratio decidendi of Hoddinott, this court must focus on why the Court of Appeal reached the decision that it reached. It is not enough to identify that the Court of Appeal would have reached the same decision as it actually reached on the particular issue, if the underlying reason for the Court of Appeal's decision to allow the appeal was in fact on a different basis to the issue before this court.

40.In the alternative, the Respondent argues that the decision of the Court of Appeal is inconsistent with and is therefore impliedly overruled by the later decision of the Supreme Court in Barton v Wright Hassall. Particular reference was made to the following passages of the judgment of Lord Sumption JSC for the majority:

“1. The appellant, a litigant in person, purported to serve the claim form in these proceedings on the defendant's solicitors by email, without obtaining any prior indication that they were prepared to accept service by that means. It is common ground that this was not good service. As a result, the claim form expired unserved on the following day. The question at issue on this appeal is whether the Court should exercise its power retrospectively to validate service. To date, the District Judge, the County Court judge and the Court of Appeal have declined to do so. If their order stands, the result will be that Mr Barton can proceed with his claim only by a fresh action…

8… The rules governing service of a claim form do not impose duties, in the sense in which, say, the rules governing the time for the service of evidence, impose a duty. They are simply conditions on which the court will take cognisance of the matter at all. Although the court may dispense with service altogether or make interlocutory orders before it has happened if necessary, as a general rule service of originating process is the act by which the defendant is subjected to the court's jurisdiction…

16. The first point to be made is that it cannot be enough that Mr Barton's mode of service successfully brought the claim form to the attention of Berrymans. As Lord Clarke pointed out in Abela v Baadarani [2013] UKSC 44, this is likely to be a necessary condition for an order under CPR rule 6.15, but it is not a sufficient one. 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. Service of the claim form within its period of validity may have significant implications for the operation of any relevant limitation period, as they do in this case. Time stops running for limitation purposes when the claim form is issued. The period of validity of the claim form is therefore equivalent to an extension of the limitation period before the proceedings can effectively begin. It is important that there should be a finite limit on that extension. An order under CPR rule 6.15 necessarily has the effect of further extending it. 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.”

41.The decision of the Court of Appeal in Hoddinott is said by the Appellants to be authority for the proposition that a party who files an Acknowledgment of Service but does not apply under CPR 11.1 for an order declaring that the court has no jurisdiction or that the court should not exercise any jurisdiction which it may have is to be treated as accepting that the court has jurisdiction to try the claim. However, the Respondent contends that, where the challenge to the court’s jurisdiction arises from the circumstances here (or in Hoddinott) where the time for serving the Claim Form has expired (or the circumstances in Hoddinott where the time for service would have expired if a without notice order extending time for service is set aside), the decision cannot stand in light of the analysis of the Supreme Court in Barton v Wright Hassall that, following after the end of the time allowed in the CPR for service of the Claim Form, the Claim Form had, in the words of Lord Sumption, “expired”. As Mr Reay put it in written submissions, the passages from the judgment of Lord Sumption in Barton v

Wright Hassall “are inconsistent with an approach where the stale claim form is neither alive nor dead but waiting for a coup de grâce from a defendant under part 11.”

42.In the alternative, it is argued that the Respondent’s First Application should be treated as an application under CPR 11.1. The Respondent accepts that the application is stated to be a strike out application and that no reference is made to CPR Part 11 either in the application itself or in the supporting witness statement from Mr Parker. The Respondent explains this by stating that the Appellants had not, at the time of the application being made, taken any point under CPR Part 11 and therefore it was not apparent that the Respondent needed to make such an application.

43.But the Respondent draws my attention to the judgment of Dingemans J in Caine v Advertiser and Times Ltd [2019] EWHC 39 an appeal from a decision of Master Yoxall. The Claim Form was issued on 9 May 2017 but not served until 5 October 2017. The Defendants, both unrepresented, served Acknowledgements of Service but neither ticked the box indicating an intention to contest the jurisdiction of the court nor made application within 14 days under CPR 11.1. On 7 November 2017 (more than 14 days after acknowledgement of service), the Defendants sought orders either striking out the claim or entering summary judgment, stating that the claim had no real prospect of success and alleging various non-compliance with rules including a failure to serve the Claim Form in time. A hearing of the application before Master Yoxall overran and as a result he invited written submissions. In those submissions, the claimant raised the defendant’s non-compliance with the requirement to make application under CPR Part 11 and the defendant responded by making a further application on 18 May 2018 seeking:

"(1) for a four day retrospective extension of time, including by way of the court's case management power under CPR 3.1(2)(a), for the period for filing an application under CPR 11(4) from 3 November to 7 November 2017; and/or (2) Under CPR 3.9 for relief from the sanctions in CPR 11(4) and 11(5) such that the Defendants are not treated as having accepted that Court has or should exercise its jurisdiction in these proceedings and the Defendants' challenge to service contained in its application of 7 November 2017 may be considered by the Court (which is pending following a part heard hearing on 11 May 2017 before Master Yoxall).”

