



Neutral Citation Number: [2023] EWCA Civ 657

Case No: CA-2022-001955

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT MANCHESTER
HIS HONOUR JUDGE PEARCE
Case No. F02YM752

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09 June 2023

Before :

LORD JUSTICE UNDERHILL (Vice-President, Court of Appeal, Civil Division)
LORD JUSTICE BEAN
and
LADY JUSTICE NICOLA DAVIES

Between :

(1) DR SANJAY PITALIA	<u>Appellants</u>
(2) DR SHIKHA PITALIA	<u>(Claimants)</u>
- and -	
NHS ENGLAND	
(FORMERLY KNOWN AS THE NATIONAL	<u>Respondent</u>
HEALTH SERVICE COMMISSIONING	<u>(Defendant)</u>
BOARD)	

Timothy Trotman (instructed by **Acklam Bond**) for the **Appellants**
Aidan Reay (instructed by **Hill Dickinson**) for the **Respondent**

Hearing date: 24 May 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 9 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean:

The issues

1. The central issue on this appeal may be stated as follows. A sealed claim form is served after the expiry of four months from its issue. The defendant acknowledges service and applies to challenge jurisdiction within 14 days, but fails to do so expressly under CPR 11. Can the court remedy the defendant's error and strike out the claim?

History of the claim

2. The Appellants appeal against the decision and order of His Honour Judge Pearce ("the judge"), sitting in Manchester County Court, following his judgment dated 24 June 2022. The judge upheld the order of District Judge Matharu, dated 27 August 2021, to strike out the Appellants' claim for failure to comply with CPR 7.5 by serving the claim form in time.
3. The proceedings arise out of a commercial contract between the Appellant general practitioners and NHS England. The Appellants allege non-payment of a grant and under-payment of rental reimbursement payments pursuant to the statutory regime. The merits of the claim are irrelevant to the rather dry procedural issues on which this appeal turns.
4. On 2 August 2019, a junior member of staff of the Appellants' solicitors delivered the claim form to the County Court in Preston. It was accompanied by a covering letter requesting that the claim form be returned to the Appellants' legal representative for service. The claim was issued on 12 August 2019, with all court fees paid on 20 August 2019.
5. The Appellants' solicitors did not notice that the court had not returned the issued claim form to them until the time for service had almost expired. They therefore served an unsealed version of the claim form (which had been amended since issue) together with particulars of claim, a schedule of loss and the appropriate response pack under cover of a letter 27 November 2019.
6. On 10 December 2019 the Respondent's solicitors wrote to the Appellants' solicitors asserting that the claim had not been effectively served. On 12 December 2019, the deadline for service, the Respondent alerted the court that good service had not been effected.
7. On 7 January 2020, the Appellants served a copy of the sealed Claim form. By letter of 16 January 2020 Hill Dickinson, solicitors for the Respondent, replied that firstly it should have been served by 12 December 2019, and in any event they should have been served with the original sealed Claim form rather than a copy. They indicated their intention to apply to strike out the claim.
8. On 17 January 2020, the Appellants made an application, amended on 7 August 2020, that sought:
 - 8.1 an order that valid service had been effected, whether by rectification of the claim form under CPR 3.10 or by permitting service under CPR 6.15 or by

dispensing with the need for service under CPR 6.16 ; or

8.2 an order that time for service be extended.

9. The Respondent filed an Acknowledgment of Service under cover of a letter dated 21 January 2020. On the Acknowledgment of Service form the Respondent ticked the box stating, "I intend to defend all of this claim" but not the box stating, "I intend to contest jurisdiction."
10. Three days later, on 24 January 2020, the Respondent made an application for the claim to be struck out due to non-compliance with CPR 7.5.
11. On 27 August 2021 DJ Matharu dismissed the Appellants' applications and struck out their claim.
12. On 5 April 2022 HHJ Claire Evans, considering the case on the papers, granted the Appellants permission to appeal on one ground, namely that the District Judge erred in law by not determining that the Respondent had accepted jurisdiction and/or lost its right to challenge the validity of the claim form in the circumstances that it had failed to use the procedure provided by CPR Part 11 and/or that the Respondent's solicitors had filed an acknowledgment of service with the box indicating an intention to contest jurisdiction not ticked.
13. On 4 May 2022 a Respondent's Notice was filed. It argued, inter alia, that the Respondent's application of 24 January 2020 could and should have been treated as an application under CPR Part 11; alternatively 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 defective service of the claim form.
14. On 24 June 2022, Judge Pearce handed down his reserved judgment dismissing the Appellants' appeal: [2022] EWHC 1636 (QB). It is this judgment that is presently under appeal.

