Neutral Citation Number: [2022] EWCA Civ 422

Case No: CA-2021-000726 (previously A2/2021/1486)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr Justice William Davis
[2021] EWHC 2243 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 March 2022

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE COULSON
and
LADY JUSTICE WHIPPLE

- -

Between :

(1) QATAR INVESTMENT AND PROJECT DEVELOPMENT HOLDING COMPANY **(2) HIS HIGHNESS SHEIKH HAMAD BIN ABDULLAH AL THANI**	**Claimants/ Appellants**
- and -	
PHOENIX ANCIENT ART S.A.	**Defendant/ Respondent**

- -
- -

Roger Stewart QC and Luke Harris (instructed by **Pinsent Masons LLP**) for the **Appellants**
Gilead Cooper QC and Francesca Mitchell (instructed by **Boyes Turner LLP**) for the **Respondent**

Hearing date : 15 March 2022

- -

Approved Judgment

Lady Justice Whipple:

Introduction

1. The Appellants are the Claimants in the underlying action. Their claim concerns an object known as the Head of Alexander the Great as Herakles (the "Head of Alexander") which was purchased by the First Claimant, a Qatari company of which the Second Claimant is the CEO, from the Respondent, the Defendant to the underlying action, a Swiss dealer in art and antiques. The purchase price was US$3 million. The sale was completed on 24 January 2014. For ease I will continue to refer to the parties as Claimants and Defendant respectively.

2. The Claimants now allege that the Head of Alexander is a fake; it is not an artwork from ancient Greece, as they had understood it to be when they purchased it.

3. The six year limitation period for the Claimants to bring a claim against the Defendant for return of the purchase price and damages for associated losses expired on 24 January 2020. Just before expiry, on 22 January 2020, the Claimants issued a claim form. Pursuant to CPR 7.5, the Claimants had four months to serve the claim form within the jurisdiction and six months to serve out of the jurisdiction; if the latter course was taken, the period for service, unless extended, expired on 22 July 2020.

4. The Claimants did not serve the claim form within that time. Instead, on 26 June 2020, the Claimants, acting by their solicitors Pinsent Masons, applied for an extension of time for service of the claim form, pursuant to CPR 7.6(2). That application was made *ex parte*, although Pinsent Masons provided a copy to Boyes Turner, a firm of solicitors acting for the Defendant in related matters. In that first application, Pinsent Masons asked for the matter to be resolved at a hearing. That application went unanswered by the Court despite some chasing, so Pinsent Masons issued a second application, also *ex parte*, on 17 July 2020 asking the Master to deal with the matter urgently on the papers. That second application was granted by Master Gidden on 20 July 2020, with the order perfected on 22 July 2020. That order extended time by four months, to 22 November 2020.

5. On or about 23 June 2020, just before issuing the first application and as a result of enquiries set in train on 16 June 2020, Pinsent Masons had found out that the Foreign Process Section of the High Court ("the FPS") was closed due to the pandemic. The FPS is the body responsible for serving proceedings outside the jurisdiction. As matters stood at the time of the two applications for an extension, the FPS was closed, it was unknown when it would reopen, there was a large backlog of cases awaiting service outside the jurisdiction, and the FPS was advising litigants who wanted to serve outside the jurisdiction to seek extensions of time for service.

6. It subsequently emerged that the FPS had been suspended since 16 April 2020. The FPS remained closed, in fact, until 28 July 2020.

7. The Claimants submitted their application for service out of the jurisdiction to the FPS on 11 August 2020 (although they suggest that the package of documents was ready by 29 June 2020 – nothing turns on the gap between those two dates). The FPS

served the Defendant in Switzerland on 8 September 2020, 28 days later and around 7 weeks after the end of the six months permitted for service out of the jurisdiction absent an extension.

8. On 15 September 2020, the Defendant applied to set aside the order of 22 July 2020. That application succeeded before Master Gidden. His decision was upheld on appeal before William Davis J. The Claimants now appeal against the judgment of William Davis J. Permission to appeal to this Court was granted on the papers by Males LJ. It follows that unless the Claimants succeed in this appeal, they are out of time to issue a claim against the Defendant for their alleged losses in connection with the Head of Alexander.

