Neutral Citation Number: [2022] EWHC 2169 (QB) Case No: QB/2021/2695

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 19 August 2022

Before:
John Kimbell QC
(sitting as a Deputy High Court Judge)

- -

Between:

(1) JAMES LONSDALE
(2) LAURA LONSDALE
(3) JONATHAN GREIG
(4) DANE HALLING
(5) LEONORA LONSDALE
(6) ROSANNA LONSDALE
(7) ARTHUR LONSDALE
(8) ESME LONSDALE

Claimants

- and –

(1) WEDLAKE BELL LLP
(2) CUMBERLAND ELLIS LLP
(3) ANN STANYER
(4) QBE UK LIMITED

Defendants

Sarah Haren QC (instructed by **Archer, Evrard & Sigurdsson LLP**) for the **Claimants**
David Halpern QC (instructed by **Reynolds Porter Chamberlain**) for the **Defendant**

Hearing date: 29 June 2022

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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email and will be released for publication on the National Archives caselaw website. The date and time for hand-down is deemed to be 10.30 a.m. on 19 August 2022

John Kimbell QC sitting as a Deputy High Court Judge:

Introduction

1. On 12 July 2021, the Claimants in these proceedings issued a claim form ('**the July Claim Form**'). They allege that in June 2011 the Third Defendant, a solicitor, gave negligent advice in relation to a trust created in 1987 by the First Claimant ('**Mr Lonsdale**') for the benefit of his family ('**the Sparsholt Settlement'**).

2. The First to Fourth Claimants are the current trustees of the Sparsholt Settlement ('**the Trustees**'). The Fifth to Eighth Claimants are Mr Lonsdale's four children. The Claimants are represented by Archer, Evrard & Sigurdsson LLP ('**AES**').

3. The Third Defendant ('**Ms Stanyer'**) was originally a partner in the Second Defendant firm ('**Cumberland Ellis**'). Ms Stanyer moved to the First Defendant ('**Wedlake Bell**'). Cumberland Ellis was dissolved on 19 August 2020. The Fourth Defendant is the indemnity insurer of Cumberland Ellis. Reynolds Porter Chamberlain LLP ('**RPC**') act for the Defendants.

4. The July Claim Form was sent to RPC by AES by email on 20 July 2021. The email stated explicitly that the Claim Form was not being formally served. The parties agreed to a stay on any substantive steps in the litigation and began discussions about mediation.

5. The four-month window for service of the Claim Form under CPR r. 7.5 (1) was due to expire on 12 November 2021. In September 2021, the parties agreed an extension of time for service pursuant to CPR r 2.11. The revised deadline was 1 December 2021. However, the July Claim Form was not in fact served until 19 January 2022. A further claim form ('**the December Claim Form**') was issued on 16 December 2021. The December Claim Form has the same parties and contains the same substantive claims as the July Claim Form.

6. The issue before the Court is essentially whether the Claimants should be confined to proceeding with the December Claim Form or whether they are entitled to rely on the July Claim Form.

The Applications

7. The fact that the July Claim Form was not served on or before 1 December 2021 has led to two applications being made. These are:

   7.1 An application by the Defendants dated 9 February 2022. In this application, the Defendants seek a declaration pursuant to CPR r. 11.1 that the court does not have jurisdiction to hear the claim set out in the July Claim Form and/or that service of the July Claim Form be set aside. This application was supported by a witness statement by Caroline Shiffner of RPC dated 9 February 2022.

   7.2 An application by the Claimants dated 23 March 2022. In this application, the Claimants seek the following relief:

      (a) a declaration that a valid extension of time has been agreed between the parties (or that the Defendants were estopped from contending otherwise) such that the July Claim Form has been validly served; alternatively

(b) a declaration that pursuant CPR r. 6.15 (2) the July Claim Form is to be treated as, served in time; alternatively

(c) an order pursuant to CPR r. 6.16 that service of the July Claim Form be dispensed with.

The Claimants' application was supported by a witness statement by Maisie Sigurdsson of AES dated 23 March 2022. This witness statement also responded to the Defendants' application.

The Factual Background

8. The Sparsholt Settlement created an accumulation and maintenance trust. The class of beneficiaries is defined in clause 2(a). As originally drafted, the class of beneficiaries included not only Mr Lonsdale's own children but any children of either of his two sisters, Joanna and Emma. At the time the Settlement was signed, Mr Lonsdale had only one daughter, Leonora, who was born on 14 June 1986.

9. The Settlement contains a wide power to vary. However, clause 10(ii) of the Settlement provides that it is not possible to vary the share of any beneficiary who has already attained the age of 25.

