Neutral Citation Number: [2023] EWHC 620 (TCC)

Case No: HT-2022-000038

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Rolls Building
Fetter Lane, London, EC4Y 1NL

Date: 27/02/2023
Start Time: **09.32** Finish Time: **11.07**

Before :

MR JUSTICE KERR

- -

Between :

CLARION HOUSING ASSOCIATION LIMITED	**Claimant**
- and -	
CREST NICHOLSON OPERATIONS LIMITED	**Defendant**

- -
- -

Mr Tom Owen (instructed by **Pinsent Masons LLP**) for the **Claimant**
Mr George Hilton (instructed by **Gateley Legal**) for the **Defendant**

Hearing date: 24 February 2023

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Approved Judgment

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Mr Justice Kerr :

1. There are before me two procedural applications in this building contract dispute. Although 28 authorities were cited to me, the applications raise no point relevant to the merits of the dispute. This is satellite litigation in its purest form.

2. The first is the defendant's application dated 18 January 2023 firstly, for relief from sanctions for the late filing of the acknowledgement of service; and secondly, under Part 11 of the Civil Procedure Rules disputing the jurisdiction of the court or inviting it to decline jurisdiction for failure to serve a claim form and particulars of claim.

3. The second application before me today is the claimant's, made on 27 January 2023 seeking an order that the particulars of claim were served in time; alternatively, if it is required, relief is sought in the form of an extension of time for service of the particulars of claim and an order under rule 3.1(2)(a) and 3.10 of the Civil Procedure Rules rectifying any procedural defect.

4. The background is briefly as follows. On 31 October 2018 the parties entered into three building contracts for the defendant to design and build 132 residential units for the claimant at a site near Bury St Edmunds.

5. In January 2022 the claimant drew to the attention of the defendant alleged electrical defects. A contractual time limit to issue proceedings was due to expire the following month. The claimant's solicitors sought to agree with the defendant an extension of the deadline for issue of proceedings which was to expire on 11th February 2022.

6. That extension of time was sought by the claimant's solicitors in a letter of 2 February, to which there was no response from the defendant.

7. The claim was brought on 11 February 2022 alleging defective performance of the defendant's obligations under the three contracts. Various causes of action were advanced: breach of contract, breach of statutory duty, negligence, a claim for contribution in respect of any liability to third parties under the Defective Premises

Act 1972 and interest pursuant to section 35A of the Senior Courts Act 1981. The amount claimed was said to be in excess of £200,000.

8. On 26 May 2022 the claimant's solicitors informed the defendant that the claim had been issued but it had not then been served on or sent to the defendant. The claimant sought a six month moratorium to avoid legal costs. The deadline for service of the claim form within four months of issue was due to expire on 11 June 2022.

9. On or about 9 June 2022, i.e. about four days before expiry of that deadline, the parties agreed a six month stay to last until 11 December 2022. The purpose of that was, I understand, so that discussions could take place and rectification work could be considered or carried out.

10. The defendant was at that stage unrepresented. Mr Alex Stark of the defendant said in his witness statement that he did not think the defendant needed legal advice at that stage. The defendant has an in-house counsel, a Mr Maguire.

11. The court's order by consent was made by me on 16 June 2022 and sealed by the court office the same day. It provided for a stay until 4 p.m. on 11 December 2022. Paragraph 2 of the order read:

> "Claimant to apply for directions for service of the Claim Form and Statements of Case prior to expiry of the stay on 11 December 2022, if not otherwise agreed".

12. I little suspected when I made that order that it would set traps for the unwary and I should not have ordered a stay that was to expire on a Sunday, which 11 December 2022 was. In mitigation, I think I was just following the text provided by the parties, but that is no excuse and I apologise.

13. On 27 October 2022 the claimant wrote to the defendant. The claimant noted that the deadline of 11 December was approaching and that unless the remedial works could be completed or agreement could be reached the claimant would soon need to instruct counsel because of the looming expiry of the stay.

14. By 7 December 2022 agreement had not yet been reached either to extend the stay or proceed in some other way that would avoid an application to the court, which would require costs to be incurred that one would hope could be avoided. The same day, 7

December, the claimant's solicitors sent a detailed pre-action protocol letter to the (still unrepresented) defendant.