9. The Claimants' case in this Court is based on the effects of the pandemic. It is said that the Master (and the Judge) should have made some or greater allowance for the disruption caused by the pandemic. They point in particular to the closure of the FPS from 16 April to 28 June 2020, but also to the general upheaval experienced by businesses at this time, as the pandemic first struck. They argue that the Master should have refused the application to set aside, alternatively the Judge should have upheld the appeal against the Master.

10. Before us, as before William Davis J, the Claimants were represented by Roger Stewart QC and Luke Harris, and the Defendant was represented by Gilead Cooper QC and Francesca Mitchell. We are grateful to all counsel for their skilled and concise written and oral arguments.

The Law

Civil Procedure Rules

11. CPR 7.6 is headed "Extension of Time for Serving a Claim Form". CPR 7.6(2) is in issue in this case; it provides as follows:

> "(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."

12. CPR 7.6(3) applies where applications for extension of time are made retrospectively, after the time for service of the claim form has expired. That is not this case. Accordingly, the specific rules set out in CPR 7.6(3) which govern this category of case – including a requirement to show that "all reasonable steps" were taken by the applicant – are not applicable here.

13. CPR 7.6(4) provides as follows:

> "(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."

14. Paragraph 8 of Practice Direction 7A is headed "Extension of Time" and provides:

> "8.1 An application under rule 7.6 (for an extension of time for serving a claim form under rule 7.6(1)) must be made in accordance with Part 23 and supported by evidence.
>
> 8.2 The evidence should state:
>
> (1) all the circumstances relied on,
>
> (2) the date of issue of the claim,
>
> (3) the expiry date of any rule 7.6 extension, and
>
> (4) a full explanation as to why the claim has not been served."

15. PD51ZA was in force from 2 April 2020 until 20 October 2020. Paragraph 4 provides:

> "In so far as compatible with the proper administration of justice, the court will take into account the impact of the Covid-19 pandemic when considering applications for the extension of time for compliance with directions, the adjournment of hearings, and applications for relief from sanctions."

Case Law on CPR 7.6(2)

16. CPR 7.6(2) has been examined in a number of cases. Many of them are helpfully summarised by Haddon-Cave LJ in *Al-Zahra (PVT) Hospital and Others v DDM* [2019] EWCA Civ 1103 at [48] to [54].

17. There is no dispute between the parties to this appeal on the approach that is to be adopted. It is sufficient to identify the key points which are relevant in this case:

    i) First, the Court's power to extend time is to be exercised in accordance with the overriding objective (*Hashtroodi v Hancock* [2004] 1 WLR 3206 at [18]; *Al Zahra* at [49(2)]).

    ii) Second, it is not possible to deal with an application for an extension of time under CPR 7.6(2) "justly" without knowing why the claimant has failed to serve the claim form within the specified period (*Hashtroodi* at [18]; *Al-Zahra* at [49(3)]). Thus, the reason for the failure to serve is a highly material factor (*Hashtroodi* at [22]; *Al-Zahra* at [49(8)]). Where there is no good reason for the failure to serve the claim form within the time permitted under the rules, the court still retains a discretion to extend time but is unlikely to do so (*Hashtroodi* at [40]; *Al-Zahra* at [49(1)].

    iii) Thirdly, a "calibrated approach" is to be adopted, so that where a very good reason is shown for the failure to serve within the specified period, an extension will usually be granted; but generally, the weaker the reason, the

more likely the court will refuse to grant the extension (*Hashtroodi* at [19]; *Al-Zahra* at [49(4)]). Weak reasons include: a claimant who has overlooked the matter (*Hashtroodi* at [20]; *Al-Zahra* at [49(5)]), and an applicant who has merely left service too late (*Hashtroodi* at [18], citing from Professor Zuckerman on Civil Procedure at p 180; *Al-Zahra* at [50]).

iv) Fourthly, whether the limitation period has expired is of considerable importance (*Al-Zahra* at [50] and [51(3)]; *Hoddinott v Persimmon Homes (Wessex) Ltd* at [52]). Where an application is made before the expiry of the period permitted under the rules for service, but a limitation defence of the defendant will or may be prejudiced, the claimant should have to show at the very least that he has taken 'reasonable steps' (*Cecil v Bayat* [2011] EWCA Civ 135 at [48]; *Al-Zahra* at [52(1)]); a claimant's limitation defence should not be circumvented save in 'exceptional circumstances' (*Cecil v Bayat* at [55]; *Al-Zahra* at [52(3)]).

