Case No: M23X055/G22YX905

IN THE COUNTY COURT AT MANCHESTER

The Civil Justice Centre
Manchester

Date: 5 December 2024

Before :

HIS HONOUR JUDGE BIRD

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Between :

KEVIN BROWN	**Appellant/ Claimant**
- and –	
THE CHIEF CONSTABLE OF GREATER MANCHESTER POLICE	**Respondent/ Defendant**

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Ms Sarah Hemingway (instructed by **Broudie Jackson Canter**) for the **Claimant/Appellant**
Mr Zander Goss (instructed by **Legal Services, Greater Manchester Police**) for the **Defendant/Respondent**

Hearing date: 18/10/2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 5 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE BIRD

His Honour Judge Bird:

Introduction

1. In February 2017, Mr Brown was arrested and his car seized. He commenced proceedings against the Defendant on 17 February 2020, by issuing a Claim Form. In March 2020, the Nation became subject to Covid restrictions.

2. The Claim Form was served by post on 16 June 2020. By an order made on 6 July 2020, the proceedings were stayed until 12 October 2020. On 12 October 2020, the Claimant applied for a further stay. On 26 October 20201 the proceedings were again stayed, this time until 12 February 2021. There was a 14 day gap between the ending of the first stay and the grant of the second stay.

3. Particulars of Claim were served on 12 February 2021. No acknowledgment of service or Defence was (or has been) served and on 26 August 2021 an automatic stay pursuant to CPR 15.11(1) was imposed. Thereafter (and by way of summary) on 14 December 2022 Mr Brown applied to lift the stay and at the same time applied for default judgment. The application was served on the Defendant on 23 January 2023. Default judgment was entered on 6 February 2023. On 28 February 2023, the Defendant applied to set the judgment aside and to strike out the claim. In support of the application to set aside judgment it was contended (see paragraph 4 of the witness statement of Sophie Ross-Jones) that the Particulars of Claim had not been validly served so that the time for filing a Defence had not expired and in support of the strike out application it was contended that Mr Brown's failure to serve his Particulars of Claim in time and "*to make an application under CPR 7.6*" was "so serious as to warrant the claim being struck out pursuant to CPR 3.4(2)(c)". The reference to CPR 7.6 was an obvious error. I set out my reasons below.

4. The application to set aside the default judgment and to strike out the claim came before District Judge Iyer in this court on 4 May 2023. The Judge set aside the default judgment and struck out the claim. His order records that he refused the claimant's application for relief from sanctions. He found that the delay in serving the Particulars of Claim, the 14-day period between the end of the first stay (on 12 October 2020) and the start of the second stay (on 26 October 2020),was sufficiently serious to justify strike out. The fact that the order records that an application for relief from sanctions was refused makes it clear that the Judge felt he was dealing with such an application.

5. The Claimant sought to appeal the order in time. I granted permission at an oral renewal hearing in respect of 2 grounds but refused permission to appeal the decision to set aside the default judgment. The 2 grounds (which I deal with below) target the District Judge's approach to CPR 3.9 and the strike out of the claim.

Relevant rules and principles

6. Proceedings commenced on paper are started when the court issues a claim form at the request of a claimant (see CPR 7.2). Where the Claim form is to be served in the

jurisdiction, the claimant must take the relevant step before 12 midnight on the calendar day 4 months after the date of issue of the claim form (CPR 7.5). Particulars of Claim must be served with the Claim Form or served within 14 days after service of the claim form, subject always to a longstop requirement that they are served no later than the latest time for serving a claim form (CPR 7.4)

7. A claimant may apply to extend the time for serving the claim form and should generally do so before time for service has expired. If the application is made after the deadline has passed it may only be granted if the court has failed to serve the claim form or otherwise if the claimant has taken all reasonable step to serve on time but has been unable to do so. In either case, the claimant must make the application promptly (CPR 7.6).

8. If a claim form is served late the proceedings are not a nullity. A Defendant may accept the court's jurisdiction to deal with the claim by, for example, acknowledging service without contesting the court's jurisdiction.