10. By August 2008, Mr Lonsdale had three further children and his two sisters had a total of five children between them. Mr Lonsdale's first child, Leonora, was by now 22 years old. Mr Lonsdale sent an email to Ms Stanyer on 4 August 2006 in which he mentioned a "major concern" he had with the Sparsholt Settlement:

> "The children of my sisters were always meant to only be a longstop beneficiary but the way [the Sparsholt Settlement] is written it appears to give them equal shares with my children. That was not my intention. Do we have to do anything to make this more clear. If so, by when?"

11. In her reply sent on 6 August 2008, Ms Stanyer, said that she agreed with Mr Lonsdale's interpretation of the definition of beneficiaries clause. She pointed out that under clause 10 the terms of the Settlement could be varied to reduce an individual beneficiary's presumptive shares down to an amount no lower than £100. She also referred to the cut off of 25 years for the exercise of the power. The first of the children of Mr Lonsdale's sisters was due to turn 25 in 2013.

The June 2011 email

12. Three years later, in June 2011, Mr Lonsdale appears to have telephoned Ms Stanyer. The reason for the call appears to have been the fact that his first daughter, Leonora, was about to turn 25 later that month. In response, Ms Stanyer sent an email on 2 June 2011. In that email, she advised when Leonora reached twenty-five, she would be entitled to a quarter share along with each of her brother and sisters. The email made no reference to the children of Mr Lonsdale's sisters as beneficiaries.

13. It is common ground that this advice was incorrect because it ignored the fact that, as previously advised in 2008, the class of beneficiaries in the Sparsholt Settlement included not just Mr Lonsdale's four children but those of his two sisters. It would appear that until July 2018, the Sparsholt Settlement was managed exclusively for the benefit of Mr Lonsdale's children and without regard to the interest of the other beneficiaries.

The 25 July 2018 letter

14. In a letter dated 25 July 2018, Ms Stanyer, now at Wedlake Bell, described how the accountants appointed by the trustees had recently pointed out that there were nine beneficiaries under the Sparsholt Settlement, not just four, but that it had not been managed in a way which reflected this. The same letter referred to the fact that five of the beneficiaries (two of Mr Lonsdale's children and three of his sister Joanna's) had already reached the age of 25 and that therefore their share could not now be varied. The same information was sent to remaining three Trustees by letters dated 9 August 2018.

15. Mr Lonsdale was not happy when he received Ms Stanyer's email. He responded as follows:

> "*As legal advisor for many years to the Sparsholt Settlement, you were asked in 2011 to advise on what steps were necessary, before Leonora became 25 on 14 June 2011, to restrict the actual beneficiaries to my four children, in accordance with my original intent.*
>
> *Your advice was given in the below email on 2 June 2011. Your advice, you are now reporting, was totally wrong.*
>
> *At stake is my childrens' inheritance worth £2,000,000 in shares, cash & loans plus many million pounds in future receipts from several life insurance policies…*
>
> *Cumberland Ellis and now under the name of Wedlake Bell have continuously looked after my family for five generations. I reserve the option to seek separate legal advice in a claim for both professional fees and damages on behalf of myself, my children and the Trustees of the Sparsholt Settlement.*"

16. Wedlake Bell's designated "complaints partner" (Charles Hicks) responded to Mr Lonsdale's email on 21 September 2018. He explained that new accounts were being prepared for the Sparsholt Settlement for the period from 8 June 2008 to 5 April 2018 on two alternative bases: (a) that the beneficiaries were just the four children of Mr Lonsdale and (b) as per the Settlement Deed i.e. with nine children as beneficiaries.

17. Mr Hicks wrote again on 24 January 2019. He attached a table illustrating the two versions of the accounts referred to in his email of 21 September 2018. In that letter he also accepted that Ms Stanyer's advice in June 2011 had been incorrect and that the children of Mr Lonsdale's sister could have been excluded in 2011 leaving only Mr Londale's own children as beneficiaries, subject only to each receiving £100.

18. In February 2020, the Trustees exercised their power to vary the Settlement to reduce the interest of Mr Lonsdale's youngest nephews to a £10,000 lump sum each.

The procedural chronology

19. In October 2020, a firm of solicitors instructed by Mr Lonsdale sent a letter before action to Wedlake Bell. The letter alleged that the advice given on 2 June 2011 was negligent. The letter went on to say that in reliance on that advice the Trustees had

taken no steps to vary the shares so as to make Mr Lonsdale's children the sole beneficiaries "as they could and would have done if properly advised".

20. Mr Lonsdale's case was that the benefit of the Sparsholt Settlement was now irrevocably divisible among seven beneficiaries rather than being confined to Mr Lonsdale's four children, as he had indicated he wanted it to be. The claim was valued as being "in excess of £1,280,518". A mediation was proposed.

21. RPC sought further information about the claim. This was provided by letters dated 11 November 2020 and 21 December 2020.

