Neutral Citation Number: [2022] EWCA Civ 1037

Case No: CA-2021-000709

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
ADMIRALTY COURT (QBD)
Mr Justice Andrew Baker
[2021] EWHC 2228 (Admlty)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 27 July 2022

Before :

LADY JUSTICE SIMLER
LORD JUSTICE POPPLEWELL
and
LADY JUSTICE CARR

- -

Between :

ST	**Claimant/ Appellant**
- and –	
BAI (SA) trading as BRITTANY FERRIES	**Defendant/ Respondent**

- -
- -

Giles Mooney QC and Linda Nelson (instructed by **Aegis Legal**) for the **Appellant/Claimant**
Sarah Prager and Henk Soede (instructed by **Tozers LLP**) for the **Defendant/Respondent**

Hearing date : 19 July 2022

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Approved Judgment

This judgment was handed down remotely at 10am on Wednesday 27 July 2022 by circulation to the parties or their representatives by email and by release to the National Archives.

Lady Justice Carr :

Introduction

1. This is a second appeal arising out of an application by the Appellant for an extension of time in which to serve a claim form pursuant to CPR 7.6(2).

2. The Appellant alleges that she was the victim of a sexual assault whilst in her cabin on board the cross-channel ferry 'Pont Aven' ("the ferry") sailing from St Malo to Portsmouth on 16 March 2018. The ferry was operated by the Respondent, BAI (SA) trading as Brittany Ferries ("BAI"). She brought civil proceedings in negligence against BAI on the basis that her cabin door lock was faulty at the time, allowing an unknown assailant to enter the cabin. She claimed damages for personal (including psychiatric) injury and associated losses. The relationship between BAI, as the ferry operator, and the Appellant, as passenger, was governed by the Athens Convention 2002. As such, it was subject to a two-year limitation period.

3. BAI was domiciled in France with an address for service of proceedings in Roscoff. Service in France could be effected without permission (pursuant to CPR 6.33 and the Brussels Regulation Recast, as then still in force). By virtue of CPR 7.5(2) the claim form had to be served within six months of issue. Proceedings were commenced on 14 February 2020 and thus service had to be effected by 14 August 2020. On 4 August 2020 the Appellant applied for an extension of time for service of the claim form (to 14 December 2020) ("the claim form application").

4. The claim form application was granted by Mr Admiralty Registrar Davison ("the admiralty registrar"), on the papers, on the following day, 5 August 2020. He maintained that decision (on an application by BAI to set the order aside) on 26 February 2021 ("the first judgment"). On appeal, by a judgment dated 16 July 2021 ("the appeal judgment"), the Admiralty Judge, Mr Justice Andrew Baker ("the judge"), overturned that decision. The question for this court is whether he was right to do so.

5. The Appellant raises two grounds of appeal:

   i) Ground 1: it is said that the judge misdirected himself as to the correct approach to consideration of an application under CPR 7.6(2) and erred in finding as a matter of fact that there was 'no reason' for the Appellant not being able to serve in time;

   ii) Ground 2: it is said that the judge wrongly substituted his own assessment of the reasons why the claim form could not be served in time for that of the admiralty registrar.

The facts

6. The detail of the chronology matters and is therefore set out below.

7. In December 2019 the Appellant, then a 69 year old retired former police officer, instructed Aegis Legal ("Aegis") to pursue her claim. A full pre-action letter of claim was sent on 12 December 2019. By email sent on 30 January 2020 BAI's insurers responded. Liability was denied. The basis of the denial was that the assault was not a reasonably foreseeable consequence of any defect in the lock, that the Appellant had

been asleep at the time (and so could not have apprehended any violence) and that her assailant was so drunk as to lack what was said to be the necessary intention. On 10 February 2020 BAI's insurers admitted in correspondence that there had been "an issue" with the cabin door lock.

8. As set out above, proceedings were commenced on 14 February 2020, just over a month before the relevant limitation period expired (on 16 March 2020). The value of the claim was then estimated at between £10,000 and £15,000. Under CPR 7.5, service had to be effected by 14 August 2020.

9. In early March 2020 Ms Rachel McKenna ("Ms McKenna"), a solicitor at Aegis, took over conduct of the claim from another fee earner taking maternity leave. Later that same month, Mr Barry Hayes ("Mr Hayes") of Tozers LLP ("Tozers") took over the correspondence on behalf of BAI. He requested a copy of the issued claim form, together with proposed particulars of claim, if available. Further, he asked for sight of the medical evidence "as an integral part of the consideration of liability".

10. On 8 April 2020 Ms McKenna provided Tozers with a copy of the claim form, expressly for information purposes only, and not by way of service. Ms McKenna was aware that, under CPR 7.4(1), there is an obligation to serve particulars of claim within 14 days of service. Further, under CPR 16 PD 4.3, any medical evidence on which the Appellant relied had to be attached to or served with the particulars of claim.

11. Efforts to obtain the Appellant's medical records (in England and France) continued, including her psychological counselling records. Ms McKenna also tried to identify a suitable medical expert, an exercise complicated by the conditions of the Covid pandemic. On 6 May 2020 Tozers requested an update on the medical evidence and for particulars of claim. Ms McKenna responded, referring to the difficulties being encountered and stating that, without medical evidence, she could not provide draft particulars of claim. On 14 May 2020 Aegis asked Tozers if it would agree to an extension of time for service of the particulars of claim. On 15 May 2020 Tozers wrote, suggesting that the matter was being allowed to drift. Mr Hayes stated that he was taking instructions on the request for an extension of time. He pressed again for the medical evidence.