18. The Claimants rely on certain passages in *Cecil v Bayat*, where the Court of Appeal allowed an appeal by the Defendants against the Judge's refusal to set aside orders extending time for service of a claim form. It was a case where limitation had expired since issue of the claim form, so that, like this case, if the extension was set aside, the Claimants would be out of time to reissue. The Court considered the relevance of limitation to the application of CPR 7.6(2). Stanley Burnton LJ said at [55]:

> "It is of course relevant that the effect of a refusal to extend time for service of the claim form will deprive the claimant of what may be a good claim. But the stronger the claim, the more important is the defendant's limitation defence, which should not be circumvented by an extension of time for serving a claim form save in exceptional circumstances."

In a concurring judgment, at [76] Rix LJ re-stated a passage from an earlier judgment, *Atkas v Adepta* [2011] QB 894, at [91]:

> "In such a system, it is important therefore that the courts strictly regulate the period granted for service. If it were otherwise, the statutory limitation period could be made elastic at the whim or sloppiness of the claimant or his solicitors. For the same reason, the argument that if late service were not permitted, the claimant would lose his claim, because it would become time-barred, becomes a barren excuse."

Turning back to the case at hand, he said:

> "108. … It is therefore for the claimant to show that his "good reason" directly impacts on the limitation aspect of the problem, as for instance where he can show that he has been delayed in service for reasons which he does not bear responsibility, or that he could not have known about the claim until close to the end of the limitation period. If he cannot do that, he is unlikely to show a good or sufficiently good reason in a limitation case.

> 109. …That means that in a limitation case, a claimant must show a (provisionally) good reason for an extension of time which properly takes on board the significance of limitation. If he does not do so, his reason cannot be described as a good reason. It is only if a good reason can be shown that the balance of hardship should arise."

Case Law on the pandemic as a reason for extending time

19. We were told that that there was no authority from this Court on the approach to extensions of time in pandemic conditions. We were supplied with copies of the following cases which have considered the effect of the pandemic on various sorts of applications to extend time which have come before the lower courts: *Municipio de Mariana and Others v BHP Group PLC* [2020] EWHC 028 (TCC) (HHJ Eyre QC), see [32], *Melanie Stanley v London Borough of Tower Hamlets* [2020] EWHC 1622 (QB) (Julian Knowles J), see [15] and [33] where the judge found that the pandemic did, in the context of that case, provide a "good reason" to set aside a default judgment, and *STA v OFY* [2021] EWHC 1574 (Comm) (Butcher J), where the judge found, in the context of that case, that the pandemic was not a good reason to extend time to bring a challenge under the Arbitration Act 1996, and see [24] in particular where the judge criticised the lack of evidence to support the application.

Master Gidden's Judgment

20. I turn to Master Gidden's judgment. In line with the principles and case law outlined above, it was for him to establish, on the evidence before him, the reasons for seeking an extension of time, and then to determine whether those reasons were sufficiently good reasons (bearing in mind the effect on limitation) to justify granting the extension.

21. In his *ex tempore* judgment he set out the facts in brief. He had before him various witness statements, including two from Mr Pulford, the partner with responsibility for this matter at Pinsent Masons; his first witness statement was dated 26 June 2020 (filed in support of the original application) and the second was dated 29 January 2021 in support of the Claimants' resistance of the Defendant's application to set aside. The Master referred to the evidence which sought to explain the steps the Claimants had taken and to excuse any failure in the event that service within time was not going to be possible ([5]). He recorded the Claimants' case that the closure of the FPS meant that, with hindsight, an extension of time was inevitable. He noted the Claimants' concession that from issue up until May 2020 no specific steps for service had been taken, and their submission that there were good reasons to justify an extension of time ([6]). He found that of the six months permitted for service, the Claimants did not use any of the first three and a half months to take steps towards service ([7]). He found that the reason for that was that the Claimants were proceeding on the basis that the Defendant's UK solicitors (Boyes Turner) would accept service within the jurisdiction; he said that whether they would or would not accept service could have been established at the point of issue of the claim form or shortly after that, but in the event the Claimants asked Boyes Turner to accept service on behalf of the Defendant by letters dated 7 and 15 May 2020 ([8]). When Boyes Turner did not reply, the Claimants turned their attention to service on the Defendant company in Switzerland, taking about a month to gather advice about how to do this,

so that the request to serve outside the jurisdiction was in the event made on 23 June 2020 (I note that the first application was in fact made on 26 June 2020); at about the same time, the Claimants became aware that the FPS was advising that extensions of time to cover the disruption to its services be sought and in consequence an application to extend time was made; by that time the deadline for effecting foreign service was only three weeks away ([11]).