22. On 11 May 2021, RPC responded substantively to the claim. RPC explained that the claim was being dealt with the by the professional indemnity insurers of Wedlake Bell. RPC disputed liability and suggested that there was an accrued limitation defence. Without prejudice to any accrued limitation defence, RPC suggested a standstill agreement. The purpose was "to prevent proceedings from having to be issued while you consider your response".

23. On 7 June 2021, AES responded to RPC's letter. Although AES had sent a draft standstill agreement to RPC following receipt of the 11 May 2021 letter, AES's view was that "with limitation looming", it would be better to issue proceedings rather than seek to negotiate a standstill agreement.

24. The reference to limitation "looming" appears to be a reference back to paragraph 4.2 in the 11 November 2020 letter. This paragraph appears to have assumed that the starting date for the three-year period in which to bring proceedings pursuant to section 14A(5) of the Limitation Act 1980 was 25 July 2018. The letter of 25 July 2018 letter was referred to by AES as the "date of the discovery of the mistake".

25. On 12 July 2021, RPC sent AES a revised draft standstill agreement and identified QBE UK Limited as the relevant insurer for the claim.

26. On 20 July 2021, instead of responding to the suggested changes to the draft standstill agreement, AES informed RPC by email that they had issued proceedings on 12 July 2021. This was said by AES to have been "to safeguard against limitation expiring". A copy of the sealed July Claim Form and the accompanying Particulars of Claim were attached to the same email. However, AES made it clear that, although the claim form had been sent by email to RPC, "this was not by way of service". No response pack was sent. It was thus clear that AES did not want RPC to acknowledge service or serve a Defence. Instead, AES proposed a series of steps leading up to a mediation in September or October. The email concluded (with emphasis added):

> "*We agree to stay any steps in the litigation in the meantime, save that we will need to serve you within the four month period for doing so …*"

27. RPC responded by email on 4 August 2021. The email contained an agreement in principle to set a timetable of steps leading up to a mediation. RPC proposed a minor revision to the timetable suggested by AES. The email also said this (again with emphasis added):

> "*For the avoidance of doubt we also agree that no steps should be taken in the proceedings before mediation, <u>other than</u> in*

> *connection with the restoration of Cumberland Elis and to effect and/or if necessary, extend the date for service*"

28. In their response to this email, AES agreed the proposed revised mediation timetable. In response to the suggestion that it might be necessary to agree an extension of the time for service of the July Claim Form, AES said this:

> "*Thank you for your suggestion of agreeing to extend time for service. We will, however, be proceeding as planned [by] serving and then agreeing a stay*"

29. RPC and AES proceeded to correspond about mediators and dates for a mediation. AES did not serve the July Claim Form.

The extension to 1 December 2021

30. In an email sent on 14 September 2021, AES proposed an extension of time for service of the July Claim Form from 12 November 2021 to 1 December 2021. A draft consent order was attached to that email. A signed version of the consent order was returned by RPC on 30 September 2021. The consent order made clear that it was intended to be an agreement to extend time under CPR 7.5(1). The consent order was subsequently signed by AES and submitted to court for sealing.

Mediation proposals

31. In an email sent on 12 October 2021, AES chased RPC for mediation dates and whether they were authorised to accept service of the July Claim Form. The email concluded:

> "*If we have not heard from you and matters moved forward by this time next week, we will have to seriously consider serving the claim form without further delay*"

32. Following a chasing email sent on 27 October 2021, RPC responded on 1 November 2021 as follows:

> "*1. Unfortunately our clients are not available on 3 December 2021. I have therefore checked [the Mediator's] availability in January 2022. She is not doing any mediations before 11 January, but is available on any day from 11 January to 31 January. Please could you advise which dates in January your clients could mediate.*
>
> *2. We do not currently have instructions to accept service. We have been proceeding on the basis that it had been agreed that it is not in any of the parties' interests for proceedings to be served prior to a mediation. We had anticipated therefore agreeing a date for the mediation and if necessary (as will now be the case) agreeing a further order to extend the date for the service of the Claim. We would accordingly invite you to let us know your clients' availability for a mediation in January as soon as possible. We will in the meantime be asking our clients to confirm their availability*."

33. Upon receipt of this email, it ought to have been clear to AES that a mediation would not be possible before the agreed extended deadline for service of the July Claim Form. The Claimants had four weeks to consider their options.

34. The principal options open to the Claimants at this stage were:

    (a) To agree to mediate in January and either agree a further extension of the deadline for service of the July Claim Form or serve it on the First, Third and Fourth Defendants (all of whom were in the jurisdiction). Cumberland Ellis had not at that stage been restored to the register so could not be served.

    (b) To give up on trying to arrange a mediation and serve the July Claim Form on the First, Third and Fourth Defendants.

35. It was obvious from the tone and content of RPC's email of 1 November that the Defendants' preferred course was to agree a date for a mediation in January 2022 and to agree a further extension for service of the July Claim Form.