44.Master Yoxall found that the application to contest the jurisdiction could be made by way of strike out application, a decision which Dingemans J found on appeal to be wrong. But Master Yoxall also held that, if he was wrong to find that the application could be made under CPR Part 3 as an alternative to CPR Part 11, he would in any event grant the application of 18 May 2018 for a retrospective extension of time for making such an application.

45.On appeal, Dingemans J accepted (as the Respondent accepts here in respect of its application dated 24 January 2020) that the original application made on 7 November 2017 was not an application under CPR Part 11 even though (as here) the application raised the issue of late service. But he went on:

“[33]... by 18 May 2018, in the light of Mr Caine taking the Part 11 point in his submissions filed after the first hearing before Master Yoxall on 11 May 2018, the point about Part 11 was expressly addressed, together with an application for an extension of time. In the application dated 18 May 2018 there was express reference to an application under Part 11 and for an extension of time. Further in the supporting witness statement reasons were set out for relief from the sanction implicit in Part 11(4) and 11(5). In these circumstances I am satisfied that the joint effect of the applications of 7 November 2017 and 18 May 2018 is that an application was made pursuant to Part 11 to challenge

the exercise of jurisdiction by the Court, and to extend time for making the application, and that Master Yoxall was entitled to consider that the application had been made, and was right to do so."

46.The Respondent contends that the same argument can be applied here. The application to strike out here was made in time so, unlike on the facts of Caine v Advertiser, no extension of time was necessary. The application was consistent with the application required under CPR 11.1, in all respects other than the description of the relief sought. The court can and should treat the application here as having been made under CPR 11.1.

Discussion

47.I start by dealing with the proper construction of CPR 11. In this respect it is necessary to consider whether Hoddinott is binding authority for the proposition that a party who files an Acknowledgment of Service but does not apply under CPR 11.1 for an order declaring that the court has no jurisdiction or that the court should not exercise any jurisdiction which it may have is to be treated as accepting that the court has jurisdiction to try the claim

48.The parties did not make submissions to me on the detail of the law of precedent and the status of the decision of the Court of Appeal. A useful summary of the position is the well-known judgment of Lord Hailsham in Cassell & Co Ltd v Broome [1972] AC 1027: "… in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in Young v Bristol Aeroplane Co Ltd [1944] KB 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom." In his judgment, Lord Hailsham went on to consider the House of Lords' own self-declared power to depart from its previous decision, set out in the 1996 Practice Statement of the then Lord Chancellor, Lord Gardener, reported at [1966] 3 All ER 7 which noted "Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules." The Supreme Court, for example in Secretary of State for Health v Servier Laboratories Ltd [2021] UKSC 24, has continued to emphasise the importance of not undermining the role of precedent and the certainty which it promotes.

49.These passages do not on their face provide an answer to the specific question that arises where, as in Hoddinott, an appeal court allows an appeal on two grounds, either of which on their own would have been sufficient to dispose of the appeal. However, the passages point strongly to the importance of precedent and the respect that the lower court should accord to the decision of the higher court on the same facts. Moreover, where the Court of Appeal indicates two (or more) alternative bases for allowing an appeal, both (or each) of which would have been sufficient alone to have led to the appeal being allowed, it is unsatisfactory to say that neither (or none) of these bases is capable of being the ratio of the case. It is more satisfactory and consistent with the principle of precedent in the English common law that any statement of principle on the basis of which the Court would have allowed the appeal is sufficient to amount to its ratio.