12. On 18 May 2020 Ms McKenna was informed that the selected medical expert could not assist. She commenced the search for a new one. Instructions to a fresh expert, Dr Rachel Gibbons ("Dr Gibbons"), a consultant adult psychiatrist, were sent on 27 May 2020. On the same day, Ms McKenna repeated her request to Tozers for consent to an extension of time for service of the particulars of claim.

13. On 3 June 2020 the Appellant applied for an extension of time for service of particulars of claim, citing delays in obtaining medical records and arranging for expert medical assessment. That application was granted on the papers on 4 June 2020, extending time to 14 December 2020. The order was sealed on 8 June 2020.

14. At the same time, on 4 June 2020, Tozers, apparently unaware that the application had been granted, wrote to Aegis suggesting that such an application was a waste of time and money, given that the claim form was for service out of the jurisdiction, had not yet been served and six months was allowed for service. Mr Hayes said that he would

need to see the evidence in support of the application before considering and communicating BAI's stance.

15. On 10 June 2020 Ms McKenna wrote to Tozers asking for confirmation (by return) whether it was instructed to accept service of the claim form on behalf of BAI. Tozers did not answer. The enquiry was repeated on 11 and 26 June 2020. Again, there was no response - until 15 July 2020, when Tozers indicated that the proceedings would need to be served out of the jurisdiction.

16. Aegis instructed counsel to draft particulars of claim on 2 July 2020, in anticipation of receipt of a medical report. On 16 July 2020 Aegis received Dr Gibbons' expert medical report. Dr Gibbons concluded that the Appellant was suffering from moderately severe posttraumatic stress disorder, triggered and caused by the alleged sexual assault. The Appellant was to continue to take anti-depressant medication and undergo therapy. A full recovery would not be possible until the litigation was concluded. She would be psychologically vulnerable in the future. A copy of Dr Gibbons' report was sent to and received by Tozers on or about 22 July 2020.

17. At the same time as sending the report across to Tozers, Ms McKenna asked whether Tozers would "now" confirm that it was instructed to accept service. She also invited BAI (not for the first time) to admit liability in order to allow a swift and amicable resolution of the claim. The enquiry into service was met with silence.

18. Ms McKenna had meanwhile been attempting to contact the Foreign Process Service, without success until 23 July 2020, in order to make enquiries about the options for effecting service in France. Having spoken to them on 23 July 2020 Ms McKenna had concerns about the effect of the Covid pandemic on postal services and the availability of the foreign process unit. She therefore concluded that service under Article 15 of the EU Service Regulations would be preferable. To this end, on the same day, she engaged Portsea International Security & Intelligence Agency ("Portsea") to advise and assist with service in France if necessary. Mr Michael Warburton ("Mr Warburton") of Portsea confirmed to Ms McKenna that he had capacity to serve by 14 August 2020. This was, he said, "plenty of time". He asked to be sent details of the claim and brief details of the background. He would liaise with his partner, Graham Dooley, and revert to Ms McKenna on costs and steps to be taken.

19. On 28 July 2020 Mr Warburton duly emailed Ms McKenna stating:

> "I have discussed the case with Graham and also our official translator who is based in France. He explained that it would need to be translated into French and then served on Brittany Ferries in Roscoff by a French official called a huissier (sheriff) who will provide a certificate of service."

20. Having said that he had asked for quotations for translation costs, he went on:

> "I should mention that the official administrative/judicial activity is slower than usual due to the pandemic and July and August are the official legal vacations, although there is coverage of these activities during this period."

21. On 29 July 2020 Ms McKenna responded to Mr Warburton:

> "Thank you for the update. I look forward to hearing from you in relation to the fees. Could you also confirm that you are satisfied that there is sufficient time to ensure that service takes place before 14 August 2020 please."

22. Mr Warburton responded on the same day as follows:

> "Hi Rachel, as I expected as indicated below the huissiers are being a little slow to respond on this. However, I have one standing by who is a little out of area in case I can't get a local one, so we can get the job done in time. I'll come back to you early next week with the fees, etc."

23. However, on 4 August 2020 Mr Warburton emailed Ms McKenna advising that:

> "…I am sorry to tell you that all our efforts to get the service done by 14 August have come to nothing. We have tried a large number of huissiers in that region of Brittany to get this done, but the only one to respond was the out of area one I mentioned below. When we asked him to quote, however, he came back with a colossal and completely unrealistic quote which came to about £2,000 not including the translator's fees which I had to reject. I am afraid that this being the period of the French judicial vacations, all huissiers in the relevant area have gone on holiday on the assumption their services won't be required. We can try again in September, if you wish, when normal services should have resumed. I am travelling now until tomorrow evening, but please don't hesitate to come back with any queries."
>
> ("the August email")

24. Upon receipt of the August email, on the same day, Ms McKenna issued the application under CPR 7.6(2) for an extension of time for service of the claim form. The application was supported by a witness statement from Ms McKenna. The reasons given for the application were as follows:

> "1. This is a claim for personal injuries and loss arising from a claim for negligence in relation to an incident on board a vessel owned by the defendants on 3 December 2016. [sic]
>
> 2. Court proceedings were issued on 14 February 2020.
>
> 3. The claimant's representative has been in correspondence with the representatives of the defendants in England. However, they are not currently instructed to accept service of proceedings. Service outside the jurisdiction is therefore required by 14 August 2020.
>
> 4. There was a delay in obtaining relevant medical records and arranging a medical examination as a result of the covid-19

> pandemic. This has now been obtained and disclosed to the Defendants. It had been hoped that service of the claim form on the Defendants would be possible before 14th August 2020.
>
> 5. Unfortunately, due to judicial vacations all the Huissiers contacted in the area in relation to service are on holiday and it is therefore unlikely that service will be possible before 14th August 2020.
>
> 6. An extension of time is therefore sought whilst communication remains ongoing between the parties representatives."

25. On 5 August 2020 the admiralty registrar granted the application on the papers and extended time for service until 14 December 2020. On 7 December 2020 a further extension of time for service (to 25 January 2021) was granted. In fact service was effected on 11 December 2020. By this stage, on 8 September 2020, the claim form had been amended (without permission under CPR 17.1(1)) so as to increase the estimated value of the claim to between £50,000 and £100,000. The amended claim form, particulars of claim, schedule of special damages, copy of the order of 5 August 2020, together with translations were all served together. The claim form application notice followed on 16 December 2020.

26. By application dated 23 December 2020 BAI applied to set aside the admiralty registrar's decision of 5 August 2020 (and the subsequent order dated 7 December 2020).

The hearing before the admiralty registrar and the first judgment

27. The admiralty registrar heard BAI's application to set aside his order of 5 August 2020 on 26 February 2021. By that stage there was in evidence witness statements from Ms McKenna and Mr Hayes with exhibits, including a letter from the Chamber of Court Bailiffs for the Department of Finistere dated 28 January 2021. That letter confirmed that a court bailiff's offices cannot close, including during the summer holiday period, and that a duty bailiff from each office must be available at least for notification of urgent proceedings. If a bailiff's office was unable to provide the service, then an alternative office could be contacted:

> "…finding a Bailiff Office accepting to issue proceedings will not be difficult."

There was also evidence that huissiers' charges for service of documents were fixed, starting at €48.75.

28. In his judgment, having set out the context and CPR 7.6(1) and (2), the admiralty registrar went on to rehearse the background up to and including the issue of the claim form application, setting out in detail the exchanges between Ms McKenna and Mr Warburton between 23 July and 4 August 2020. He described the August email as "the crucial email".

29. The admiralty registrar then stated that he turned "to the reason why the claim form could not be served within the prescribed time". He identified the relevant legal

principles, including that any departure from the starting point (that a defendant has a right to be sued within the limitation period and within the period of a claim form's initial validity) had to be justified. The approach on the authorities, he stated, was essentially, first to evaluate the reason, and then to put that reason into a wider context, which included consideration of the overriding objective and the balance of hardship to the parties. What was a good reason for an extension of time for service of particulars of claim was not necessarily a good reason for an extension of time for service of a claim form.

30. He stated that difficulties with service of a claim form were undoubtedly capable of being a good reason. He held that that was the situation here. When the position became clear to her, Ms McKenna made the application to extend time promptly. The quality of the reason was diluted by the fact that enquiries were not commenced until three weeks before service was due. That was lacking in prudence. Whilst courts were generally less sympathetic to claimants who "court[ed] disaster", that factor did "not trump every other, and it [was] relevant that in normal times three weeks would in fact have been a sufficient period".

31. The admiralty registrar then went on to look at matters in the round. He considered it to be "very material" that Tozers had called for and been provided with a copy of the claim form. They also had the full letter of claim and Dr Gibbons' report. BAI had suffered no prejudice in the conduct of the case. By contrast, the Appellant would lose her cause of action altogether, were the order of 5 August 2020 to be set aside. The denial of justice would add considerably to her distress.

32. The admiralty registrar stated that, whilst concise, the claim form application had contained "the essential information". He had not been misled on the question of limitation, which he could and did see for himself had expired.

33. He concluded with three short propositions:

    i) The reason for not being able to serve in time was "neither weak nor strong". Rather it was "middling-good" – still a "good reason";

    ii) The balance of hardship was in favour of the Appellant. It would be just and proportionate to allow the claim to go forward;

    iii) There was no real basis to say that the Appellant had failed to comply with her duty of full and frank disclosure when making the claim form application.

34. After disposing of a further discrete point relating to the amendment of the claim form, he went on to refuse BAI's application to set aside.

The appeal hearing and judgment

35. Having granted (limited) permission to appeal on 23 April 2021, the judge heard the appeal on 16 July 2021, delivering a full and clear ex tempore judgment at the conclusion of the hearing. He allowed the appeal, with the effect that the order of 5 August 2020 was set aside. The claim form had not therefore been served in time and the claim was struck out.

36. The judge identified at the outset the three grounds on which permission to appeal had been granted, namely:

    i) The admiralty registrar did not give sufficient weight to the fact that the claimant had not made any attempt to serve the claim form within the first five months after its issue;

    ii) The admiralty registrar did not give sufficient weight to the fact that the claimant could have served the claim form within its lifetime but chose not to do so on the ground of expense.

    iii) The admiralty registrar did not give sufficient weight to the fact that the effect of the claimant's application was to deprive the defendant of a limitation defence.