36. AES did not respond to the suggested new date for mediation or to the suggestion of a further extension to the date for service of the July Claim Form. In fact, there is no further open correspondence of any type between the parties in the four weeks between the receipt by AES of RPC's email of 1 November 2021 and the expiry of the deadline for the service of the July Claim Form on 1 December 2021.

37. The next open email in evidence is sent by RPC on the morning of 2 December 2021. This refers to the postponement of a settlement meeting which was due to take place on 2 December.

38. On 7 December 2021, AES sent an email to RPC in which they said the following:

> "*We accept that the previous agreement regarding service of the claim form expired on 1st December. We placed reliance upon both of our firms working in good faith to mediate this claim in complying with your request to defer service although we appreciate that we should have raised this point with you before 1st December.*
>
> *Thus we now have a choice, either to extend service for say another two months for mediation or for us to re-issue*."

39. It would appear that AES's preferred option was for RPC to agree a retrospective extension of time for service of the July Claim Form. However, AES appeared relaxed about the prospect of having to issue a new claim form instead. It would have involved incurring a further £10,000 in court fees but the view expressed by AES in this email was that "we have until mid-January until limitation risks expiring on this claim." This stance of course represented a change in view on AES's part. As set out above, the reason given by AES for issuing the July Claim Form when they did was because they believed limitation was "looming".

40. In a follow up email sent the following day, AES invited RPC to agree an extension of time to 28 February 2022. A draft consent order was attached to the email.

41. By a letter sent on 15 December 2021, RPC informed AES that:

    41.1 They were instructed not to agree the proposed extension of time;

41.2 They would also oppose any application to extend time;

41.3 They were instructed to accept service of the July Claim Form but, if it was served, an application would be made to contest jurisdiction on the basis that the time for service had already expired.

42. The July Claim Form was served on RPC on 19 January 2022. The application by the First, Third and Fourth Defendants to set aside service of that claim form was issued on 9 February 2022. I have been told that the case management conference in the proceedings commenced in the December Claim Form has been stayed pending the hearing of these applications.

43. It was agreed between counsel that it was appropriate for Ms Haren to make her submissions first even though the Defendants' application was issued first. This made sense because, unless she succeeds on one or more of her applications, the July Claim Form had expired by the time it was served in January 2022 and it was therefore ineffective.

Submissions

44. Ms Haren abandoned any reliance on the suggestion that the emails exchanged between the parties prior to 1 December 2021 constituted an agreement in writing to extend time. Her primary position was that the Defendants were estopped from relying on the fact that the July Claim Form had expired.

Estoppel

45. The species of estoppel relied upon by Ms Haren was promissory estoppel. Ms Haren referred me to the well-known passage from Lord Cairns' speech in Hughes v. Metropolitan Railway Co. [1877] HL 439 at 448:

> "… but it is the first principle upon which all Courts of Equity proceed, that if parties have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture – afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense of held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have taken place between the parties".

46. She also referred me to *Chitty on Contracts* (34th edition) Vol 1 ('**Chitty**') at para. 6-094. She summarised the requirements of promissory estoppel as follows: (i) a legal relationship between the parties giving rise to rights and duties (ii) a promise, assurance or representation that the representor will act in a particular way rather than in accordance with his legal rights (iii) reliance on that promise, assurance or representation by the representee (iv) that it would be unconscionable or inequitable to resile from the promise, assurance or representation.

47. Mr Halpern referred me to para 6-098 in Chitty in support of a submission that the promise or representation for requirement (ii) as set out above must be as clear, unequivocal, precise and unambiguous as a representation capable of giving rise to a successful plea of waiver or estoppel by representation. I am satisfied that this is so.

Indeed, it has been said that the promise must have the same degree of uncertainty as would be needed to give it contractual effect if it were supported by consideration – see Woodhouse AC Israel Cocoa Ltd. v Nigerian Produce Marketing Co. [1972] AC 741 and Food Corporation of India v Antclizco Shipping Corp [1988] 2 Lloyd's Rep 130 at 142 (Bingham LJ) - affirmed [1988] 1 WLR 603.

48. Mr Halpern did not accept that any of the requirements for promissory estoppel were made out on the facts of this case. He also submitted that the estoppel case faced a further difficulty which was that if accepted it would render nugatory the requirement in CPR r. 2.11 that any agreement to extend time be in the form of "a written agreement". In that context he referred me to Thomas v Home Office [2007] 1 WLR 230.

49. In Thomas, the claimant had relied on a series of oral agreements extending time for service of the claim form while without prejudice negotiations were held. The agreements were recorded only in internal files notes made by the respective solicitors and not in a consent order or correspondence. The Court of Appeal held that such separate internal file notes did not constitute an agreement in writing for the purposes of CPR r. 2.11. An agreement in writing required the existence of a document or exchange of documents which was intended to constitute the agreement or to confirm or record it.