50.This conclusion is consistent with the judgment of Dingemans J (as he then was) in Caine v Advertiser and Times Ltd op cit. At first instance, the Master had found that an application that the court should not exercise its discretion made after service of an Acknowledgment of Service could properly be made under CPR Part 3. Having considered the judgment of the Court of Appeal in Hoddinott and the subsequent judgments of the Court of Appeal in Aktas v Adepta [2010] EWCA Civ

1170, of His Honour Judge Havelock-Allen QC in Burns-Anderson Independent Network plc v Wheeler [2005] EWHC 575 and of the Privy Council in Texan Management Ltd v Pacific Electric Wire and Cable Co Ltd [2009] UKPC 46, Dingemans J concluded:

"…in my judgment the decision in Hoddinott v Persimmon, followed in this respect by Aktas v Adepta, is clear authority, binding on both Master Yoxall and me, that an application that the court should not exercise its jurisdiction to try a claim must be made by Part 11. Master Yoxall was right to note that in the analysis in Atkas and Burns-Anderson the courts appeared to have overlooked a provision of Part 2.3(1) relating to whether a claim form was also a statement of case, but this does not meet the point that Hoddinott v Persimmon was binding. As has been noted in later cases, and in particular in the judgment of the Privy Council in Texan Management at paragraphs 63 to 66, Part 11 has been 'inelegantly and inconsistently drafted'. In such circumstances different interpretations of the rules may appeal to different judges. However the rules of precedent exist to provide that in courts bound by the precedent like cases are decided alike, thereby providing reasonable certainty to litigants. In my judgment Master Yoxall was wrong to find that the application to set aside service of the claim form could be made pursuant to Part 3.4."

51.For these reasons, I conclude that the judgment of the Court of Appeal in Hoddinott is authority for the proposition that a defendant who files an Acknowledgment of Service, but does not apply under CPR 11.1 for an order declaring that the court has no jurisdiction or that the court should not exercise any jurisdiction which it may have, is to be treated as accepting that the court has jurisdiction to try the claim. On the face of it, this would appear to dispose of the issue of the proper construction and application of CPR 11 to the facts of this case, since the County Court is bound by a judgment of the Court of Appeal.

52.However, as I have indicated, the Respondent goes on to argue that the decision of the Court of Appeal in Hoddinott was impliedly overruled by the Supreme Court in Barton v Wright Hassall. The concept of a decision being impliedly overruled was referred to in the judgment of the Court of Appeal in Young v Bristol Aeroplane op cit given by Lord Greene MR when, in considering exceptions to the general rule that the Court of Appeal was bound to follow its own precious decisions, at pages 729 to 730, he identified three:

"The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarise: (1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (3) The court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam."

53.In his opinion in the appeal to the House of Lords in the same case, Viscount Simon said:

"One of the conclusions reached in the judgment of the Master of the Rolls, with which I agree, is that if the Court of Appeal, when sitting in one of its divisions, has in a previous case pronounced on a point of law which necessarily covers a later case coming before the court, the previous decision must be followed (unless, of course, it was given per incuriam, or unless the House of Lords has in the meantime decided that the law is otherwise), and that this application of the rules governing the use of precedents binds the full Court of Appeal no less than a division of the court as usually constituted."

54.The principle enunciated by the Master of the Rolls in Young v Bristol Aeroplane and approved by Viscount Simon applies with equal force to the case of a lower court faced with a decision of the Court of Appeal which was inconsistent with a later decision of the House of Lords or Supreme Court on an issue of law, namely that the lower court would be bound to follow the decision of the House of Lords or the Supreme Court rather than that of the Court of Appeal.

55.However, this principle must have limited application. The concept that the Court of Appeal decision cannot, in Lord Greene's words, "stand with" the decision of the House of Lords or Supreme Court must depend on showing not simply that the higher court would or might have decided the case that was the before the Court of Appeal differently but that the effect of the judgment of the higher court is that the Court of Appeal decision must be taken to be a wrong statement of the law.

56.When analysing the position here, the Respondent makes much of Lord Sumption's reference in Barton v Wright Hassall to the Claim Form having "expired" when it was not served within the term of its validity. This leads the Respondent to its analogy that the Claim Form is, on the Appellant's case, "neither alive nor dead" if the time for service has expired but the defendant has not applied for an order declaring that the court does not have jurisdiction or should not exercise any jurisdiction that it does have under CPR 11.