15. On Thursday 8 December, three days before expiry of the stay, Mr Paul Loader of the claimant spoke to Mr Stark of the defendant and Mr Loader, I accept, formed the view that the parties had "otherwise agreed" a way forward, making an application to the court unnecessary.

16. At paragraph 2.4.9 of his witness statement Mr Loader says that Mr Stark refused to extend time "so it was agreed on that call that the Claimant … would serve proceedings without an extension".

17. But after the call, Mr Stark emailed Mr Loader saying the defendant's proposed solicitors, Winckworth Sherwood, (not in the end instructed because they were conflicted) would respond by Friday 16 December to documents received from the claimant's solicitors. That would be after expiry of the stay.

18. In his email of 8 December 2022, Mr Stark neither confirmed nor denied the agreement Mr Loader believed had been reached on the phone, but in his witness statement Mr Stark denied that any such agreement was reached. There is therefore a stark conflict as to whether the agreement Mr Loader says was made was, in fact and law, made or not made.

19. I interject that I cannot resolve that dispute on an interim hearing such as this with a 1.5 hour time estimate. It depends on an objective assessment of what actual words were used in the telephone conversation. I cannot decide today whether agreement was reached to dispense with an application to the court for directions and I am not willing to adjourn for the purpose of oral evidence on that point; that would be disproportionate.

20. Whether a binding agreement was reached orally in the telephone conversation is, of course, to be objectively ascertained. It is quite possible for both men to hold contrary subjective beliefs on the point. Objectively, one must be right and one wrong, but I cannot decide which.

21. It is clear from both accounts that by the end of the conversation Mr Stark was being told by Mr Loader that the defendant should expect to be served with proceedings that had been issued since the defendant was not consenting to an extension of the stay and was not due to respond further until after it had expired.

22. As I have said, I express no view on whether, objectively speaking, Mr Stark agreed to that course or not.

23. Mr Hilton for the defendant said at paragraph 35 of his skeleton argument that such an agreement would have to be in writing, but I see no basis in authority for that proposition; the agreement could be oral.

24. The same day, 8 December 2022, the claimant's solicitors wrote to the defendant saying that the stay was about to expire and the claimant would have to serve proceedings the next day, 9 December, in the absence of an agreed extension of the stay. The letter did not refer to any agreement to dispense with an application to the court for directions.

25. The particulars of claim are dated 9 December 2022, which was the Friday of that week. Together with the claim form they were delivered that day by courier at 17.49 to the defendant's registered office address in Surrey. The package was addressed to Mr Alex Stark of "Crest Nicholson".

26. Mr Stark does not work there and did not receive the paper copy wrapped up in a parcel at that stage, but he did receive on 9 December 2022 the electronic versions by email, which he forwarded to the solicitors Winckworth Sherwood who, the defendant then thought, were to be instructed (see paragraph 4.21 of Mr Stark's witness statement).

27. The covering emails from Mr Stark enclosing electronic versions of the claim form and particulars of claim informed him that "the same will be served in hard copy". Mr Stark approached the defendant's general counsel, Mr Maguire, to ask whom to instruct instead of Winckworth Sherwood. He did not receive an answer from Mr Maguire by 16 December 2022 when Mr Stark ceased work because of the festive period.

28. The electronic versions of the claim form and particulars of claim were not, it is common ground, validly served by email, as willingness to accept service by email had not been communicated to the claimant by the defendant which was then unrepresented.

29. It is common ground that if the claim form and particulars of claim were validly served, the deadline for filing and serving the acknowledgement of service was, after taking account of the days when the court office was closed, 29 December 2022 (see the claimant's skeleton argument paragraph 4.2).

30. The defendant's Mr Stark says, and I accept, that because of the festive season break he did not see the claim form and particulars of claim until after he returned to work in the new year, by which time the parcel had been forwarded to his place of work in Essex. However, he had already forwarded the electronic copies to the defendant's then proposed solicitors, as I have said.