22. The Master then considered whether this history disclosed a good reason not to have served the Defendant by 22 July 2020 ([12]). He reminded himself that this was a claim issued just before limitation expired, a factor of importance under the case law, and that it was a sizeable claim in which much was at stake for both sides ([13]). He addressed the impact of the public health emergency, concluding that the upheaval meant that it would have been wiser for the Claimants' solicitors to leave less to chance ([14]). He said that experience had shown that the Claimants could not afford to presume anything of the Defendant and that "vital time … was lost in hoping for the best" ([15]), and he again recorded the Claimants' concession that from issue of the claim to the point of suspension of the FPS in April 2020, and then into early May 2020, no specific steps for service were taken, with no enquiries being made of the FPS until 16 June 2020 ([16]).

23. The Master concluded at [17]:

> "Bearing in mind these factors and applying the principles in *Al-Zahra*, it is not in my estimation possible to conclude other than the Claimants simply failed to grasp the nettle of what had to be done in the time permitted by rule and in keeping with the circumstances that prevailed in order to successfully accomplish what needed to be done."

24. He added at [18]:

> "Considerations as to why the claim was not issued sooner; even holding fire on issue further whilst hoping still that the dispute could be resolved by negotiation; believing that the defendant solicitors would accept service in the jurisdiction and that they would reply to correspondence; problems encountered with electronic filing with the court; court errors and administrative inefficiency; the long-standing nature of the dispute as to authenticity; the raft of activities after 19 May which the claimants solicitors valiantly threw themselves into; the speed with which the claimants acted once the extensions had been granted on an ex parte basis; these are all factors which add to the picture but they do not to my mind, on a proper application of the principles, alter the outcome to be arrived at now."

25. He considered the fact that limitation had expired and that the case law provided that a limitation defence should not be circumvented save in exceptional circumstances, but was not persuaded that the circumstances in this case could be considered so exceptional as to perforate an otherwise strict regime and that "[T]here is in this instance, no basis to exercise a discretion in the Claimants' favour." ([19]).

William Davis J's Judgment

26. The Claimants appealed to the Judge, adopting grounds of appeal which are more extensive than the grounds before us. They asserted that Master Gidden had misdirected himself on the law, alternatively failed to take account of all material facts in the exercise of his discretion, identifying various pandemic-related facts which they said had not been sufficiently or correctly taken into account by the Master. The Claimants sought permission to rely on a third witness statement of Mr Pulford, dated 11 March 2021, in which Mr Pulford said, amongst other things:

> "11. Consequently, during this time, normal case management and decision making practices with respect to the service of the claim were disrupted and tasks took longer, including for myself and my assistant at the time …. Whilst in retrospect it is difficult to precisely state or quantify what would have been done and when with respect to the service of the claim *but for* the impact of Covid-19, and notwithstanding other work related pressures and commitments, I have a high degree of confidence that, were it not for the effect of Covid-19, the two letters sent by Pinsent Masons to Boyes Turner LLP on 7 May and 15 May 2020, in which Boyes Turner were asked to confirm acceptance of service by email on behalf of the Defendant, would have been sent sooner. Had the letters been sent earlier and the same lack of response received, Pinsent Masons would have taken the requisite steps toward service of the claim out of the jurisdiction at an earlier date, including those steps outlined in … my first witness statement and … my second witness statement."

27. In his judgment, William Davis J set out the facts in detail ([5]) – [26]). He set out the legal framework including the relevant provisions of the CPR and the essential propositions to be drawn from the cases ([27] – [28]). He reviewed the Master's judgment ([29] – [33]). He summarised the competing submissions, noting the Claimants' argument that they could not be criticised for not achieving service of the claim form on or before the FPS' closure in April 2020, and after that an extension of time was inevitable in light of the wholly unexpected event, namely the pandemic; further he noted the contents of Mr Pulford's third witness statement ([34] – [36]).