Legal framework

15. CPR 7.5(1) requires a claim form to be served within four months after the date of issue. CPR 7.6 provides:
 - (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.

16. CPR 11 provides a procedure for disputing the court's jurisdiction. It reads as follows:

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.
- (6) An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including—
- (a) setting aside the claim form;
 - (b) setting aside service of the claim form;
 - (c) discharging any order made before the claim was commenced or before the claim form was served; and
 - (d) staying the proceedings.
- (7) If on an application under this rule the court does not make a declaration—
- (a) the acknowledgment of service shall cease to have effect;
 - (b) the defendant may file a further acknowledgment of service within 14 days or such other period as the court may direct; and

(c) the court shall give directions as to the filing and service of the defence in a claim under Part 7 or the filing of evidence in a claim under Part 8 in the event that a further acknowledgment of service is filed.

(8) If the defendant files a further acknowledgment of service in accordance with paragraph (7)(b) he shall be treated as having accepted that the court has jurisdiction to try the claim.

(9) If a defendant makes an application under this rule, he must file and serve his written evidence in support with the application notice, but he need not before the hearing of the application file—

(a) in a Part 7 claim, a defence; or

(b) in a Part 8 claim, any other written evidence.

17. CPR 3.10 provides the court with a general power to rectify matters where there has been an error of procedure. It reads as follows:

3.10 General power of the court to rectify matters where there has been an error of procedure

Where there has been an error of procedure such as a failure to comply with a rule or practice direction—

(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and

(b) the court may make an order to remedy the error.

The judgment of HHJ Pearce

18. The Appellants argued before the judge that the case was settled in their favour by the decision of this court in *Hoddinott v Persimmon Homes (Wessex) Ltd* [2008] 1 WLR 806, where Dyson LJ 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...”

19. The Appellants’ submission was that *Hoddinott* established a rule that failure to apply under CPR 11(1) for a declaration that the court has no jurisdiction when acknowledging service precludes a defendant from challenging jurisdiction in any other way such as by an application to strike out the claim, even when the claim form has been served out of time. The Respondent argued that any such rule cannot stand in the light of the subsequent observation of Lord Sumption JSC, giving the majority judgment of the Supreme Court in *Barton v Wright Hassall LLP* [2018] 1 WLR 1119, that a claim form “expired” at the end of the period for service allowed under the Rules.

20. Judge Pearce said at paragraph 51:-

“.....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.”

21. He then went on to consider the Respondent’s argument that *Hoddinott* was impliedly overruled by the Supreme Court in *Barton*. He held that Lord Sumption’s use of the word “expired” did not mean that the validity of a claim form was to be determined by analogy to a creature which is either living or dead, but by application of procedural rules and practice which provide that, while usually a claim form that has not been served within its period of validity has no continuing validity there are circumstances such as those referred to in CPR 7.6 or cases where the defendant has accepted jurisdiction, where it can continue to have or can resume validity. He went on:-

“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 *Hoddinott* 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)."

22. Judge Pearce then turned to the argument, raised in the Respondent's Notice, that the decision of DJ Matharu ought to be upheld on the basis that the Respondent's application to strike out the claim should have been treated as an application under CPR 11. He was referred to the decision of Dingemans J in *Caine v Advertiser and Times Ltd* [2019] EWHC 39 (QB), but distinguished it on the facts. In *Caine* two different applications had been made, the second of which had expressly referred to CPR Part 11 even though the first had not. In the present case, by contrast, the Defendant's application had not referred to CPR Part 11 at all. Judge Pearce went on to consider the Respondent's alternative argument, that the failure of the application expressly to refer to CPR 11 was an error of procedure capable of being rectified under CPR 3.10. He held:-

"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.

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."

23. Accordingly, he dismissed the Claimant's appeal.
24. By order of Stuart-Smith LJ dated 27 February 2023 permission was granted for a second appeal to this court.