31. On 4 or 5 January 2023, the claimant filed a certificate of service in respect of the particulars of claim saying that the date of service was 12 December 2022. On 4 January 2023 the defendant's current solicitors were instructed.

32. On 5 January the claimant's solicitors wrote enquiring after the acknowledgment of service and warning that they would apply for default judgment unless it was filed and served in short order.

33. The defendant's acknowledgment of service is dated 5 January 2023, the same day. It was filed that day. It is common ground that that is a week later than required under the rules.

34. On 18 January 2023, 13 days later, the defendant filed its application for relief from sanctions and its Part 11 challenge to the court's jurisdiction. It is common ground that this was outside the 14 day period running from 29 December 2022, the due date for the acknowledgement of service, within which an application under Part 11 challenging a court's jurisdiction is required to be made. But it was, just, within 14 days from 5 January 2023 when the acknowledgment of service was in fact filed and served.

35. The claimant then made its application dated 22 January 2023 seeking an order confirming that the particulars of claim were served in time; alternatively, if required, the claimant sought relief in the form of an extension of time for service of the particulars of claim by means of an order under CPR rule 3.1(2)(a) and 3.10.

36. Before considering the parties' rival contentions I start by standing back and noting the general factual position. The defendant knew that the claim had been issued. It could have required service of the claim form on it (see CPR rule 7.7). The parties had been in contact about the issues and had already in June 2022 jointly enlisted the services of the court to seek the stay by consent.

37. The parties were also in contact during the stay. Some works were being done or considered or discussed. Both knew all about the litigation and the consent order of 16 June 2022. Both knew when the stay was to expire and what the terms of the stay were, as set out in the consent order.

38. The parties would naturally each expect the other to engage in a dialogue in the run-up to 11 December 2022 and both knew that if agreement were not reached the claimant would need to reapply to the court, which could either extend the stay or give directions for the claim to proceed.

39. The claimant did not apply to the court and the reason given for that is that the claimant considered there was an agreement that service of the claim form and the particulars of claim would take place and that the action would proceed on the lifting of the stay at 4 pm on 11 December 2022.

40. The first matter to consider is the defendant's application for relief from sanctions in respect of the filing and serving of its acknowledgment of service a week late. This issue is governed by the usual three stage test derived from *Denton v T H White Ltd*.

41. The defendant submits that the late service is not significant or serious, in that it had no detrimental effect on the claimant, which has not been prejudiced. The lateness included bank holidays over the festive period.

42. The reason for the lateness of the acknowledgement of service was, the defendant submits, the claimant's errors in delivering the claim form and particulars of claim to

a non-director of the defendant at a place where he did not work, without properly identifying which of the 27 Crest Nicholson companies that share the same registered office where the documents were delivered, was the defendant.

43. In all those circumstances the defendant submits relief against sanctions should be granted.

44. The claimant says, first, that the breach was serious or significant. If the acknowledgement of service had been filed timeously, the 14 day period would already on 12 January 2023 have expired before the jurisdiction challenge was brought six days after that.

45. The claimant says there was no good reason for the lateness. The defendant knew all about the proceedings and the dispute, had been advised by the claimant in June 2022 to seek legal advice but had chosen not to instruct solicitors until 4 January 2023. The defendant, and Mr Stark in particular, had received electronic versions of the claim form and particulars of claim as early as 9 December 2022; and he had in the covering email been told to expect hard copies by way of service.

46. Thirdly, the claimant submits that consideration of all the circumstances points against granting relief. As it is put in Mr Owen's skeleton, the defendant is "seeking to call 'snap'", but, due to its own fault is reliant on the court's indulgence to do so which should not be permitted; it would be contrary to the overriding objective and would lead to injustice. Further, the claimant says the application for relief was not made promptly.

47. If the claim had proceeded in a normal way, I would not have regarded the defendant's default as significant or serious. The period of delay, a week, would normally have indicated that the defendant was remiss and lax but nothing worse. The period of delay included part of the festive season.