57.The use of the word "expired" by Lord Sumption is taken by the Respondent as an analogy with a creature that can either be alive or dead. Such analogies are not infrequently adopted in respect of the state of litigation, but care is required in not taking them too far. It is clearly the case that, whatever description one wishes to use for a Claim Form that has not been served within the time provided for in CPR 7.5, the Claim Form can once again have validity in certain circumstances, most obviously perhaps if the Court retrospectively extended time for service of the Claim From in accordance with CPR 7.6. It might be tempting to describe that as resurrection of the Claim Form or even to see the Claim Form as something akin to Schrödinger's cat, simultaneously both alive and dead. It would perhaps be better to see the validity of a Claim Form as something not to be determined by analogy to a creature which is either living or dead, but by application of procedural rules and practice that provide that, whilst usually a Claim Form that has not been served within its period of validity normally has no continuing validity, there are circumstances, such as those referred to in CPR 7.6 or cases where the defendant has accepted the jurisdiction of the court, where the Claim Form can continue to (or even arguably resume) validity.

58.If the judgment of Hoddinott on the effect of CPR 11 is looked at in this way, the position becomes clearer:

a.Where the time for service of the Claim Form under CPR 7.5 has expired and the court has not granted an extension of time for service under CPR 7.6, the Claim Form is normally no longer valid and proceedings cannot be commenced in reliance upon late service of it unless the defendant has accepted the jurisdiction of the Court;

b.However, if the defendant has lost the right to challenge the validity of the Claim Form by submitting to the jurisdiction of the court, it remains valid;

c.If the Claim Form has been served and an Acknowledgment of Service is filed, the Defendant does not thereby lose any right to dispute the court's jurisdiction;

d.However, a Defendant who serves an Acknowledgment of Service but does not make an application under CPR 11 for an order declaring that the court has no jurisdiction or that the court should not

exercise any jurisdiction which it may have is to be treated as accepting that the court has jurisdiction to try the claim and hence will not be able to dispute the continued validity of the Claim Form.

59.These conclusions are not inconsistent with the judgment of the majority of the Supreme Court in Barton v Wright Hassall so as to cause the court to conclude that Hodinott has been impliedly overruled. I reject that proposition.

60.I should add, since it is relevant to some of the argument advanced in this case, that it is clear that the failure to tick the box in a Claim Form indicating an intention to contest the court's jurisdiction is neither a necessary nor a sufficient basis to do so. It is not necessary because an application under CPR 11(1) is not predicated on the defendant having done so; it is not sufficient because, once the Acknowledgment of Service is served, CPR 11(1) sets out a different procedure that must be adopted in order to contest the court's jurisdiction. However, the court will not doubt be alert in the appropriate case to the possibility that, by failing to tick the relevant box, the defendant may in fact be taken to have accepted that the court has jurisdiction to hear the case. That matter will be fact specific. It would certainly not apply here where the Acknowledgment of Service was accompanied by a letter specifically raising that issue.

61.It will be noted that the consequence of this is that failing to comply with CPR 11(1) is a discrete way of submission to the jurisdiction that arises by virtue of CPR 11(5). A party may make application under CPR 11(1) but be treated as submitting to the jurisdiction by reason of other factors (though given the need for such submission to be unequivocal, this may be rare). But equally a party who has unequivocally not submitted to the jurisdiction may be treated as having done so by virtue of the failure to comply with CPR 11(1). The court needs to be astute not to confuse the two, though matters that are relevant to the determination of whether the defendant has submitted to the jurisdiction on one of the grounds may equally be relevant to submission on the other.

62.I turn to the second issue here which is whether, on the material before, the District Judge came to the correct conclusion on whether the Respondent had submitted to the jurisdiction. The first point to make is that, by reference to anything other than the terms of CPR Part 11, the Judge was undoubtedly entitled to find that there was no submission to the jurisdiction. The Respondent repeatedly made clear its intention to argue that it disputed the Appellants' right to rely on the Claim Form on the grounds that its validity had expired; indeed, it applied to strike the claim out on this basis. Disregarding for the moment the effect of Part 11, the District Judge was clearly entitled to come to the conclusion that "there had been no waiver, express or implied, of its right to challenge the jurisdiction."

63.But, the Appellants say, regard must be had to the procedural provision of CPR 11 in the light of Hoddinott. The simple fact is that an Acknowledgment of Service was filed but no application was made under CPR 11 and, in light of CPR 11(5), the court is bound to treat it as having accepted that it has jurisdiction to try the claim.

64.In my judgment this is correct. The Court below was bound by the decision in Hoddinott to find that the Respondent was to be treated as having accepted the jurisdiction of the court unless it had made the requisite application under CPR 11(1).