Submissions in this court

25. Mr Trotman, for the Appellants, submits that Judge Pearce's decision to dismiss his client's appeal was based on an impermissible use of the rectification power under CPR 3.10, which must not be used to achieve something expressly prohibited by other Rules. He cited *Vinos v Marks & Spencer plc* [2001] 3 All ER 784. The claimant had failed to serve the claim form in time. After the four month period had expired he sought a retrospective extension of time and an order remedying the error which his solicitors had made. This court held that CPR 3.10 was not available for this purpose. May LJ said at paragraph 20:

“The meaning of rule 7.6(3) is plain. The court has power to extend the time for serving the claim form after the period for its service has run out "only if" the stipulated conditions are fulfilled. That means that the court does not have power to do so otherwise. The discretionary power in the rules to extend time periods – rule 3.1(2)(a) - does not apply because of the introductory words. The general words of Rule 3.10 cannot extend to enable the court to do what rule 7.6(3) specifically forbids, nor to extend time when the specific provision of the rules which enables extensions of time specifically does not extend to making this extension of time.”

26. Similarly Peter Gibson LJ said at paragraph 27:-

“A principle of construction is that general words do not derogate from specific words. Where there is an unqualified specific provision, a general provision is not to be taken to override that specific provision. Rule 7.6 is a specific sub-code dealing with the extension of time in all cases where the time limits in rule 7.5 have not been or are likely not to be met. The sub-code sets out in some detail what the claimant must do if he wants an extension of time and the circumstances in which the court may exercise the discretion conferred on it to extend the time: rule 7.6(3). That the circumstances specified in subparagraphs (a), (b) and (c) of rule 7.6(3) are the sole relevant conditions for the discretion to be exercisable seems to me to be made crystal clear by the words "only if". It is plain that the general power in paragraph 3.1(2)(a) to extend time cannot override rule 7.6. Nor, in my judgment, could the general power in rule 3.10 to remedy a failure to comply with a rule be pressed into service to perform the like function of, in effect, extending time. Even though rule 3.10 differs from rule 3.1(2) in not having wording to the effect of "except where the rules provide otherwise", that is too slight an indication to make rule 3.10 override the unambiguous and restrictive conditions of rule 7.6(3).”

27. In *Ideal Shopping Direct Ltd v Visa Europe Ltd* [2022] 1 WLR 1541 the claimants had served unsealed claim forms promptly, but sealed claim forms were not served until the period prescribed by the rules had expired. They accepted that they had made an

application that contained an error (the absence of a seal) but argued that this put them in a better position than if they had erroneously failed to make an application at all. This court held that in order to remedy the defect in service the Appellants were “asking the court to do the very thing which *Vinos* and the line of authority which follows it does not permit. The general provision in Rule 3.10 cannot be used to override a specific provision.”

28. Mr Trotman places much reliance on *Hoddinott*. In that case 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 DJ 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 DJ Daniel heard the defendant’s application to set aside the order of 13.9.06. He set aside the order of 13.9.06 extending time for service; and struck the claim out.

29. This court held that the claim should not have been struck out. A defendant who files an acknowledgment of service but does not indicate a challenge to the jurisdiction of the court as required by CPR 11 is taken to have submitted to the jurisdiction. The fact that the defendants in that case had previously applied to strike out the claim made no difference.
30. Mr Trotman’s second ground of appeal argues that the Respondent was in effect applying for relief from sanctions; that *Denton v TH White Ltd* [2014] 1 WLR 3296 is accordingly applicable; and that no indulgence should be granted to the Respondent since its failure to comply with CPR 11 was serious and significant. Mr Trotman further argues that if a high standard of procedural rigour is to be applied to the Appellants’ error, the same standard should apply to the Respondent.
31. On behalf of the Respondent Mr Reay did not renew the submission which he had made to the judge that *Hoddinott* has been impliedly overruled by *Barton*, but did submit that *Hoddinott* is different from the present case. In *Hoddinott* the defendant simply acknowledged service without challenging jurisdiction. In the present case, by contrast, the acknowledgment of service was accompanied by a covering letter indicating the Defendant’s intention to have the case struck out and was followed three days later by an application to set aside service and strike out the claim. Mr Reay argued that there was nothing in the authorities which prevented the judge from treating that application, using the rectification power under CPR 3.10 if necessary, as if it had been made under

CPR 11(1).

Discussion

32. The following principles emerge from the authorities in this area:

(i) *Barton v Wright Hassall LLP* makes clear the particular importance attached by the Supreme Court to the timely and lawful service of originating process. Failure to comply with the Rules about such service is to be treated with greater strictness than other procedural errors. In the present case, if the Respondent's solicitors had made their application of 24 January 2020 expressly seeking a declaration under CPR 11(1) that the court has no jurisdiction to try the claim, there would have been very little that the Appellants could have said in response.