50. The claimant in Thomas ran (but then abandoned) an estoppel argument. This is described by Neuberger LJ as follows:

> "30. In the claimant's notice of appeal and in Mr Grover's skeleton argument in support it was contended that, if the facts of the present case mean that there was no sufficient "written agreement" for an extension of time for service of the claim form into June 2005, then the defendant was none the less estopped from denying that there was such an agreement or, to put it another way, the defendant was estopped from relying on the time limit contained in rule 7.5 , on the basis that there had been an oral representation that the claimant need not serve the claim form, upon which the claimant had relied by not serving the claim form until June 2005.
>
> 31. Such an argument would face obvious difficulty on the basis that it would effectively render nugatory the express requirement of rule 2.11 that any agreement to extend time be "written". Furthermore, there would be obvious force in the argument that, by entering into an oral agreement to extend time, it could not clearly be said that, without more, the defendant was unequivocally indicating that it would not insist on the strict legal requirement that any such agreement, in order to be effective, be in writing.
>
> 32. In the event, when faced with the reasoning of the House of Lords in Actionstrength Ltd v International Glass Engineering SpA [2003] 2 AC 541, especially at paras 9, 28, 35 and 52–53, on a not dissimilar estoppel argument in relation to section 4 of the Statute of Frauds 1677 (29 Car 2, c 3), Mr Grover abandoned the point.

> 33. In these circumstances, while it is only right to say that, as at present advised, it seems to me that Mr Grover was entirely realistic in abandoning the argument, it is inappropriate formally to rule on it."

51. Ms Haren submitted in response that as the estoppel point was abandoned in Thomas, it is still open to her to argue that the analogy between oral agreements to extend time and oral guarantees is not a strong or helpful one. Furthermore, she submitted that the Claimants' case is not based on an oral agreement but on a representation in writing (by email) that the Defendants would agree (in writing) to extend time again for service of the July Claim Form until after a mediation cold take place in January 2022.

52. Even if the point abandoned in Thomas is still open to Ms Haren and the facts here are in some respects different from the scenario in Thomas, in my judgement, the estoppel claim fails because the Claimants cannot point to any relevant representation or assurance which is capable of founding the estoppel.

53. The parties were not in a contractual relationship which is the standard field of operation for promissory estoppel. Their relationship was simply that of parties engaged in civil litigation. The reasonable expectations they have of each other are defined by the civil procedure rules and their communications with each other ought to be interpreted in the context of that framework of rules. In order for the Defendants to be estopped from relying on a procedural right under the CPR, there must be an unequivocal representation that they are forgoing that right.

54. In my judgement, none of the emails from RPC relied upon by the Claimants as giving rise to a representation that the Defendants were willing to waive any of their procedural rights, come anywhere close to being a representation to that effect. If anything, the opposite is the case.

55. The communications between the parties suggested that they were both intending to observe all necessary formal procedural steps. It was the Claimants who when offered a standstill agreement decided to issue proceedings. It was also the Claimants who suggested that notwithstanding any stay which might be agreed on taking other steps pending a mediation, it was their intention to "serve [the July Claim Form] within the four month period for doing so".

56. In the first of the statements relied upon by Ms Haren in support of her estoppel argument, the email from RPC of 4 August 2021, RPC specifically carved out of any stay two matters: the restoration of Cumberland Ellis and service of the claim form (or an extension of time for so doing). The parties were agreed at this stage that any stay for mediation should not extend to service of the claim form. Both were insisting on their formal rights in respect of service.

57. The parties thereafter acted in accordance with this mutually expressed intention. It was AES on behalf of the Claimants who proposed an extension of the four month period in which to serve the July Claim Form and sent to RPC a consent order to formally record that agreement. Far from suggesting that such formality is not required (in fact according to the decision in Thomas only an exchange of letters rather than a consent order was necessary), RPC duly signed the consent order on behalf of the Defendants which is then submitted to court by AES.

58. It was common ground that the reason for the choice of 1 December 2021 in the consent order was that it was hoped that a mediation would take place by November 2021. When on 1 November 2021, RPC wrote to say that this would not be possible and suggesting (i) January for the mediation and (ii) agreeing a further order to extend the date for service of the Claim Form, it is, in my judgement, clear that RPC were inviting AES to agree both matters i.e. a new date for a mediation and a new date by which the July Claim Form had to be served. It was open to AES to say 'No' to one or both. RPC could not compel the Claimants to accept either suggestion. The ball was plainly in the Claimant's court to say whether and, if so, on what terms they would accept a later mediation than had been planned hitherto.