65.In coming to this conclusion, I bear in mind the decision of Patten J in SMAY Investments Ltd v Sachdev [2003] EWHC 474. It was from this judgment that Judge Matharu took the passage at paragraph 33 of her judgment (wrongly attributed to Peter Smith J) as to the need for a submission to the jurisdiction to be unequivocal. In that case, the Defendant Sachdev was alleged to have submitted

to the jurisdiction by several acts. Patten J held them not to be unequivocal acts of submission. But Patten J also held “Given the assertions by Mr Sachdev in his affidavit about a challenge to the jurisdiction and the subsequent affirmation of that position in the acknowledgment of service, the position, in my judgment, could only have become unequivocal either by his failure to issue an application challenging jurisdiction within the time limits prescribed by CPR Part 11(4) or by his indicating to the Court in clear and express terms that he had abandoned his intention to contest jurisdiction. Neither of these events occurred.” To assert that neither event occurred is seemingly to assert that Mr Sachdev did not either indicate that he abandoned his intention to contest the jurisdiction or, more significantly, did not fail to issue an application under CPR 11(4) – in other words that he did issue such an application. I confess to being somewhat unclear about this finding, because I cannot see any other mention in the judgment of such an application having been issued, even though it would have been of some considerable significance to the matters that the court was considering. But in any event, that judgment does not support the conclusion that, where CPR 11 is engaged, the court is only concerned with whether there has been an “unequivocal” submission; rather it supports the conclusion that the right to challenge the jurisdiction will be lost in a case where CPR 11 applies and an Acknowledgment of Service has been filed either if there is no application under CPR 11(1) or if there is an unequivocal submission to the jurisdiction. This is consistent with my interpretation of Hodinott as set out above.

66.I have also had regard to the Respondent’s arguments that cases such as Mann v Towarzystwo Ubezpieczen Inter Polska SA [2021] EWHC 2913 show that the court can permit challenges to jurisdiction other than by means of application under CPR 11.1. As a general proposition, I do not doubt that this is the case. For example, a defendant who for whatever reason did not serve an Acknowledgment of Service could not be held to the procedural obligation of CPR 11(1) - see for example the facts of and decision in Shiblaq v Sadikoglu [2003] EWHC 2128. Whether the decision of the Master at paragraph 14(cc) of the judgment in Mann flows from the passage in Hoddinott cited at paragraph 14(bb) is rather more questionable. The passage cited is in the context of the Court of Appeal saying that the particular circumstance of an application to set aside an order for extension of time for service being made before an Acknowledgement of Service is filed is not an exception to the rule that, following service of an Acknowledgment of Service the defendant must make the relevant application under CPR 11.1 if it seeks to challenge the court’s jurisdiction on the ground of expiry of validity of the Claim Form, whereas the Master appears to have taken it as support for the argument that an application under CPR 11.1 might not be necessary if the defendant had already applied to set aside the extension of time for service of the Claim Form even if it subsequently served an Acknowledgement of Service. That suggestion would be inconsistent with Hoddinott.

67.I turn to the third issue, which is that made clearly by the Respondent in its Respondent’s Notice, namely that the judgment should be upheld on the ground that the Respondent’s application to strike out the claim should be treated as an application under CPR 11.

68.The first matter to consider is the power in the court to treat an application made under one part of the CPR as having been made under another. In Caine v Advertiser, Dingemans J did not spell out the basis for the exercise of the power. However, he noted at paragraph 32 of his judgment that counsel for the defendant in that case argued that “properly analysed the applications made by the Advertiser and Times company and Mr Curry are applications under Part 11, but that if there was an error of procedure it should be rectified under CPR Part 3.10 or I could dispense with the requirement to make the application pursuant to CPR Part 23.3”. The learned Judge expressly declined to dispense with the requirement to make an application because an application had actually been made (see

paragraph 35 of his judgment) and the same point applies with equal force on the facts of the present case.

69.On my reading of his judgment, Dingemans J was persuaded on the facts Caine that, as a matter of their proper construction, the applications dated 7 November 2017 and 18 May 2018, were to be treated as being made under CPR Part 11. That conclusion was open to him because the second of the applications expressly referred to CPR Part 11. I do not consider that this route is open to the court on the facts of the present case because there never was any reference in the application to CPR Part 11. This is my understanding of Judge Matharu's comment in paragraph 38 of her judgment to the effect that she did not consider the application to satisfy the provisions of CPR 11.4. I agree with that conclusion.