48. The defendant's reason for the delay of a week is unconvincing. Mr Stark had at least the means of knowledge, if not actual knowledge, of the contents of the claim form and particulars of claim on 9 December 2022 and good reason to expect service of the same on that date. I would characterise the main reason for the delay as the failure of

Mr Stark and Mr Maguire between them to organise legal representation before rather than after Christmas.

49. I am not impressed with the defendant's attempts to pin the blame on the claimant for failing to nominate the correct company. The first place where Mr Stark and Mr Maguire should have been expecting to receive the served hard copy documents was the address of the defendant's registered office. They made no enquiry and allowed the parcel to pass between group premises while the period for filing the acknowledgement of service expired.

50. As for the third stage of the *Denton* enquiry, the circumstances as a whole include, crucially, the prejudice the defendant seeks to inflict on the claimant if it can obtain the required relief and validation of its late filing and service of the acknowledgement of service. The defendant requires relief for the express purpose of making the Part 11 application, which is otherwise not open to it.

51. The defendant is inviting the court to apply a double standard, asking the court to excuse the defendant's default so that it can then ask the court to condemn the claimant's default. I am not willing to do that and I will refuse the defendant's application for relief. The claimant does not seek any judgment in default. It accepts that the defendant should retain its right to defend the claim on its merits.

52. Next, I come to the defendant's application under Part 11. That cannot be advanced because there is no valid acknowledgement of service (see CPR rule 11.2). However, I will address it anyway.

53. Four grounds of challenge to the court's jurisdiction are advanced. The first is not now pursued. It is that the four month period for service of the claim form had already expired by the time I made my order on 16 June 2022. The argument would be that the order, though by consent, could not preserve the effectiveness of the claim form which lapsed when it remained unserved four months after issue.

54. That is obviously not right, because the parties agreed before expiry of the four month period to the six month stay and my order gave effect to that agreement, thereby preserving retroactively the validity of the unserved claim form. That is now

conceded in line with the observations of Mrs Justice Cockerill in *Oran v QBE* [2020] 1 WLR 3257 at [4], [13] and [14].

55. The second ground in the Part 11 challenge proceeds from the premise that service of the claim form on 9 December 2022 was a nullity because it occurred during the period of the stay. The defendant relies on the observation of Coulson LJ in *Grant v Dawn Meats (UK) Ltd* [2018] EWCA Civ 2212 at [18] that "in general terms" during a stay "no steps in the action, by either party, are required or permitted".

56. The defendant submits, as I understand it, that here the claimant either had to serve the claim form after the stay had expired, which in this case would be too late to preserve its validity, or the claimant had to have applied to lift the stay and obtained a lifting of the stay in time for service within four months of issue, excluding the six month period of the stay, i.e. by 11 December 2022.

57. The defendant submitted that the court should find there was no agreement between Mr Loader and Mr Stark that the claim form and particulars of claim would be served before expiry of the stay. The claimant had not alleged any such agreement in correspondence until 4 January 2023 and there is no written evidence or confirmation of any such agreement. Mr Loader does not attribute any actual words to Mr Stark in their telephone conversation.

58. Further, the defendant submits, an oral agreement would not have been effective to lift the stay anyway: "At the very least, a consent order would have been required to vary the existing order". The quote is from the defendant's skeleton at paragraph 35.

59. The claimant submits that *Grant v Dawn Meats (UK) Limited* is not authority that service of proceedings during the currency of a stay is a nullity; it is only authority that stay periods are discounted when reckoning the four month time limit for service of a claim form (contrary to the contention of the unsuccessful and opportunist defendant in that case).

60. The claimant submitted that the Court of Appeal had clarified in *Arkin v Marshall* [2020] 1 WLR 3284 at [38] and [50] to [51], in the context of the automatic stay of possession proceedings during the Covid pandemic, that it "may be going too far to

say that the parties to a stayed action are not permitted to take any steps at all" (per Sir Geoffrey Vos C, as he then was, giving the judgment of the court at [51]).

61. Further, the definition of a "stay" in the glossary to the CPR states that steps authorised by "the terms of the stay" remain permitted. Here, paragraph 2 of the consent order expressly permitted service of the claim form during the period of the stay by agreement, as an alternative to applying to the court.