9. A stay (see the Glossary to the CPR) "*imposes a halt on proceedings, apart from taking any steps allowed by the Rules or the terms of the stay*." In *David Grant v Dawn Meats (UK) Limited* [2018] EWCA Civ 2212, Coulson LJ explained that a stay "*operates to 'halt' or 'freeze' the proceedings. In general terms, no steps in the action, by either side, are required or permitted during the period of the stay. When the stay is lifted, or the stay expires, the position as between the parties should be the same as it was at the moment that the stay was imposed. The parties (and the court) pick up where they left off at the time of the imposition of the stay*."

10. Save where a judgment or order is made against a State, it takes effect from the day it is made or such later date as the court may specify (CPR 40.7).

11. CPR 3.4(2)(c) permits the court to strike out a statement of case where there has been a failure to comply with a rule, practice direction or court order. In *Excotek Limited v City Air Express and another* [2021] EWHC 2615 (Comm) Henshaw J refused to strike out a claim on the basis that the Particulars of Claim were served late because it would not be just or proportionate to do so. It was common ground before him that the principles applicable to an application to extend time to serve Particulars of Claim were "*essentially similar to*" but not the same as those applicable when a party seeks relief from sanction under CPR 3.9. Henshaw J emphasised (by reference to *Walsham Chalet Park Ltd v Tallington Lakes Ltd* [2014] EWCA Civ 1607 see paragraphs 45 to 47) that the *Mitchell/Denton* approach is "*relevant and important*" when considering whether to strike out a claim because those principles are reflected in the overriding objective to which the court must have regard when exercising any discretion. However, he noted that "*the ultimate question for the court in deciding whether to impose the sanction of strike-out is materially different from that in deciding whether to grant relief from a sanction that has already been imposed. In a strike-out application under rule 3.4 the proportionality of the sanction itself is in issue, whereas an application under rule 3.9 for relief from sanction has to proceed on the basis that the sanction was properly imposed (see Mitchell, paragraphs 44-45). The importance of that distinction is particularly obvious where the sanction being sought is as fundamental as a strike-out*".

12. In the same case, Henshaw J pointed out that strike out was a draconian step of last resort (*Summer v Fairclough Homes* [2012] UKSC 26), and one of the most powerful weapons in the court's case management armoury which should not be deployed unless its consequences can be justified (*Michael Wilson & Partners v Sinclair* [2015] EWCA Civ 774). To put in another way (as it was put in *Price v Price* [2003] EWCA Civ 888) the Court's duty when faced with such an application "*is to decide whether it would be a disproportionate response to stop the case now by refusing the extension of time outright, or whether it may be possible to fashion a more proportionate response.*"

13. CPR 3.9 applies where a party seeks relief from any sanction imposed for a failure to comply with any rule, practice direction or court order. In *Yesss (A) Electrical Ltd v Martin Warren* [2024] EWCA Civ 14, the Court of Appeal considered the circumstances in which the rule is engaged. Birss LJ explained the position as follows: "*the general approach to working out whether a case is covered by r3.9 is to start by identifying if a rule, PD, or order has been breached. If there is none then the rule does not apply. If there has been a breach then the next task is to identify any sanction for that breach which is expressly provided for in the rules, PDs or in any order. If there is no such express sanction then, outside the third category identified in FXF and the specific recognised instances of implied sanctions identified in Sayers, and Altomart (i.e. notices of appeal and respondent's notices), there is no relevant sanction for the purposes of r3.9, and so that rule does not apply*." The third category identified in FXF (see paragraph 27of *Yesss*) arises where a step is taken as a result of the non-compliance such as the entry of default judgment. The parties agree that that category has no application here.

14. CPR 23.8 allows the court to deal with an application without a hearing if the parties agreed to the terms of the order sought, agreed to dispense with the hearing or if the court does not consider that a hearing would be appropriate. CPR 23.4 deals with applications made "without notice". It requires service of an application notice on each respondent unless a rule or Practice Direction states otherwise or the court dispenses with the requirement. CPR 23.9 provides that where an application is made "without notice" a copy of the application notice and the evidence in support will (unless the Court otherwise orders) be served by the Court with the order. The regimes for making an order without a hearing and for making an order without notice are different. An application for an order to be made without a hearing should, unless the court orders otherwise, be served on every respondent (CPR 23.4).

Two preliminary questions

15. Two questions ought to be determined before I deal with the appeal. Each concerns the nature of the test to be applied when the court considers whether to extend time for service of Particulars of Claim: first should the rules that apply to an extension of time for serving the Claim Form apply? And secondly, how relevant is CPR 3.9?