70.However, the alternative argument, that the failure of the application expressly to refer to CPR 11(1) was an error of procedure capable of being rectified under CPR 3.10, was not considered by Judge Matharu. This is unsurprising since on her other findings it was not necessary for her to do so. But given my analysis on the other issues, this becomes an acute matter. Since the District Judge did not consider the exercise of this power, I do so not as a matter of review but as a new exercise of discretion.

71.The following matters support the argument that the error of procedure should be rectified under CPR 3.10:

a.The Respondent in all documents other than the Acknowledgement of Service itself, always made clear that it disputed the court's jurisdiction on the ground that the Claim Form was served out of time;

b.The letter under cover of which the Acknowledgement of Service was served itself raised the issue of late service of the Claim Form and stated an intention to apply to strike out;

c.The application to strike out was made within the 14 days prescribed for application under CPR 11(1);

d.Had the application notice bore additional words to the effect that an application was being made for an order declaring that the court had not jurisdiction because of the late service of the claim form, it would have been compliant with CPR 11(1); yet it is clear from the witness statement of Mr Parker in support of the application that this was the very argument being advanced.

72.The following matters militate against the exercise of the power under CPR 3.10.

a.Generally, the Respondent knew the case being advanced by the Appellants and received an unsealed claim form in time. It would be wrong to deprive the Appellants of the opportunity to advance this case by a procedural device that would leave the claim struck out.

b.Specifically, the Appellants' application for an extension of time for service of the Claim Form was unsuccessful because of a technical failure on their part to serve the sealed Claim Form in time; the Respondent should be held to the same standards of procedural rigour.

73.In her judgment, the District Judge spoke of the Appellants' "dilatory or lax approach to good and proper service." In the light of the procedural failings found in her judgment (which though initially the subject of an application for permission to appeal, were not pursued to an oral hearing of the application), it is impossible to find some kind of equivalence with the criticism that is to be made of the Respondent. The Respondent would not have fallen foul of CPR Part 11 if it had added one line to

an Application Notice so as to set out expressly an argument that it was clearly seeking to make in any event, albeit by a different procedural route. In contrast, the District Judge found much to be critical of in the Claimant's approach to service of originating process. Every litigation lawyer knows (or at least should know) the importance of timely service of originating process. It has been repeatedly spelt out by the court, for example by Lord Sumption in Barton v Wright Hassall. In those circumstances, the mere fact that a defendant may know in detail the case that the claimant wishes to advance is not a ground to refuse to exercise the power under CPR 3.10 to regularise the defendant's attempt to strike the claim out, achieving the result that the claimant is permitted to pursue its claim notwithstanding late service of the Claim Form. Equally, there is no basis for concluding that to find for the Respondent on the issue in question would be to hold it to a different standard than the Appellants (and other litigants) are held to.

74.Once these arguments are dispensed with, the argument in favour of exercising the power to rectify the procedure error under CPR 3.10 by treating the Application Notice dated 24 January 2020 as including an application for a declaration that the court has no jurisdiction to hear the claim on the ground of the expiry of the validity of the Claim Form before service of it is overwhelming. The right to such a declaration was clearly inherent to the application that the Respondent was making; the application was made in time; it was supported by a witness statement making clear that the basis of the application was the failure to serve the Claim Form within the term of its validity; and compliance with CPR 11(1) would have been achieved by the addition of minimal additional wording which was implicit in the application that was being made in any event. The court should exercise its power to rectify the procedural failing so as to render this an application under CPR 11(1). Any other result would be a triumph of form over substance.

Conclusion

75.It follows from the above that:

a.This court is bound by the decision of the Court of Appeal in Hoddinott as to the procedural requirement of a defendant who has served an Acknowledgment of Service to apply under CPR 11(1) for an order declaring that the court has no jurisdiction to try the claim, otherwise the defendant is to be treated as having accepted that the court has jurisdiction to try the claim;

b.The District Judge was right to find that, other than in failing to make explicit reference to its application to strike out being made pursuant to CPR 11(1), the Respondent did not either expressly or impliedly waive its right to challenge the court's jurisdiction;

c.In all the circumstances, the Respondent's application dated 24 January 2020 should be treated as an application made in compliance with the provision of CPR 11(1).

d.Accordingly, it was open to the Respondent to challenge the jurisdiction of the court on the basis of late service of the Claim Form;

e.On the District Judge's other findings, and in particular on her refusing either to dispense with service or retrospectively to extend time for service, she was right to find that the claim must be struck out.

76.Accordingly, the appeal is dismissed.