59. I can see no basis whatsoever for the suggestion that the Defendants were representing in their email of 1 November that there was no need to agree a new date by which the July Claim Form needed to be served or that service of the July Claim Form should now be subsumed within a general stay for mediation. Quite the opposite, RPC expressly referred to "a further order" to extend time. Clearly RPC expected AES to send a further consent order for their agreement.

60. I do not accept what Ms Sigurdson says in paragraph 29 of her witness statement. There she says, "The only fair reading of these emails [i.e. The emails of 4 August 2021 and 1 November 2021] is that RPC agreed that the Claimants did not need to take steps to effect service until at least January 2022; in fact they were positively requesting that they should not do so." Read in light of the previous conduct and communications of the parties, it is plain that what RPC expected AES to do was to say: (a) whether or not they agreed to a mediation taking place in January 2022 and (b) whether they wished to extend the date for service of the July Claim Form again or just wished now to serve it and then agree a stay (as AES had previously suggested on 9 August 2021).

61. It ought to have been clear to the case handlers at AES that they needed to respond to RPC's email of 1 November 2021 one way or the other before 1 December 2021 when the agreed deadline for service of the July Claim Form expired. Even if it was reasonable for Ms Sigurdson to believe that the submission of a consent order extending time would be a formality once a new date had been agreed, her witness statement contains no credible explanation as to why RPC's email of 1 November 2021 was not responded to in the four week period between it being received and the expiry of the agreed period of service.

62. It ought to have been obvious to any reasonably competent solicitor that there is all the difference in the world between inviting RPC to agree an extension before 1 December and inviting them to so after that date had expired. Before 1 December, if RPC declined to agree an extension, the Claimants could have simply served the July Claim Form by sending it by post. By contrast, after 1 December 2021, with the claim form now expired, the option of serving in the absence of agreement was lost. It is all the more surprising that AES failed to respond to the 1 November 2021 email until after the July Claim Form expired given that it was issued because AES had formed the view that limitation was potentially "looming". Whatever the reason why AES did not respond to RPC's email of 1 November 2021 before the July Claim Form expired, I am not persuaded that the Defendants represented that there was no need for an agreement in writing or that there was no need for the Claimants to take any steps to effect service until January 2022. The correspondence supports the opposite conclusion. RPC expected AES to either serve the July Claim Form or agree a new long stop date for service. The estoppel argument therefore fails.

CPR 6.15

63. The Claimants next submission is that the Court should exercise its power under CPR r.6.15(2) to make an order declaring that the sending of the July Claim Form by email of 20 July 2021 to RPC constitutes 'good service'.

64. CPR r. 6.15(2) provides as follows:

> "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.
>
> (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."

65. The nature and exercise of the power in r. 6.15(2) was considered by the Supreme Court in Barton v Wright Hassall LLP [2018] 1 WLR 1119. That case concerned the service of a claim form by a litigant in person by email on solicitors acting for the defendant with whom he had been communicating. The Claimant had left service of the claim form until the very last day of the four-month period permitted under CPR 7.5 and had failed to obtain the solicitor's consent for service before serving by email. The defendant's solicitors issued an application seeking an order declaring that the claim form had not been validly served and that the claim was statute barred. The Claimant cross-applied under CPR r. 6.15(2). His cross-application failed before the district judge, upon appeal to a Circuit Judge and the Court of Appeal. By a majority of 3:2, the appeal to the Supreme Court was also dismissed.

66. The following points emerge from the judgment of Lord Sumption (with whom Lord Wilson and Lord Carnwath JJSC agreed):

66.1 CPR 6.15 gives rise to special considerations which do not necessarily apply to other rules or orders of the court. The main difference is that the disciplinary factor is less important. 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.

66.2 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.

66.3 The following principles (taken from Abela v Baadarani [2013] 1 WLR 2043) apply:

(1) The test is whether, "in all the circumstances, there is good reason to order that steps taken to bring the claim form to the attention of the defendant is good service".

(2) Service has a number of purposes, but the most important is to ensure that the contents of the document are brought to the attention of the person to be served (para 37). This is therefore a "critical factor". However, "the mere fact

that the defendant learned of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under rule 6.15(2)" .

(3) The question is whether there is good reason for the Court to validate the mode of service used, not whether the claimant had good reason to choose that mode.

(4) The object was to open up the possibility that in appropriate cases a claimant may be enabled to escape the consequences for limitation when a claim form expires without having been validly served.

66.4 The four principles set out above are not an exhaustive statement of the principles on which the power under CPR r. 6.15(2) will be exercised.

66.5 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.

67. Ms Haren emphasised in her oral submissions that the claim form and particulars of claim had been brought to the Defendants' attention well within the period for service. However, that fact alone does not in my judgement take her case very far. As Lord Sumption said of the same point when made on behalf of Mr Barton:

> "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*, 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."