Is the test for extending time for service of Particulars of Claim the same test applied to a request to extend time for the service of a Claim Form, that is, the CPR 7.6 test?

16. Before me and before the District Judge, Mr Goss submitted that an application to extend time to serve Particulars of Claim was subject to the same stringent test as that which applies to an extension of time to serve a claim form. The statement in support of the application to strike out relies on a failure to make an application under CPR 7.6 (which deals with the Claim Form not Particulars of Claim).

17. In my judgment it is plain that CPR 7.6(3) applies only to an application to extend time to serve the Claim Form and not to an application to extend time to serve Particulars of Claim.

18. I can see nothing in CPR 7, or elsewhere in the CPR, that would lead me to conclude that the CPR 7.6 test should apply to an application to extend time for service of Particulars of Claim.

19. The matter is put beyond doubt by *Totty v Snowden* [2002] 1 WLR 1384 cited in *Venulum* at paragraph 52. The Court of Appeal in that case specifically decided that CPR 7.6 did not apply to service of the Particulars of Claim. Kay LJ said: "*I consider that there is a perfectly sensible reason why a distinction could be drawn between service of the claim form and service of the particulars of claim. Until the claim form is served, the defendant may be wholly unaware of the proceedings. He may, therefore, because of his ignorance be deprived of the opportunity to take any steps to advance the case. The same would not be true if the claim form had been served but the particulars of claim were outstanding. In such circumstances it would be open to a defendant either to seek an order for immediate delivery of the particulars of claim or, if it was justified, to seek to strike out the claim. Thus a strict regime in relation to the claim form and a discretionary regime subject to the overriding objective is a perfectly sensible approach to the differing problems raised by the two types of failure to comply with the rules as to service…..For these reasons I have come to the conclusion that there is no justification for concluding, in the absence of express words to that effect, that the particulars of claim come within the provisions of rule 7.6 by implication. Thus, I am satisfied that the court does have a discretion to extend time in circumstances such as those in this case.*"

20. Whilst not a point on the appeal, it is important to note that the application to strike out was firmly based on a proposition of law (namely that extending time for service of the Particulars of Claim was subject to the same stringent regime that applied to Claim Forms) which was, for the reasons set out in *Totty*, wrong.

The relevance of CPR 3.9

21. It is clear in my judgment that CPR 3.9 has no direct application on the facts before me. Again, whilst not a point in the appeal, I consider it important that the District Judge considered that CPR 3.9 applied directly. Applying the principles set out in *Yesss* the failure to file Particulars of Claim in time attracts no sanction. The third category identified in *FXF* does not apply, neither do the specific recognised instances of implied sanctions that relate to notices of appeal and respondent's notices.

22. In *Yesss*, Birss LJ noted at paragraph 32 that in a given scenario, CPR 3.9 "*either applies or it does not. If it does not then the application will be governed by the*

modern approach to the overriding objective, which will in appropriate circumstances bring in the "ethos" of [3.9]."

23. Henshaw J appears to have taken the same approach in *Excotek*.

24. This is not a CPR 3.9 case because there is no sanction for late service of the Particulars of Claim. I accept however that the proper approach to an application to extend time would have been to apply "*the modern approach*" and bring in the ethos of CPR 3.9 without treating the case as one governed by CPR 3.9. The difference between the approaches (at least in a strike out case) is explained in *Excotek*. In essence the Court must consider proportionality and ask itself if the draconian remedy of strike out is justified.

The Judgment and its context

25. Faced with an application to strike out the claim on the basis of late service, the Claimant's primary position was that the Particulars of Claim had not been served out of time. There is no appeal against the decision that the Particulars were served late. With the benefit of hindsight, the Claimant ought to have applied for a retrospective extension of time in respect of service of the Particulars of Claim.

26. The Claimant made no application to extend time as a fall back. However, the District Judge appears to have treated the relief from sanctions application as if it was an application to extend time. He took a pragmatic approach.

27. The District Judge asked himself what the delay in serving the Particulars of Claim was. He examined two periods of delay: first, between the date on which Particulars of Claim ought to have been served and the date the first stay took effect (17 days between 17 June and 6 July 2020) and secondly, the period between the expiry of the first stay and the commencement of the second (between 12 October and 26 October 2020). He found the first period was not a period of delay because there was an agreement in place that Particulars of Claim did not need to be served. He found the second period was a period of delay.