62. There was such an agreement here, the claimant contended. Even if that was wrong, service during a stay took effect at the moment of the lifting of the stay; or, in the further alternative, if there was an error in the procedure, that can and should be remedied under rule 3.10.

63. In my judgment, the claim form and particulars of claim were validly served on Friday 9 December 2022 at 1749 when they were delivered to the defendant's registered office by courier. I accept the submission that Coulson LJ did not in *Grant v Dawn Meats (UK) Ltd* intend to preclude service of originating process during the period of the stay. Deadlines that would expire during a stay are extended by the postponement of the running of time until the expiry of the stay, when time starts running again.

64. What is "not permitted" to borrow Coulson LJ's words, during a currency of a stay is the enforcement of compliance with procedural obligations in the proceedings, including agreed steps. A party may not apply to the court during a stay and may not during a stay complain of a missed deadline that expired during the stay. Nor may it complain after the stay has expired of a missed deadline that would have expired but for the stay but has not yet expired as extended by the stay. The stay does not nullify any step taken during its currency.

65. Whether it was right or wrong for the claimant to proceed by service of the claim form and the particulars of claim before 11 December 2022 rather than applying to the court for directions is a separate matter. It depends on the point I refrain from deciding, namely, whether agreement was reached that the claimant would serve the proceedings instead of applying to the court for directions.

66. I reject the submission of the defendant that only a consent order could vary the period of the stay or lift it. That would defeat the objective of saving costs by requiring a claimant to apply for directions only if the parties had not agreed "otherwise".

67. The third ground of challenge to the court's jurisdiction is that the particulars of claim were served late. The basis of this ground is that the particulars of claim were delivered to the defendant's registered office at 1749 on Friday 9 December 2022, after the 4.30 pm close of business deadline, with the consequence that, in the usual way, the deemed date of service is the next business day, which was Monday 12 December 2022, after the latest time for serving the claim form.

68. The defendant accepts that this defect is curable by relief from sanctions, that an application for relief has been made by the claimant and that whether relief should be granted is "primarily a matter between the claimant and the court" as Mr Hilton put it.

69. I accept the submissions of the claimant that the particulars of claim were served with the claim form and at the same time as the claim form, on 9 December 2022. That was the date of actual service. The deemed service provisions in Part 6 are not relevant. There is nothing in this ground of challenge.

70. The particulars of claim were not served late and I therefore do not need to consider whether the claimant should have relief from sanctions. There is therefore no need to consider further the claimant's application for an order confirming that the particulars of claim were served in time or, alternatively, for relief from sanctions in respect of any lateness.

71. The fourth ground of challenge is that service of the claim form and particulars of claim was invalid because they were delivered to the defendant's registered office which was wrongly addressed to "Crest Nicholson" without further identifying the defendant and wrongly marked for the attention of "Alex Stark" who did not work at that address and was not a statutory director of the defendant.

72. However, the package containing the claim form and particulars of claim was, it is common ground, delivered to the "relevant place" under CPR rule 7.5, namely the defendant's registered office. It is submitted in the defendant's skeleton at paragraph

50 that the package "was not left at a relevant place as it was not left in a manner or with an address that would cause the recipient to consider that it had been for the Defendant".

73. However, it is not a requirement of good service on a limited company that a package must be left "in a manner" that would cause that company to consider that it had been for the person served. Where service is on a limited company, the company is on notice that any package delivered to its registered office *should* cause the company to consider that the package is for that company.

74. It was therefore incumbent on the defendant to discover which of the 27 Crest Nicholson companies was the one that mattered. The omission to name the defendant specifically on the envelope is not material. Mr Stark and Mr Maguire had every reason to expect documents for the defendant to be delivered to its registered office on 9 December 2022, as already explained. There is nothing in this ground of challenge.

75. The claimant's application therefore, as I have explained, does not arise. An order is sought that the particulars of claim were served in time, but there is no need for such an order; they were served in time. In the alternative, the claimant seeks relief in the form of an extension of time for service of the particulars of claim. That relief is not needed either.