68. As for limitation, it is the Defendants' position that if the power under r. 6.15(2) is exercised, they will be deprived of an arguable limitation defence based on the fact that Mr Lonsdale was informed of Cumberland Ellis' mistaken advice by the letter of 25 July 2018 and he and the other trustees (from 9 August 2018 at the latest) and had sufficient knowledge to start the three year period running for the purposes of section 14(1A) of the Limitation Act 1980. The Claimants dispute this analysis. Ms Haren submits that the Court is in no place to evaluate the strength of the limitation arguments on this application.

69. In my judgement, there is sufficient material before the Court from which I can form the view that there is at the very least a reasonably arguable limitation defence available to the Defendants based on the contents of the letter of 25 July 2018. Indeed, it is slightly odd for the Claimants to contend otherwise since they themselves issued the July Claim Form when they did because they formed the view that, on the information they had at the time, limitation was indeed "looming". Ms Haren did not attempt to take me to any new information or evidence which has come to light since AES expressed that view which caused them to change their mind.
70. The interaction between CPR r. 6.15 and limitation defences is described in this way by Lord Sumption in Barton:

> "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."

71. However, any prejudice that the Defendants will suffer if deprived of a reasonably arguable limitation defence is not the decisive or overriding factor. It has to be weighed against other factors. In appropriate cases, where strong factors point towards the exercise of the power, a defendant may even be deprived of even an indisputable limitation defence. Lord Sumption said as much in Barton:

> "By comparison, the prejudice to [the Defendant] is palpable. They will retrospectively be deprived of an accrued limitation defence if service is validated. If Mr Barton had been more diligent, or Berrymans had been in any way responsible for his difficulty, this might not have counted for much."

72. It is thus clear that the reasonableness of the Claimant's conduct and the behaviour of the Defendant leading up to the failure to serve the Claim Form in accordance with the rules are both important factors. One or other or both in combination may be enough to persuade a Court to deprive a Defendant of a limitation defence.
73. As to the level of diligence to be expected of a Claimant, Lord Sumption was at pains to stress that the bar must not be set too high. He accepted the submissions that it was "not necessarily a condition of success in an application for retrospective validation that the claimant should have left no stone unturned." The test of diligence was expressed as follows: "It is enough that he has taken such steps as are reasonable in the circumstances to serve the claim form within its period of validity."

74. The reason why there was no diligence to weigh in the balance on behalf of Mr Barton was that:

> "Mr Barton made no attempt to serve in accordance with the rules. All that he did was employ a mode of service which he should have appreciated was not in accordance with the rules."

75. Mr Halpern relies on the following observation by Lord Sumption:

> "I note in passing that if Mr Barton had made no attempt whatever to serve the claim form, but simply allowed it to expire, an application to extend its life under CPR rule 7.6(3) would have failed because it could not have been said that he had "taken all reasonable steps to comply with rule 7.5 but has been unable to do so." It is not easy to see why the result should be any different when he made no attempt to serve it by any method permitted by the rules."

76. In my judgment, the Claimants in this case find themselves in the same position as the hypothetical claimant envisaged by Lord Sumption in the passage above. AES took a conscious decision to send the July Claim From to RPC and asked then not to treat this as service under the CPR. In doing so they made clear to the RPC that they fully understood that they would need to serve it within four months or agree an extension in writing, which is precisely what they did. Thereafter as the procedural chronology above makes clear, that deadline passed with the no attempt being made to serve the July Claim Form or to agree a new extended date. It could have easily been served at any time in the four weeks between 1 November 2021 and 1 December 2021 but was not.
77. In my judgement, therefore the Claimants did not act with reasonable diligence between 1 November 2021 and 1 December 2021. They courted disaster by failing to respond at all to RPC's letter of 1 November 2021 until after the agreed deadline for service of the July Claim Form had expired.
78. The factor on which Ms Haren concentrated most heavily was the Defendants' behaviour. She submitted that:
    78.1 The failure formally to serve the claim form was a result of the request and/or encouragement of the Defendants not to serve proceedings prior to the mediation.
    78.2 RPC led the Claimants to believe that they would agree to a further extension of time for service of the claim form. They did nothing to withdraw from that until after the time for the service of the claim form had expired, despite being aware of the date for service.
    78.3 The Defendants' refusal to agree a further extension of time for service after 1 December 2021 was "wholly opportunistic".
79. I do not accept these submissions. In my judgement, RPC bear no responsibility whatsoever for the non-service of the July Claim From. Taking each of Ms Haren's points in turn:
    79.1 In their email dated 1 November 2021 the Defendants did not encourage or request the Claimants not to serve the July Claim Form. They merely informed the Claimants that they would not be able to mediate until January 2022 and asked whether the Claimants were willing to wait that long (and, if so, to send

proposed dates). RPC certainly signalled a willingness to agree a new extension for service of the July Claim Form but is in my judgement it was for the Claimants to say 'yes' or 'no' to the proposed new mediation date and either serve the July Claim Form or propose a new longstop deadline for service. AES did neither.