28. Having determined that the Particulars of Claim had been served late (by 2 weeks), the District Judge asked himself how serious and significant the delay was. Rightly, he concluded that the proceedings were not a nullity. He accepted there was a failure to comply with a rule so that his power to strike out under CPR 3.4(2)(c) arose. Dealing with the gravity of the error he said: "*this is an important error because it is one in respect of which a claimant would be expected to apply for relief against sanctions*." He came to that conclusion by reference to the decision of Edwards-Stuart J (as he then was) in *Venulum v Space Architecture* [2013] 4 Costs LR 596. He went on to conclude that "*unless I grant relief against sanctions to the claimant the claim ought to be struck out*".

29. The District Judge noted that there was no formal request for relief. But went on to deal with the relevant factors, namely (as set out by Mr Gross at paragraph 24 of his skeleton argument: to identify and assess the seriousness and significance of late service of the Particulars, to ask why they had been served late and then "*to evaluate*

all the circumstances of the case so as to enable the court to deal justly with the application".

30. The District Judge's consideration of the first question (on seriousness and significance) was limited to a finding that 2 weeks "*was a significant delay*" because "*2 weeks is a significant period*".

31. As to the second consideration he took account of the fact that the Claimant's solicitor had "*some difficulty in getting instructions from the claimant*" because he was dyslexic. The District Judge must have had in mind an email dated 18 June 2020, exhibited to the witness statement of the Defendant's solicitor prepared in support of the application to set aside the default judgment and strike out the claim. In that email the Claimant's solicitor explains why time was required: "*Mr. Brown has severe dyslexia. It has been difficult to get instructions from him over the phone on documents I have sent to him in the past. With something as complex as particulars of claim in order to be satisfied that he has a sufficient enough understanding of the contents in order to sign a statement of truth I think it is necessary to see him in person or at least via video link. At present there is no direct access to the prison, and we are unable to organise a video link due to the court and prison not being able to facilitate this*." The witness statement records at paragraph 7 that this explanation as to why the Particulars of Claim would not be served in time was accepted. The District Judge noted that he had no formal evidence before him that the Claimant was indeed dyslexic.

32. Dealing with the third point, the District Judge noted that the Defendant had not responded at all to the Particulars of Claim and that there was a "*long, apparently unexplained delay by the Claimant in bringing the case*" and a delay of 18 (or 16) months before the Claimant asked for the automatic stay to be lifted and judgment to be entered. He noted that the Claimant had asked for (and in fact secured) a series of stays but there was no adequate explanation for such "*lengthy periods of delay*" and finally noted that the events at the centre of the claim took place some 6 years ago so that "*the quality of the evidence will have been considerably impaired*". The District Judge's conclusion was: "*I find, taking into account all the circumstances of the case, that the claimant has not satisfied me that it is appropriate under the Denton test to grant relief against sanctions and although I allowed the application to be made, I refuse it and the claim is therefore struck out."*

The delay in more detail

33. It is common ground that the Particulars of Claim ought to have been served by no later than midnight on 17 June 2020 (the last day for valid service of the Claim Form). In a Respondent's Notice, the Defendant asserts that the District Judge ought to have concluded that there was a further delay of 18 days in serving the Particulars of Claim between midnight on 17 June 2020 up to 6 July 2020 when the first order for a stay was made.

34. The parties agree that before the Claim Form was served the Defendant had asked for a 56 day extension to file the Defence pursuant to CPR PD 51ZA introduced on 2

April 2020 as a result of the Covid pandemic.

35. The Claim Form was served with an application dated 11 June 2020 for a stay until 4pm on 12 October 2020. On 18 June 2020, the Defendant acknowledged receipt of the application and asked for an explanation as to why more time was needed. That led to the response I have set out at paragraph 29 above. On the same day, the Defendant replied refusing to consent to the stay application but agreeing, in principle, to allow more time to serve the Particulars of Claim. The Defendant asked the Claimant to forward a draft consent order and suggested that a term extending time for service of the Particulars of Claim to 12 October 2020 would be more appropriate than a stay.