37. He then rehearsed the facts, commenting along the way with heavy criticism of Aegis and Ms McKenna:

    i) The obvious implication from Tozers' letter of 4 June 2020 was that BAI was standing on its right to be served out of the jurisdiction before considering whether to engage fully in the proceedings that had been issued;

    ii) There was no evidence as to why "nothing had been done in respect of service" by early April 2020, or as to why "nothing was done for two months thereafter", or why "nothing was done with any sense of urgency upon Tozers not having confirmed promptly that service could be effected on them";

    iii) There was no evidence on Aegis' side of any awareness of any actual or potential problems with limitation;

    iv) There was no evidence that "any thought at all was given to the inevitable likelihood that normal processes and timescales…would be unreliable for conditions…with Europe then in the grip of the first main wave of the…pandemic, or that any thought was given to the entirely well-known fact that July and August is an annual French legal vacation period.";

    v) Ms McKenna could readily have insisted that, if necessary, the "somewhat expensive fee be agreed", given that it was the only way to ensure timely service and the matter was urgent. Her reaction to the August email demonstrated that she had failed to grasp the urgency and importance of meeting the service deadline;

    vi) The evidence in support of the claim form application was "a wholly inadequate basis for the extension of time sought and was seriously misleading". The reference to delays in obtaining medical records and an expert report had nothing to do with the decision not to attempt to serve the claim form until 23 July. The statement that, due to judicial vacations, the huissiers in the area were all on holiday such that service was unlikely to be possible, was "at best a half-truth". The true position was that an out-of-area huissier was available to effect service within time, albeit at unwelcome significant expense. Additionally there was no reference to expiry of the limitation period.

38. The judge then turned to the law, referring to the relevant passages in the White Book and authorities. He considered that there was no authority for the proposition that there was a need for "exceptional circumstances" in order to justify an extension of time when a limitation defence had accrued; he preferred to proceed on the basis that it would generally be unjust to extend time in such circumstances without there being "a powerful good reason" why the claim form was not going to be served within its period of validity for service.

39. The judge accepted that the admiralty registrar had correctly identified the legal principles to be applied. Absent any primary misdirection of law in approach on the part of the admiralty registrar, he stated that he would proceed on the basis that the question for him was whether it was appropriate for him to interfere with the admiralty registrar's decision because it was "plainly wrong".

40. He stated that he did not recognise in the admiralty registrar's description of the difficulties with service of the claim form the facts of the case. This was, in his view, not a case in which, except in one very limited respect, there was any difficulty about serving the claim form. There was no difficulty other than an additional expense which was the result of needing to serve the claim form at the last minute. The fact that the claim form application was made promptly upon the August email was of little real importance.

41. The judge further held that, when addressing the fact that matters had been left until the last minute, the admiralty registrar wrongly treated a reason for the need for an extension of time as having been already established.

42. Against this background, the judge addressed the first and second grounds of appeal together. In his judgement, the admiralty registrar had "wrongfully treated this case as one in which (a) it had not been and was not going to be possible to serve the claim form in time, when steps were finally taken with a view to serving it, and (b) there was a "reason for not being able to serve it in time" that was inherently a good reason, albeit one the strength of which, as a factor in favour of an extension being granted, was weakened somewhat by the last minute nature of the steps taken." The conclusion that there was a "middling-good reason" was one without any reasonable foundation in the facts.

43. Considering the first judgment as a whole, the judge was of the view that the admiralty registrar had treated the August email as good reason why the claim form could not be served in time. The admiralty registrar was said to be wrong on two counts. It was not a reason why the claim form could not be served in time, and it was in any event not a good reason, because it was unreasonable to take no steps until three weeks prior to the expiry of the validity of the claim form towards effecting service in France in any event, and all the more so in face of the impact of the pandemic and the "inevitable and well-known capacity for delay in France in July or August".

44. On a proper analysis of the facts and considering the application afresh, the judge considered that there was no reason why the claim form would not be served on time, except that a choice had been made not to serve it in good time. There was a failure to take immediate and prompt action in early June 2020 when there was not an immediate confirmation that Tozers were not instructed to accept service. That choice was

compounded with the lack of urgency and the choice not to pursue through the alternative route, albeit at a higher price.

45. Having reached these conclusions, the exercise of discretion by the admiralty registrar could not stand, and fell to be exercised (by the judge) afresh on the basis that the claim form could have been served within time. There was no reason capable of being a good reason why it was not, and the background was one in which, for no reason that had been explained, proceedings were commenced only shortly before the limitation period and that fact was not treated by those acting for the Appellant as having an impact on the importance of procedural compliance.

46. Turning to the third ground of appeal, the judge next commented that the admiralty registrar had treated the limitation point "very lightly". However, had the admiralty registrar been correct about the existence of good reason, the judge would not have been prepared to say that he was not entitled to treat that good reason as on balance outweighing the limitation factor.

47. In the absence of any reason, alternatively any good reason, the balance of hardship did not lie in favour of the Appellant.

48. In conclusion, allowing the appeal, the judge said this:

> "The [admiralty registrar], in my judgment, exercised his discretion upon an incorrect basis, principally because of an unreasonable conclusion not capable, with respect, of justification on the facts that good reason had been shown why the claim form would not be served within its original period of validity of service."