79.2 It was reasonable for RPC to wait for AES to respond to the email of 1 November 2021. RPC cannot, in my judgement, be criticised for not chasing AES or not reminding them that the deadline for service of the July Claim Form was about to expire. It was solely a matter for AES to decide whether to serve the Claim Form or agree a new deadline. As Carr LJ said in R(Good Law Project) v Secretary of State for Health and Social Care [2022] 1 WLR 2339:

> "Provided that a defendant has done nothing to put obstacles in the claimant's way, a potential defendant is under no obligation to give any positive assistance to the claimant to serve. The potential defendant can sit back and await developments…. Thus, there is no duty on a defendant to warn a claimant that valid service of a claim form has not been effected."

79.3 I also reject the suggestion that RPC's conduct was opportunistic. They dealt with matters reasonably as they unfolded. A request to agree a retrospective extension of time after a claim form has expired is a very different thing to a request before time has expired. RPC was entitled to raise the issue of whether it was even possible to extend time retrospectively and was obliged to have regard to their clients' interests by taking account of any potential limitation defence which might be lost if they agreed. Having done so, they declined to agree the extension.

80. I am not satisfied therefore that there is a good reason to exercise the power under CPR r 6.15(2) for the following reasons:

80.1 The Claimants failed to take reasonable steps to effect service by 1 December 2021 or to agree a further extension in writing for service of the July Claim Form.

80.2 The Defendants did nothing to create or contribute to the difficulty. On the contrary, the Defendants suggested a new date for mediation and indicated a willingness to agree a new extension. The Claimants' solicitor failed to respond to either proposal.

80.3 It was reasonable for the Defendants' solicitor to sit back and await developments after sending the email of 1 November 2021. There was, in particular, no duty on RPC to remind AES that the extended deadline for service of the July Claim Form was about to expire before it did expire.

80.4 If the power were exercised, the Defendants would be deprived of a potential limitation defence which is at least reasonably arguable on the basis of the material presently before the Court.

80.5 There is no satisfactory explanation as to why the Defendants' proposals in the email of 1 November 2021 were not accepted or, failing that, why the July Claim Form was not served on the First, Third and Fourth Defendants by 1 December 2021.

80.6 There are no other factors or circumstances which weigh in favour of the Claimants.

CPR 6.16

81. The final limb of the Claimants' application was for an order that service of the July Claim Form be dispensed with under CPR r. 6.16.
82. CPR r 6.16 provides "The Court may dispense with service of a claim form in exceptional circumstances."
83. The exceptional circumstances threshold is higher than the 'good reason' test under CPR r. 6.15. In Bethell Construction Limited v Deloitte and Touche [2011] EWCA Civ 1321, applications were also made under CPR r 6.15 and 6.16. The Chancellor of the High Court said this:

> "If the facts of this case do not reveal a 'good reason' to make the order regarding service of the claim form sought under CPR 6.15 they cannot possibly disclose 'exceptional circumstances' sufficient to justify dispensing with service altogether."

84. In my judgement, the same applies in this case. For the same reasons as I have found that there is no basis for exercising the power the court has under CPR r. 6.15(2), I find that there are not exceptional circumstances within the meaning of CPR r. 6.16. Indeed, the first instance judge's description of what happened in Bethell as reproduced at [27] in the judgment of the Court of Appeal is equally apt to describe what (in summary) has happened in the present case:

> "..this is not a case where the claim form was delivered to the defendants within the period for service by a method of service which the claimants and their solicitors thought was a reasonable method of service. The claim form had been delivered expressly not by way of service, and was never delivered to the defendants again; nor was any statement made that by serving the particulars of claim the claimants were treating the claim form as having, by that act, been served. There was nothing to suggest that the claimants were regarding the not-by-way-of-service condition attached to the previous delivery of the claim form as in any way having been extinguished. Again, it seems to me that it would be an impermissible exercise of the power under the rule to dispense with service of the claim form in those circumstances."

85. In this case, the Claimants made a strategic decision to issue (but not serve) the July Claim Form in July 2021. They agreed one extension to the period for service but then failed to serve the July Claim Form within that period and failed to agree another extension. In the circumstances, this is not a case which can conceivably amount to exceptional circumstances to justify dispensing with service altogether.

Disposal

86. Accordingly, the Claimants' application is dismissed and the Defendants' application succeeds. The service of the July Claim Form on 19 January 2022 is set aside because it

had expired by the time it was served. The Court therefore has no jurisdiction to hear the claims in the July Claim Form. I would ask the parties to agree an order to give effect to this Judgment in the usual way.