76. For those brief reasons, I will refuse relief to the defendant in respect of the late filing of the acknowledgement of service. I will dismiss the defendant's application under Part 11 of the CPR. On the claimant's application I find that good service of the claim form and particulars of claim took place on 9 December 2022. No order of the court is required and I will make no order. I will give directions for further statements of case and set a timetable unless any further stay is agreed.

(Following submissions in relation to costs)

77. I am asked to rule on costs. The successful party is clearly the claimant and I refer to my main judgment for the reasons for that. The claimant says the defendant should pay the claimant's costs of the defendant's application. The claimant further says that as for its (the claimant's) application, either the defendant should pay its costs or there should be no order as to costs on the claimant's application.

78. The defendant says that in relation to its own application it accepts that it has been unsuccessful and should pay the claimant's costs, but in respect of the claimant's application the defendant points out that no order was made because it was unnecessary and there should either be no order for costs or a substantial reduction in the defendant's costs liability.

79. My starting point is that it was blindingly obvious to the court when reading into this case that the just outcome had to be that the claim should proceed on its merits and this episode, with respect to the parties, has been a waste of their time and the court's and need not have happened.

80. On the claimant's side, it needed either to obtain an inter partes document to prove the oral agreement on which it relied, or it should have applied to the court for directions. It did neither. It was not adequate to rely on what could easily turn out to be, and has turned out to be, one person's word against another's or differing interpretations of a conversation between non-lawyers.

81. On the defendant's side, it should not have allowed the case to remain unattended to between 9 December 2022 and 4 January 2023. That was asking for trouble. And it should not have contested that there was good service of the claim form and particulars of claim on 9 December 2022, stay or no stay.

82. I direct myself in the usual way in relation to the factors that are set out in CPR rule 44.2.

83. If I were considering these applications separately I would have ordered that the defendant must pay the claimant's costs of the defendant's application and I would have made no order as to costs on the claimant's application.

84. But taking account of the broader picture and the undesirability of having to unpick the costs incurred in respect of the two applications and disentangle them from each other, it seems to me more just that, having regard to the conduct of the parties to which I have alluded, to make one composite costs order covering both applications.

85. As I have said, the claimant is clearly the successful party, but its own application was unnecessary. So, rather than making two separate but tailored costs orders, one for

each application, I will rather, applying a broad brush, order that on both applications the defendant must pay 75 per cent of the claimant's costs.

(Following further submissions concerning costs)

86. I am asked to assess costs and I have been given a helpful schedule from Pinsent Masons setting out the claimant's costs of the two applications which come to a grand total of £56,201.20. There are four areas of disagreement, which I will take in turn.

87. The first is that the defendant says the guideline rates for a Leeds based firm, which this is, should be used rather than the considerably higher actual rates charged. The differences are quite marked. I have considered this.

88. I am aware that, on the one hand, these are guideline rates which apply to all kinds of litigation and this is specialist litigation in which the viability of the claim itself was at stake. But on the other hand, the claim itself is not particularly large by TCC standards and certainly was not extra heavy litigation to which higher guideline rates apply.

89. On balance, it seems to me that the right course is to allow a rate which falls half way between the Leeds guideline rates and the London 2 guideline rates, which means that, for example, in the case of a Grade A partner whose actual rate is £445 the allowed rate will be a figure half way between ££261 and 373; and likewise going down the scale.

90. That seems to me to strike the right balance. Can I just check that that is clear to everybody and the numerical exercise can follow.

MR OWEN: My Lord, yes.

MR HILTON: My Lord, yes.

91. Moving on, the next point is the attendance of solicitors in court. The only challenge is to the attendance of a Grade D solicitor on Friday. It is quite normal to have only one solicitor, or even none in these days of instant technological electronic communication.

92. While it is always good to see less experienced solicitors attending court hearings and it is no doubt good for her development, I do not think it is justifiable that the cost of that should fall on the defendant and I will disallow the six hours at £175 an hour claimed for her attendance at court on Friday, a total of £1,050 for the attendance of that solicitor.

MR HILTON: My Lord, the only point I was really interjecting on is there is also the travelling and waiting of that solicitor and I would suggest that that should also follow that that is deducted.