(ii) On the other hand, the principle established in *Vinos* and followed in cases such as *Ideal Shopping* is that CPR 3.10 cannot be used to override an express prohibition in another Rule. An example of such an express prohibition is in CPR 7.6(3). If a claimant applies retrospectively for an order to extend the time for service of a claim form the court may make such an order only if the remaining conditions laid down by the rule have been fulfilled. If they have not been fulfilled then Rule 3.10 is simply not available. But the *Vinos* principle must not be expanded into saying that CPR 3.10 cannot be used to rectify any breach of the CPR. Otherwise the Rule would be deprived of its utility. When CPR 3.10 is invoked it presupposes that some error of procedure has been made. Without it civil litigation would be even more beset by technicalities than it is already.

(iii) There is a valid distinction between making an application which contains an error, and failing to make a necessary application at all. *Steele v Mooney* [2005] 1 WLR 2819 is a useful illustration. In that case the claimants sought the defendants' consent to a draft order extending time for service of the Particulars of Claim. That consent was forthcoming, but the extension of time was useless since the claimants had omitted to refer to the claim form. This court, distinguishing *Vinos*, held that the application for an extension of time was clearly intended to be for service of the claim form as well as the particulars. The subsequent application for relief was not in substance an application to extend time for service of the claim form, but an application to correct the application for an extension of time which had been made within the time specified for service and which by mistake did not refer to the claim form.

33. *Hoddinott* lays down that if a Defendant acknowledges service without making an application under CPR 11(1) for an order declaring that the court has no jurisdiction (or should not exercise its jurisdiction) to try the case, this is taken to be an acceptance of jurisdiction. Whatever one might think of *Hoddinott*, the decision is binding on us, and like the judge I do not consider that it has been impliedly overruled by *Barton*. The judge was also right to reject the argument, based on the use of the word "expired" in *Barton*, that there is an analogy between the expiry of a claim form and the death of a living creature. Plainly in some circumstances an expired claim form can be revived: see CPR 7.6(3).

34. I agree with the judge that the failure of the Defendant's solicitors, when completing the acknowledgment of service form, to tick the box indicating an intention to contest jurisdiction is not fatal to their application for relief. Even if the box had been ticked an application would still have been required to be made within 14 days. CPR 11(1) does

not say that a box on a form must be ticked: it says that an application must be made. As the judge put it, a tick in the box is neither necessary nor sufficient as a basis for challenging jurisdiction.

35. The critical question, therefore, is whether the Defendant's application of 24 January 2020 can, by the use of CPR 3.10, be treated as having been made under CPR 11(1). I do not accept Mr Trotman's argument that such rectification would offend against the *Vinos* principle. CPR 11(1) does not contain clear mandatory wording equivalent to that laid down by CPR 7.6 (3) that a retrospective extension of time may be granted "only if" certain conditions are fulfilled.
36. The failure to make express reference to CPR 11(1) in the letter of 21 January 2020 or the application of 24 January 2020 was in my view an error capable of rectification under CPR 3.10. The three documents - the acknowledgment of service, the covering letter and the application to strike out supported by witness statements – together made the Defendant's intentions clear. This was in substance an application to stop the case on the grounds that the Claimants had failed to serve the claim form in time. The case is much closer to *Steele v Mooney* than to *Vinos* or *Hoddinott*.
37. I am not impressed by the argument on behalf of the Appellants that if their failure to comply with the rules is to be treated so strictly despite the serious consequences, the same procedural rigour should be applied to the Respondent. That argument is contrary to the decision of the Supreme Court in *Barton*. Errors in issuing and serving originating process are in a class of their own.
38. I would also reject the Appellants' alternative argument based on *Denton v TH White Ltd*. I do not regard the failure of the documents served on 21 and 24 January 2020 to make express reference to CPR 11(1) as a serious and significant transgression. It was, rather, just the sort of technical error for which CPR 3.10 was designed.
39. I wish to pay tribute to Judge Pearce's erudite and carefully reasoned judgment, which in my view was correct in all material respects. I would dismiss the appeal.

Lady Justice Nicola Davies:

40. I agree.

Lord Justice Underhill (Vice-President, Court of Appeal, Civil Division):

41. I also agree.