The parties' submissions

The Appellant's position in summary

49. As to the first ground of appeal, Mr Mooney QC for the Appellant submits that the judge misdirected himself as to the correct approach under CPR 7.6(2). All that was required was identification of the reason (or reasons) for not serving in time and an evaluation of the strength of that reason in the overall context. The judge's finding that there was "no reason" because "the claim form could have been served in time" demonstrates that he was applying the wrong test. The judge had in fact identified that "additional expense" was the reason and erred in finding that, as a matter of fact, there was "no reason". The admiralty registrar was aware of the circumstances leading up to and including the email of 4 August 2020. The admiralty registrar correctly determined the reasons why the Appellant was applying for an extension of time.

50. As to the second ground of appeal, it is argued that the judge erred in substituting his own assessment for that of the admiralty registrar in circumstances where the admiralty registrar had taken into account all the relevant factors. The admiralty registrar expressly evaluated the reason for not being able to serve in time; his conclusion that it was a "middling-good" reason was one properly open to him. The material adduced by BAI in support of its application to set aside, highlighted that judicial vacation should not of itself have meant that service could not be effected and that the quotation of

around £2,000 on 4 August 2020 was "colossal and completely unrealistic". Ms McKenna had been assured by Portsea on three separate occasions that there was plenty of time to serve, that there was coverage of service activities and that the "job" could be done in time. Then on 4 August 2020 Ms McKenna was told that Portsea had rejected the (unrealistic) quotation. The admiralty registrar's assessment of the strength of the reason for delay could not be said to be plainly wrong.

51. In his oral submissions Mr Mooney emphasised that the judge had misread the admiralty registrar's statement when he referred to the reason why the claim form "could not" be served. The judge treated the admiralty registrar as having found that service within time was impossible. However, properly understood, it is said to be clear that the registrar did not have in mind impossibility of service, but rather only difficulties with service. Once that error is corrected, it is said that all that is left in terms of the judge's attack on the admiralty registrar's finding as to good reason was that Aegis had left it too late before starting the process of service abroad, and that the Appellant could have paid the sum of £2,000 to achieve service. As to the question of timing, that was a matter which the admiralty registrar considered expressly and was entitled to assess as he did; equally whether or not it was reasonable to expect the Appellant to pay £2,000 was again something for the admiralty registrar to assess as a matter of discretion.

BAI's position in summary

52. For BAI Ms Prager submits that it was not only correct for, but incumbent on, the judge to find that there was no good reason for failing to serve the claim form in time. There was no reason at all why the claim form could not have been served if Aegis "had been so inclined". There was a reason why it was not served, namely "the poor one of disinclination to spend £2,000 in doing so". Aegis did not take positive steps to attempt to serve until three weeks before expiry of the lifetime of the claim form. The difficulties encountered were "entirely predictabl[e]".

53. It is said that an analogy can be drawn with the facts of cases such as *Cecil v Bayat* [2011] EWCA Civ 135, [2011] 1 WLR 3086 ("*Cecil*"), where the claimant's solicitors had delayed service in order to obtain funding. Ms Prager emphasised in her oral submissions, referring to *Cecil* at [97], that the situation here was also one where the reason for non-service was a desire to eliminate risk for the Appellant (in respect of the £2,000 fee for service abroad). That was not a good reason for what was a deliberate decision to delay service, necessitating an application for an extension of time, particularly in a context where the relevant limitation period had expired.

54. As for the second ground, it is said that the judge had in mind that he should only substitute his assessment of the factual matrix for that of the admiralty registrar if he considered that the latter fell outside the generous ambit where reasonable decision-makers may disagree. In these particular circumstances, it was open to the judge to substitute his assessment of the procedural history for that of the admiralty registrar. The reason given by Aegis was not a reason at all; it was an explanation, and a poor one in the context of the pleaded value of the claim.

55. Separately, it is said that there is a self-standing reason for rejecting the (second) appeal. As the judge found, the evidence in support of the claim form application was "seriously

misleading", making for example no reference at all to the fact that the limitation period had expired.

56. This last submission does not warrant further consideration. As the judge recorded, there was no separate ground of appeal based on any complaint of failure of full and frank disclosure, and he did not proceed on that basis. There was no Respondent's Notice. I do not refer to it again.

57. In summary, it is said that there is no proper basis on which to overturn the judgment. The judge was rightly critical of Aegis' general approach and the lack of urgency.

The law

58. CPR 7.6 provides:

> "7.6 – Extension of time for serving a claim form
>
> (1) The claimant may apply for an order extending the period for compliance with rule 7.5
>
> (2) The general rule is that an application to extend the time for compliance with rule 7.5 must be made –
>
> a) within the period specified by rule 7.5; or
>
> b) where an order has been made under this rule, within the period for service specified by that order.
>
> (3) If the claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if –
>
> a) The court has failed to serve the claim form; or
>
> b) The claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and
>
> c) In either case, the claimant has acted promptly in making the application.
>
> (4) An application for an order extending time for compliance with rule 7.5 –
>
> a) Must be supported by evidence; and
>
> b) May be made without notice."