28. William Davis J rejected the Claimants' arguments that the Master had erred in law in the approach he took ([38] – [40]); those grounds are not renewed before us and I say no more about them. He turned to the suggestion that Master Gidden had erred in the exercise of his discretion, summarising the three main points being advanced by the Claimants, which were: (i) that the Master had failed to make any allowance for the fact that the FPS was suspended from 16 April 2020 rendering service out of the jurisdiction from that date until the FPS opened impossible; (ii) that the Master was illogical in seeming to suggest that the Claimants should have anticipated the pandemic and its effects earlier and before they were generally recognised; and (iii) the fact that the FPS had itself advised Pinsent Masons to apply for a lengthy extension and to hold off submitting any documents for service until after it had heard the outcome of its application for an extension of time ([41]).

29. The Judge considered these points in sequence. As to (i), he noted that the difficulties with the FPS did not begin until the middle of March with the advent of the pandemic and the service was not suspended until the middle of April 2020. The Claimants had

issued just before expiry of limitation and it was incumbent on them to act promptly. The rule permits 6 months to serve out of the jurisdiction, not the better part of 6 months before taking any steps to discover what needs to be done to serve out of the jurisdiction. Reasonable steps in the context of this case would have involved the Claimants at an early stage informing themselves of the processes for service out of the jurisdiction. The Claimants had taken an optimistic view of the attitude of the Defendant to accepting service via Boyes Turner, which attitude was unwarranted given the history of the case in the period preceding issue of the claim form when negotiations towards settlement and extension of a standstill agreement had been underway but were in the end unsuccessful. Master Gidden had been clear that the Claimants' lack of activity between issue and early May 2020 was a critical factor in his reasoning. He had given proper weight to the closure of the FPS but "[i]n reality, those issues were not of the significance argued for by the Claimants" ([42]). As to (ii), he did not find the paragraph of the Master's judgment dealing with the effects of the pandemic the easiest to understand, but he thought the Master was entitled to say that the pandemic had not come out of the blue; it was not illogical for him to refer to the need to leave nothing to chance given what was unfolding from early March 2020 ([43]). As to (iii), he accepted that the Master had not referred in terms to the information provided by the FPS to Pinsent Masons in late June (that the service was closed, that litigants should seek an order extending time, that Pinsent Masons had been advised that they should await the outcome of the extension application before submitting the claim form and accompanying documents for service). But he said that this information, and evidence about it, could not have affected the decision of the Master and there had been no need for him to refer to it specifically ([44]).

30. The Judge concluded that there was no error of law by the Master, whose decision lay well within the scope of his discretion. The appeal failed ([45]). He went on to say that even if there had been a proper basis to impugn the Master's decision, he would have re-made the decision in the same way and would not have been swayed by the third witness statement of Mr Pulford which gave no reason for the expressed high degree of confidence that letters would have been written earlier than they in fact were, and no details in relation to when and how the claim form would have been served if the pandemic had not occurred. In consequence, Mr Pulford's third statement carried little weight and would not tip the balance in favour of the Claimants ([46]).

Submissions

31. Mr Stewart for the Claimants argues that the Master (and by extension the Judge, who upheld the Master) adopted an unreasonable approach to the very real problems caused by the pandemic. The effect of the Master's judgment in this case was to reduce the period available to effect service from the 6 months or 182 days permitted under the rules, to just 84 days which is the period from issue of the claim form until 16 April 2020, when the FPS closed - or arguably to 56 days which is the time from issue to lockdown on 16 March 2022 (in fact, lockdown occurred on 23 March 2022 which means that number is a few days out). He argues that in the face of this global pandemic, and in light of what we know its effect to have been on the FPS, it was almost inevitable that service would have been delayed beyond the six months and an extension of time was going to be necessary in any event. The closure of the FPS was outside the Claimants' control and was the sort of reason Rix LJ had in mind in *Cecil*

v Bayat when he referred at [108] (see above at paragraph 18) to reasons for which a person does not bear responsibility. As things turned out, the FPS reopened on 28 July 2020, the application for service outside the jurisdiction was made on 11 August 2020 and service took place on 8 September 2020, just 28 days later. In addition to the closure of the FPS, the Court should take account of the enormous dislocation caused by the pandemic. The Court does not require evidence to demonstrate what it already knows: this was a great peacetime upheaval in response to which the Court should demonstrate some flexibility in the expectations put on solicitors, particularly in these very early days of the pandemic when businesses were having to adapt to the new working environment very rapidly (Mr Stewart distinguishes *STA v OFY* which was heard in June 2021, by which time the pandemic was well-established). PD51ZA required allowance to be made for the pandemic and such an allowance should have been made even though this practice direction had been revoked by the time of the hearing before the Master. The Claimants did not miss the deadline by much and it is reasonable to suppose that without the disruption of the pandemic, they would have got on with preparing for service of the claim form earlier. It would only need to have been a few days earlier, because the papers were ready to go to the FPS on 29 June 2020 in fact; assuming 28 days for service, the deadline was only missed by a few days.