36. A draft order was provided but no copy has been produced. It appears that the draft order provided for an extension of time for service of the Particulars of Claim. The Court did not approve the order. Instead, on 6 July 2020 the court made an order on the 11 June 2020 application staying the claim until 4pm on 12 October 2020. That order, which was served on the Defendant, contained the usual notice of the right to apply to set it aside. No application to set aside was ever made.

37. On 12 October 2020, the last day of the stay, the Claimant made another application to the Court for a stay. The stay was granted on 26 October 2021. The order granting a stay again set out the right to apply to set the order aside. No such application was made. It appears that "*on receipt of the 26 October 2020 order, Ms Tomlinson [the Defendant's solicitor] asked the claimant's solicitor for a copy of the without notice application, but from reviewing our file it appears we have never received the application*."

38. Procedurally, the 12 October 2020 application lost its way. The application notice itself asks that it be dealt with without a hearing. In answer to the question "who should be served with this application?" The answer "defendant" is given. No service address for the defendant is provided. The application was not a "without notice" application. That is because none of the exceptions set out at CPR 23.4 applied. It follows that the application ought to have been served on the defendant.

Grounds of Appeal

39. There are 2 grounds of appeal: in deciding not to grant relief from sanction and to strike out the claimants claim, the District Judge:

    a. was wrong to find that the 14 day delay amounted to a failure of such seriousness and significance that the claim should not be allowed to proceed

    b. and failed to reasonably apply the Denton principles and satisfy the overriding objective in the circumstances of the case, it was not reasonable to find that the defendant had suffered prejudice as a result of the claimant's delay.

40. The grounds implicitly accept the District Judge was right to consider the 3 stage approach to a CPR 3.9 application. I accept that is the case, although not (as he identified) because CPR 3.9 directly applied, but because (as has been made clear in

Yesss which was decided after the District Judge's decision) the modern approach to case management requires in these circumstances, the "*ethos*" of CPR 3.9 is to be applied.

41. The first ground (as was confirmed during submissions) is an attack on the District Judge's general approach to the CPR 3.9 considerations. It covers the evaluation of all the circumstances and (as is clear from *Excotek*) the need to consider if it was proportionate to strike out the claim. The second ground is a specific attack on the District Judge's finding that the delay had prejudiced the Defendant.

The Arguments

42. The Appellant's primary position is that the Particulars of Claim were not late. That is because the application for the second stay was made before the expiry of the first stay. If the Appellant is wrong about that, then he submits that the District Judge went wrong in considering the seriousness and significance of the 14 day (or 31 day) delay. The delay was neither serious nor significant because in failing to apply to set aside the second stay the Defendant acquiesced in the making of the order. In the further alternative, the seriousness or significance of the delay was such that it was plainly disproportionate to strike out the claim. In considering the seriousness and significance of the delay the court ought to have taken into account those matters that were in evidence before it, which I set out at paragraph 29 above. The finding of prejudice is not sufficient to amount to a proper consideration of the third limb of Denton and is in any event wrong. I was told that body worn video footage has been preserved and that in any event the majority of the evidence in the case will be documentary.

43. The Respondent submits that the judge was entitled to come to the conclusion that he reached and that in any event the delay was more substantial than the 14 days he had accepted. The Respondent's primary position was that CPR 7.6 (time limits for service of the Claim Form) applied to service of the particulars of claim. I have explained why I am unable to accept that submission above. The Respondent also submitted that CPR 3.9 applies directly. I have also explained why in my judgment that submission cannot be accepted.

44. I have had the benefit of written and oral submissions from both parties. I have taken all of those submissions into account in reaching my conclusion.

Conclusion

45. In my judgment the District Judge fell into errors of law in determining that the claim should be struck out.

46. In deciding whether to extend time for service of the Particulars of Claim the District Judge was obliged to adopt the modern approach to case management embodied in the overriding objective. The District Judge needed to apply the ethos engaged in dealing with a CPR 3.9 application.

47. In my view, strictly adhering to the 3 stage approach of Denton the District Judge was entitled to conclude that the Particulars of Claim were served late and that there was a 14-day delay. I accept that the Claimant made an application for a stay on the last day the first stay was operative, but the order granting the second stay takes effect on the day it is made and does not take effect when the application was made.

48. The District Judge was entitled also to conclude that a delay of 14 days in complying with a deadline to serve Particulars of Claim within 14 days, was both significant and serious. At stage 1, there was no need for the District Judge to consider the reasons for the delay or the overall justice of the case and the proportionality of refusing an extension (with the consequence that the claim would be struck out).