59. It can be seen immediately that there is clear water between the test to be applied on an application for an extension of time to serve a claim form i) before and ii) after the expiry of time for service under CPR 7.5. Specifically, unlike on a retrospective application, a court can allow an application to extend time prospectively without being

satisfied that the claimant has taken "all reasonable steps" to comply with CPR 7.5. There is, as it was put in the leading case of *Hashtroodi v Hancock* [2004] EWCA Civ 652, [2004] 1 WLR 3206 at [17] ("*Hashtroodi*"), a "striking" "contrast" between the two regimes.

60. The Appellant's application for an extension of time was made prospectively, under CPR 7.6(2). As such, it is, strictly speaking, inapposite to speak of a "failure" to serve a claim form within time. Rather, the Appellant needed a (prospective) extension of time in which to serve.

61. CPR 7.6(2) has been examined in a number of well-known cases, including *Hashtroodi*; *Collier v Williams* [2006] EWCA Civ 20, [2006] 1 WLR 1945; *Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203, [2008] 1 WLR 806 ("*Hoddinott*"); *FG Hawkes (Western) Ltd v Beli Shipping Co Ltd* [2009] EWHC 1740 (Comm), [2009] All ER D 207; *Cecil*; *Al-Zahra (PVT) Hospital and Others v DDM* [2019] EWCA Civ 1103, [2019] 6 WLUK 444 ("*Al-Zahra*"); and, most recently, *Qatar Investment & Projects Holding Co v Phoenix Ancient Art SA* [2022] EWCA Civ 422, [2022] 3 WLUK 432 ("*Qatar*").

62. For ease of reference, I summarise the relevant general principles as follows:

    i) The defendant has a right to be sued (if at all) by means of originating process issued within the statutory period of limitation and served within the period of its initial validity of service. It follows that a departure from this starting point needs to be justified;

    ii) The reason for the inability to serve within time is a highly material factor. The better the reason, the more likely it is that an extension will be granted. Incompetence or oversight by the claimant or waiting some other development (such as funding) may not amount to a good reason. Further, what may be a sufficient reason for an extension of time for service of particulars of claim is not necessarily a sufficient reason for an extension for service of the claim form;

    iii) Where there is no good reason for the need for an extension, the court still retains a discretion to grant an extension of time but is not likely to do so;

    iv) Whether the limitation period has or may have expired since the commencement of proceedings is an important consideration. If a limitation defence will or may be prejudiced by the granting of an extension of time, the claimant should have to show at the very least that they have taken reasonable steps (but not *all* reasonable steps) to serve within time;

    v) The discretionary power to extend time prospectively must be exercised in accordance with the overriding objective.

63. Following up on the question of limitation, as noted in *Qatar* at [17(iv)] (and *Al-Zahra* at [52(3)]), it was stated in *Cecil* (at [55]) that a defendant's limitation defence should not be circumvented save in "exceptional circumstances". This is a phrase that needs to be approached with care; it is one about which the judge himself expressed reservations. At their outer limit, the words "exceptional circumstances" can be taken to mean "very rare" (or "very rare indeed"). In the present context, however, the phrase should not be

taken to mean any more than its literal sense, namely "out of the ordinary". It means, as identified for example in *Hoddinnott* at [52], that the actual or potential expiry of a limitation defence is a factor of considerable importance. The factors in favour of an extension of time will have to be, either separately or cumulatively, out of the ordinary. Only in this way can the phrase "exceptional circumstances" be reconciled with the primary guidance in *Hashtroodi* (at [18]) and [22]) that the discretion under CPR 7.6(2) is to be exercised in accordance with the overriding objective and in a "calibrated" way, as emphasised in *Qatar* at [17(iii)]. It is neither helpful nor necessary to go further in terms of guidance, by reference to a need for "powerful good reason", as the judge suggested, or otherwise.

64. For the sake of completeness, such an approach is consistent with *Cecil*, properly understood. In *Cecil,* described by Rix LJ (at [98]) as "commercial litigation on a grand scale", it was held that the fact that an extension of time was needed to obtain funding (or rather because of a desire that funding be in place for the whole of the litigation so as to eliminate or minimise any risk to the claimants) was not a good reason. The writ could and should have been served with an application thereafter for a stay if necessary (see in particular [27b)], [28b)], [42], [43], [51], [96] and [97]). In what were obiter remarks addressing the relevance of limitation periods, Stanley Burnton LJ (at [48]) emphasised that there was no need for a claimant to establish that all reasonable steps had been taken. He referred to the comments of Rix LJ in *Aktas v Adepta* [2011] QB 894 at [91], where Rix LJ referred to the need for strict regulation of the period for service to avoid the statutory limitation period becoming "elastic at the whim or sloppiness of the claimant or his solicitors". None of this equates with a need for there to be "exceptional circumstances" in the sense of circumstances that are very rare.

65. Finally, and self-evidently, the result of an application under CPR 7.6(2) in each case will be highly fact-specific. A comparison with the outcome on the facts of other cases is unlikely to be instructive.

Discussion

66. It is important at the outset to identify the proper role of the judge, sitting in an appellate capacity. The appeal was limited to a review; it was not a re-hearing (see CPR 52.21(1)). Further, it was a review of an exercise of discretion by the admiralty registrar on a procedural matter. The appellate court's function was thus not to carry out a balancing task afresh, but to ask whether the decision of the judge below was wrong by reason of some identifiable flaw in the treatment of the question to be decided, such as a gap in logic, a lack of consistency or a failure to take account of some material factor which undermines the cogency of the conclusion and which takes the decision outwith the generous ambit within which a reasonable disagreement is possible (see for example *R (Good Law Project Ltd) v Secretary of State for Health and Social Care* [2022] EWCA Civ 355, [2022] 1 WLR 2339 ("*Good Law*") at [37]).