32. Mr Cooper for the Defendant argues that the Judge, and the Master before him, were right for the reasons they gave. This is a case where the Claimants sat on their hands and did nothing for the majority of the time permitted under the rules. Their reasons for seeking an extension of time were not good reasons and there was no error in the Master's refusal to exercise discretion in the Claimants' favour in the light of the facts as found. The pandemic had little or nothing to do with the delays in preparing to serve the claim form; the Claimants are now simply using the pandemic opportunistically as an excuse for their own dilatoriness.

Discussion

33. The Claimants focus on two particular aspects of the pandemic, the closure of the FPS and the disruption to business. I shall consider those two aspects separately, although of course they are both aspects of the same pandemic and they are connected.

Closure of FPS

34. The Master found that the FPS's closure was not a reason for the Claimants' application for an extension, because the Claimants required the extension of time for other reasons, unconnected with that closure. The Master held that the reason or reasons for the Claimants' not having served the claim form in time (and thus seeking an extension of time) was the Claimants' failure to grasp the nettle and get on with preparing for service earlier than they in fact did; he noted that they did not even know the FPS was closed until late June 2020, by which time they were already up against the deadline for service of the claim form and already in need of an extension.

35. Those are the facts as found. It is difficult to see how the Claimants can get around them.

36. But in any event, I believe there is a fundamental flaw in the Claimants' argument. The Claimants say that the Court should have taken account of, indeed found to be

determinative, the fact that service would not have been possible by 22 July 2020 in any event given the closure of the FPS. But the Court's task when faced with an application for extension of time under CPR 7.6(2) is to determine the reasons for the application for extension. That is a fact-finding exercise rooted in the evidence provided to the Court. Once the facts are found, the Court evaluates the reasons as good (i.e., are they sufficiently good to justify extension?) or not so good. The Claimants are wrong to suggest that the Court should investigate what the position would or might have been "in any event". That is a different exercise altogether.

37. It is possible to envisage a case where the closure of the FPS might have been a good reason for the extension application. Mr Cooper gave the example of two claimants who issue on the same day against foreign defendants: the first makes sensible preparations for service and submits the papers to the FPS, only to find that the FPS is closed for the remainder of the period for service; the second does nothing towards service and then finds out that the FPS has in fact been suspended and that service could not have been effected anyway; both are in the same position so far as the outcome is concerned, because the FPS is closed; both make applications for extensions of time for service. Mr Cooper submits that the Court's sympathy might very well be with the first claimant, who can show that the FPS' closure was a reason for seeking an extension, but not with the second claimant who (like these Claimants, he argues) did nothing until it was too late and then relied on the fact of closure opportunistically. I agree that the closure of the FPS would be a reason (arguably, a good reason) for the first claimant seeking an extension of time, but it would not be a reason for the second having to do so. I agree that this example illustrates the flaw in the Claimants' argument.

38. In this case, the closure of the FPS was not a reason, let alone the reason, for the Claimants needing to seek an extension of time; they needed an extension anyway. The closure of the FPS, once Pinsent Masons found out about it, simply added to the existing problems.

Disruption to business

39. Mr Stewart also emphasised the disruption caused by the pandemic. He argued that evidence of that generalised disruption was not necessary; but that in any event, there was sufficient evidence before the Court to demonstrate that disruption caused by the pandemic materially contributed to the Claimants' delays in preparing to serve the claim form.

40. Evidence is required to support an extension of time: see CPR 7.5(4) and PD7A paragraph 8, see above. In my judgment, that is true of pandemic-related reasons just as much as other sorts of reasons. I agree with Butcher J in *STA v OFY*. The pandemic had different effects on different businesses; some thrived while others struggled. The Court must be given sufficient detail of the effects of the pandemic in the particular case, in order to make the necessary findings of fact and evaluate the merits of the application. I therefore reject Mr Stewart's submission that the Court should have taken or can now take judicial notice of pandemic-related disruption as a reason for the extension application. The Court cannot make assumptions about the nature and extent of business disruption, and specifically, the effect that any such disruption had on the conduct of a particular case.