49. The final evaluation of the circumstances of the application and the context in which it was made (stage 3) required the District Judge to take account of the fact that the initial delay (of 17 days) had arisen when the parties were in agreement that the Particulars of Claim would be delayed and that the second delay had arisen after the Claimant had made an application to stay the proceedings during the currency of the first stay (albeit on the last day). That meant, even taking account of the fact that the Claimant ought to have applied earlier, that the 14 day delay was a function of the time it took a Judge to deal with the application. That matter was wholly outside the Claimant's control. An important part of the context was that the Defendant did not seek to set aside the order for the second stay, instead choosing to allow it stand.

50. The absence in the judgment of any consideration of proportionality suggests that it was not considered. In my judgment that amounts to an error of law. If it was considered, then it is important that the District Judge failed to take account of the factors I have referred to above and also (as set out in the second ground of appeal) wrongly took account of (or applied too much weight to) the fact that the evidence "*will have been considerably impaired by [the] delay*".

51. I do not accept (as the Defendant advanced in his Respondent's Notice) that the Defendant's suggestion on 18 June 2020 that the Claimant should make an application to extend time rather than applying for a stay, is relevant.

52. Taking these matters into account, in my judgment the District Judge (if he took proportionality into account at all) erred in concluding that it would be proportionate to strike out the claim.

53. I therefore allow the appeal on the first ground and on the second ground. The order of the District Judge must therefore be set aside, and the matter considered afresh.

Next steps

54. I can see no benefit in remitting the matter to a District Judge for determination of the matters that ought to have been considered. I have all relevant matters before me. Directing that the Claimant make a formal application for an extension of time would

in my judgment be inappropriate and unnecessary.

55. Considering the matter afresh I have concluded that the application to strike out must be dismissed and the Claimant should have an extension of time to the extent required for service of the Particulars of Claim. I reach that conclusions for the reasons now set out.

Reasons and approach

56. In deciding whether to grant an extension of time for service of the Particulars of Claim I bear in mind the requirements set out in the overriding objective to enforce compliance with the rules and to allot to any given case no more than an appropriate share of the court's resources bearing in mind the need to allocate resources to other cases. I find that a failure to file Particulars of Claim on time gives rise to no sanction and whilst therefore no application for relief from sanctions needs to be considered, the ethos set out in cases like *Denton* applies.

57. I find that the total period of delay in serving the particulars of claim is around 31 days. This comprises the period before the grant of the first stay and the period between the expiry of the first stay and the making of second stay. I accept at this stage, looking only at considerations of time and nothing else, that these delays are significant and serious.

58. As to the second stage, I am satisfied that the first period of delay of around 17 days arose because the parties had reached an agreement at that time that the Particulars of Claim would not be served and so there is a very good reason for it. Neither party would have seen the failure to serve at that time as a delay. As to the second delay, I accept that that arose as a result of a combination of 2 factors: the Claimant's solicitor's delay in making the second application for a stay at the last possible moment and the fact that the Court did not get round to dealing with the application for 2 weeks.

59. As to the third stage, I find:

    a. The Claimant has on the merits a perfectly arguable claim.
    b. There is no reason to conclude that there cannot be a fair trial of the issues.
    c. The delay of 2 weeks has no impact on the claim.
    d. The Defendant raised no objection to the 2 week delay at the time. He had an opportunity to apply to the court to set aside the stay order but decided not to do so. The Defendant might have applied to set aside the order and applied then for an order that the claim be struck out.
    e. I accept that the circumstances were such that it was necessary for the Claimant's solicitors to meet with the Claimant so that they could explain the Particulars of Claim to him in person. His dyslexia meant that he could not read and understand the technical document without assistance. I also accept that the ability to visit the Claimant in prison, or even to arrange a satisfactory video link with him, were severely hampered up to the time the Particulars of Claim were served (and including the 2 weeks period of delay) by reason of the COVID epidemic.

60. Bearing all of these factors in mind I am satisfied that the interests of justice require that an extension of time be granted. It would be disproportionate to refuse an extension of time because that would lead to the striking out the claim and that would itself be disproportionate.

61. I am grateful to both counsel for their helpful submissions.