67. The essential question for the judge was therefore whether the decision of the admiralty registrar to extend time or, more accurately, to refuse to set aside the order extending time, was one which fell within the range of reasonable decisions open to him.

68. A rigorous approach to the limited scope of the appellate function may be of particular importance in the context of applications under CPR 7.6(2). In some cases, for example, the result of reversing a decision to grant an extension of time for service may

be to deprive the claimant of the opportunity to issue a fresh claim within the relevant limitation period(s). Although this is not such a case, here the Appellant can point to the fact that, when the admiralty registrar granted the extension of time (on 5 August 2020), there were still nine days in which she could have effected service in France. Had the admiralty registrar rejected the application, then she would still have had the opportunity to serve in time (by immediately reverting to Portsea and insisting that the huissier's quotation at £2,000 be accepted).

69. As set out above, at no stage was it suggested that the admiralty registrar incorrectly identified the law. Indeed the judge accepted that the admiralty registrar had correctly stated the principles to be applied. The admiralty registrar thus took express account of BAI's right to be sued by means of originating process issued within the statutory period of limitation and served within the period of its initial validity of service, and recognised the need to justify departure from this starting point. In terms of the exercise to be carried out in practice, the admiralty registrar put it neatly: the exercise is essentially first to evaluate the reason, and then to put that reason into a wider context, which requires consideration of the overriding objective and the balance of hardship to the parties.

70. That is precisely what the admiralty registrar then went on to do. He considered first the reason for the purpose of the exercise identified in the authorities. Contrary to the judge's understanding, it is clear that the admiralty registrar considered the reason to be difficulties with, and not impossibility of, service. This is apparent in particular from the clear wording of [8]:

> "Difficulties with service of the claim form are undoubtedly capable of being a good reason. There is plenty of authority for that, and that was the situation here. There is no reason to doubt Miss McKenna's evidence on this…"

71. He evaluated the strength of the reason, concluding that it was neither weak not strong, but "middling good" and nevertheless still a good reason.

72. The judge was wrong to find that that conclusion had "no reasonable foundation in the facts".

73. First, there were undoubtedly difficulties with service. Putting to one side Tozers' unexplained failure to answer promptly whether they were instructed to accept service, Ms McKenna considered that it would not be safe to use the Foreign Process Service. She turned to Portsea which, through Mr Warburton, assured her repeatedly that Portsea would be able to secure service in time. Then, 10 days before the last day for service, and out of the blue, Ms McKenna was informed that that would not be possible, save on unacceptable terms, by paying some £2,000 (not including translator's fees).

74. The judge appears to have considered that there were no difficulties because that was a sum that it would have been reasonable to pay – it was in his words (only) "somewhat high". However, it was at the very least open to the admiralty registrar to take a different view. This was a relatively modest personal injury claim. Portsea described the quotation as "colossal and completely unrealistic". (That view would appear to have been fully justified, given the fixed charge regime referred to above.) The question of reasonableness was always one of fact and degree for the admiralty registrar to evaluate. The admiralty registrar was entitled to consider that, even in the context of an expired

limitation period, it was reasonable for Aegis to opt to make a prospective application for an extension of time for service, rather than to pay what Ms McKenna was being told was a ridiculous fee. In the light of Tozers' approach revealed in the correspondence, it could reasonably have been concluded that such expenditure would be challenged as disproportionate in any costs assessment in which it was sought to be recovered from BAI.

75. Seen in this light, it was artificial to speak of the Appellant, through her solicitors, making "choices" not to serve in the initial six month period of the claim form's validity. It was open to the admiralty registrar to consider that the Appellant had, in reality, no choice, or that the choice to seek an extension, rather than pay a disproportionate and potentially irrecoverable fee, was a reasonable step to effect service in the circumstances.

76. *Cecil* does not support BAI's position in this regard, not least because the landscape there was completely different, but also because this was not a question of waiting for funding for the whole litigation so as to eliminate risk for the Appellant. Rather, it was a question of being unable to find a huissier to effect service in France in time at reasonable and proportionate cost.

77. It is right that Ms McKenna had not commenced her enquiries for service abroad until three weeks before service was due, as the admiralty registrar expressly recognised. However, the admiralty registrar was entitled to conclude, as he did, that this factor did not trump every other factor, and to consider that it was relevant that in normal times three weeks would in fact have been sufficient. That three weeks would normally have been adequate was a finding amply made out on the facts. Ms McKenna was assured no less than three times by Portsea that such a period would indeed suffice. The judge made much of what he described as the "inevitable and well-known capacity for delay in France in July or August". However, Portsea was assuring Ms McKenna in July that service could be effected in three weeks and the evidence from the Chamber of Court Bailiffs for the Department of Finistere was that there always had to be a huissier on duty for urgent work, including in July and August, and finding a huissier to effect service should not be difficult.