MR JUSTICE KERR: I beg your pardon; that must follow, yes.

MR OWEN: We would accept that.

MR JUSTICE KERR: And therefore that is an extra disallowed two-and-a-half hours at £175 an hour, £437.50.

93. Moving on to what has been called the "line 5" documents, the point here is that the defendant says that an unjustified estimated time for preparation after 22 February, which was five day ago, is charged for in a total amount of 21 hours, amounting to £6,305. The defendant says that is not reasonable as the matter was in the capable hands of counsel for presentation to the court at that stage. Mr Owen for the claimant says that there were a number of late matters to deal with.

94. For my part, I cannot see how anything like 21 hours can have been justifiably incurred in the sense that the costs of that could reasonably be passed on to the losing party on a standard basis; and applying a broad brush I am simply going to reduce the figure from 21 hours down to 5 hours.

95. I have not seen any details of anything substantial or significant in terms of last minute bundles, authorities, correspondence, etc. The one matter that did arise was an open draft consent order that I was told about on Thursday, but you do not get to 21 hours or anywhere near just from that. I will allow 5 hours instead of 21 hours.

MR OWEN: My Lord, I am sorry to interrupt. How is that to be allocated? Which grade?

MR JUSTICE KERR: Pro rata'd down, thank you.

96. Finally, counsel's fees. The case has been very capably presented by experienced counsel and I accept that it is a matter of importance and that this is quite an expensive court where counsel fairly do well for themselves and so no criticism of that was made.

97. On the other hand, it was not the largest claim. Sometimes I have seen lower fees for matters that were considerably simpler than this but just involving much greater sums of money. We can have millions turn on a simple point or not so much turning on complicated issues, and this case is in the latter category.

98. I do not think that Mr Hilton's figures are to be adopted, but I do think some reduction is called for in the allowable amount, and I propose to allow, for preparation and considering the application, advice work and pre-trial work, £3,000; and £15,000 for the brief fee, a total of £18,000 for counsel's fees, and that is exclusive of VAT.

(*Following an application by counsel for the defendant for permission to appeal)*

99. There is an application for permission to appeal. It is said, first, that my decision refusing relief from sanctions in respect of the late service of filing of the acknowledgement of service was "flawed and unduly harsh", to use Mr Hilton's phrase. He says the delay was only seven days and it included the Christmas period and that my approach was too draconian.

100. I do not think that is arguably going to succeed or has a real prospect of success in the Court of Appeal. It is well known that case management decisions are the province of the first instance judge and, absent any flaw, error of principle or error of law, will not be interfered with on appeal.

101. Here the critical point was the double standard point to which I alluded in the judgment and which seems to me fatal to the arguability of a putative appeal on this point.

102. Next, Mr Hilton says that there should be permission to appeal on the basis, as I understand his submission, that the court ought to have considered the jurisdiction challenge outside the parameters of Part 11 and not only within them.

103. Mr Hilton refers to the recent decision in the judgment of Nugee LJ in the *Zebra* case, produced at court late in the hearing for the first time. That to me seems far fetched. Until the very end of the hearing, there was no application outside the parameters of Part 11 and it was accepted that the application within its parameters was contingent on the success of the, as it happened, failed relief from sanctions application.

104. Although Mr Hilton did float late in the hearing on Friday the possibility of the court looking at the jurisdiction point more widely and produced the *Zebra* case in an attempt to support that, he did not have any written application to the court to amend or otherwise apply in any formal way for that to happen, and I do not think it realistic that an indication of a possible non-Part 11 jurisdictional challenge in the middle of a case could assist the defendant in any appeal.

105. Finally, Mr Hilton submits that the part of my decision dealing with the *Dawn Meats* and *Arkin* cases is arguably wrong and ought to be considered at appellate level.To my mind, it is inconceivable that the Court of Appeal would regard Coulson LJ's observation in the *Dawn Meats* case as invalidating all service of process during a stay. That would be contrary to the subsequent decision in the same court in the *Arkin* case and I do not think that point would have a real prospect of success on appeal.

106. For those brief reasons I will refuse permission to appeal.