41. The problem for Mr Stewart is that there was no evidence before the Master that the pandemic had caused the delays in this case. Mr Pulford's first witness statement did not suggest that the pandemic had anything to do with the request for an extension (Covid is not even mentioned in that statement save for a passing reference in the context of potential difficulties in serving outside the jurisdiction); the reasons he put forward in that statement related entirely to the protective nature of the claim form, the hopes of achieving settlement and the assumption that Boyes Turner would have accepted service. Mr Pulford's second witness statement, prepared for the set aside hearing in February 2016, was to similar effect: he went through the background to the litigation and referred to failed attempts to agree a standstill agreement; he emphasised the hopes of settlement by negotiation in the early months of 2020; he said that counsel and experts needed to be instructed to settle particulars of claim before the claim form could be served; he repeated his firm's assumption that Boyes Turner would accept service. In his second witness statement he did refer to the closure of the FPS, but not to suggest that this had caused his firm any specific difficulty or delay, but instead to make the point that service could not have been effected within time in any event (a point made on appeal and which I have addressed already at paragraphs 33-36 above). He did say in his second witness statement that the pandemic had "indisputably caused delays for solicitors" but he gave no details as to how that had affected the timeline in this case.

42. My own reading of Mr Pulford's first and second witness statements is in line with the Master's view of the evidence and indeed the Judge's view of it too. Pinsent Masons held back investigating service outside the jurisdiction for some months for a number of reasons, none of which was connected with the pandemic.

43. Mr Stewart seeks to rely on Mr Pulford's third witness statement. In reliance on paragraph 11 of that statement (see above at paragraph 26), when read with the rather muted references to the pandemic in the first and second witness statements, Mr Stewart submits that the whole timeline would, but for the pandemic, have shifted earlier in time; and that if it had been so, service within time might have been achieved before the FPS closed, or, alternatively and more likely, the closure of the FPS would have become the effective obstacle in the way of service by 22 July 2020 because the necessary preparations would have been completed before that date.

44. Even if Mr Pulford's third witness statement was properly before us (which it is not, because it was not before the Master), I would not be persuaded that it changes the position. Like William Davis J, I take the view that the third statement would not carry much weight: it is too vague, too speculative in content, too lacking in specifics. Even if Mr Pulford could not say with certainty how many days could have been saved but for the pandemic, he could surely explain the difficulties in his office which gave rise to the delays in this case and try to put some measure on the number of days lost due to the pandemic. Simply to say that he is confident that the letters of 7 and 15 May 2020 would have been sent earlier is insufficient.

Conclusion

45. The Master considered the closure of the FPS due to Covid-19 but did not find that to be a reason for the delays in this case.

46. The Master did not consider the general disruption to business due to the pandemic because he was not asked to, and because there was no evidence of that before him.

47. Neither aspect of the pandemic relied on by the Claimants is capable of assisting them in this appeal. The pandemic cannot provide a basis for setting aside the Master's judgment and restoring the extension order, or for exercising discretion in the Claimants' favour.

48. The Master adopted the correct approach and reached conclusions open to him on the evidence. I would dismiss this appeal.

Lord Justice Coulson :

49. I agree that, for the reasons given by my Lady, Lady Justice Whipple, this appeal should be dismissed. On the face of it, Mr Stewart's best point was that, unless the Claimants had effected service outside the jurisdiction by 15 April 2020 (the date that the FPS was suspended) it would always have required an extension of time. But that was not the reason for the delay which actually occurred: on the findings of the Master and William Davis J, the Claimants only woke up to the difficulties of service outside the jurisdiction over two months later, in late June 2020, and it was the delays up to that point, for which there was no good excuse, which made an application for an extension of time inevitable.

50. That can be tested the other way round. If in late April 2020, the Claimants had been ready to serve outside the jurisdiction, only to be told that the FPS was closed because of the pandemic, a prudent solicitor would have sought an immediate extension of time. It is highly likely that such an application would have been granted. That did not happen because, on the facts here, the Claimants had not even thought about using the FPS until about 23 June 2020, five months into the six month period. It was that delay which necessitated the application for an extension, and that was not a good reason to extend time for service.

Lord Justice Peter Jackson :

51. I agree with the judgments of both Lady Justice Whipple and Lord Justice Coulson.