78. It appears to have been the judge's view that it was incumbent on Aegis, in effect, to serve the claim form immediately on issue, given the limitation position. The limitation position was of course a factor of overarching importance, and the reasonableness of Aegis' conduct needed to be assessed in that context.

79. However, it was not a case of Ms McKenna doing nothing about service of the claim form until three weeks before the expiry of its validity, or acting unreasonably in not taking steps to arrange service as soon as the claim form was issued.

80. At the outset, Ms McKenna recognised the consequence of service of the claim form, namely that it would trigger the need to serve particulars of claim and a medical report within 14 days. She knew specifically that Tozers considered the medical evidence to be "integral" to any assessment of liability (even if she did not understand why that was the case). During the correspondence, Mr Hayes repeatedly referred to the importance of the medical evidence. It was not unreasonable for Ms McKenna to seek to obtain the necessary medical evidence, or an extension of time for serving the particulars of claim, before serving the claim form for so long as it did not create a real risk of being

unable to serve the claim form in time. When it became clear that there would be delays in drafting the particulars of claim, a request was made (on 14 May 2020) for BAI to agree to an extension of time for service of the particulars of claim. Tozers said on 15 May 2020 that it would take instructions but did not revert on the point within the next fortnight. On 27 May 2020 Ms McKenna repeated the request. On 4 June 2020 Tozers indicated that consent would not be forthcoming.

81. On 10 June 2020 Ms McKenna made the first of a series of requests for Tozers to indicate whether it was instructed to accept service of the claim form, a copy of which was of course already in their possession. It was reasonable for her to expect that Tozers might be so instructed. As Males LJ commented when granting permission to appeal:

> "On the face of things, it is surprising that a company running a daily service to an English port should refuse to accept service of proceedings by a passenger".

82. It would have been a step which would obviously have saved time and costs. It was not unreasonable for Ms McKenna to wait for a reasonable period of time for an answer.

83. The judge took the view that the "obvious implication" from Tozers' letter on 4 June 2020 was that BAI was standing on its right to be served out of jurisdiction. I would not accept that but in any event, it is clear that Ms McKenna, to Tozers' knowledge, did not see it that way – hence her subsequent requests. And even if that was BAI's position on 4 June 2020, there was no reason why that position could not change, for example in the light of receipt of Dr Gibbons' report on 22 July 2020.

84. There was no explanation for the failure to answer Aegis' repeated enquiries in June as to whether Tozers was instructed to accept service until 15 July 2020 and the failure to answer the renewed enquiry on 22 July. As Ms Prager pointed out, there was no obligation on BAI positively to assist the Appellant in effecting service, provided that it had not done anything to place obstacles in her path (see *Good Law* at [57]). But there was no apparent excuse for BAI's failure to respond timeously, one way or the other, to Ms McKenna's question. Ms Prager was bound to accept that the failure to respond promptly could, at least on one view, be seen as tactical manoeuvring on the part of BAI.

85. It was also reasonable for Ms McKenna to rely on Portsea's repeated assurances, until the August email, that service could be effected in France in time.

86. None of this detracts from the important fact that, as the admiralty registrar stated, Aegis might prudently have commenced the process of instructing Portsea earlier than occurred, given the limitation position and particularly when faced with silence in response to the request to Tozers to accept service in June. But Tozers' failure to respond promptly in June contributed to the ultimate inability to serve in time at reasonable and proportionate cost.

87. In short, the admiralty registrar's identification and evaluation of the reason for the need for an extension of time for service of the claim form had a solid foundation. It was open to him properly to conclude that the difficulties in service amounted to a "middling good" reason. It is important always to remember that a claimant seeking an extension of time prospectively under CPR 7.6(2) does not have to establish that all reasonable steps had been taken. Other judges might have reached a different conclusion as to

whether or not there was a good reason; but that is not the test. The admiralty registrar's evaluation fell squarely within the range of reasonable assessments open to him.

88. In these circumstances, it did not fall to the judge to carry out the calibration exercise afresh (and it is clear that he would not have gone on to do so, had he upheld the admiralty registrar's conclusion on good reason).

89. As to the overall evaluative exercise to be carried out under the overriding objective, there is no proper basis on which to interfere with the admiralty registrar's balancing out of the various factors. The judge himself concluded that the expiry of the limitation would not have been sufficient to outweigh good reason, had such a reason existed. That conclusion was not challenged by way of Respondent's Notice.

90. The admiralty registrar calibrated the good reason that he considered to exist, namely difficulties in service, alongside the following additional relevant factors:

    i) The limitation period had expired, as he had understood at the time of making the order of 5 August 2020;

    ii) The application to extend time was made promptly;

    iii) Tozers had been provided with a copy of the claim form, a full letter of claim and a medical report. BAI had therefore suffered no prejudice in the conduct of the claim;

    iv) By contrast, if the order extending time were to be set aside, the Appellant would lose her cause of action against BAI, which would add considerably to the distress she had already suffered.

91. It was fully open to him to conclude in all the circumstances that the balance of hardship was in favour of the Appellant and that it would be in accordance with justice and proportionality to allow the claim to go forward.

92. The admiralty registrar's decision was therefore not plainly wrong; rather it was within the generous ambit where reasonable decision-makers may disagree.

Conclusion

93. For these reasons, I would allow the appeal.

Lord Justice Popplewell:

94. I agree.

Lady Justice Simler:

95. I also agree.