Neutral Citation Number: [2023] EWCA Civ 602 Case No: CA-2022-001722

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)
Robin Vos (sitting as a Deputy High Court Judge)
[2022] EWHC 2073 (Ch)

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 6 June 2023

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE NUGEE
and
LADY JUSTICE FALK

- -

Between :

ERIC WALTON	**Claimant / Appellant**
- and -	
(1) PICKERINGS SOLICITORS **(2) F BROPHY**	**Defendants / Respondents**

- -

Richard Turney (instructed by direct access) for the **Appellant**
Henry Bankes-Jones (instructed by **Clyde & Co LLP**) for the **1st Respondent**
Marc Brown (instructed by **Talbots Law Ltd**) for the **2nd Respondent**

Hearing date: 16 May 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 6 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. This second appeal arises out of an unfortunate series of events. The Appellant, Mr Eric Walton, wished to issue a claim form. Despite attending the court office on 20 July 2020 and paying the £10,000 issue fee, he did not receive a sealed claim form from the Court until 7 December 2020, and when he did it was backdated so as to be sealed with the date of 20 July 2020. He served it on both Defendants within a matter of days but since it was only valid for service for 4 months from the date of issue it was already out of date.

2. He therefore applied for a retrospective extension of time for service. That was refused by Deputy Master Dray (**"the Deputy Master"**) on 28 June 2021, and again on appeal by Mr Robin Vos (sitting as a Deputy High Court Judge) (**"the Deputy Judge"**) on 18 August 2022.

3. Mr Walton now appeals to this Court on three grounds. We heard argument on the first of these grounds, which was that the Court has no power to backdate the claim form, and is obliged to seal it with the date on which it is actually issued. After hearing argument on this ground we notified the parties that we did not need to hear argument on the remaining grounds.

4. I now give my reasons for agreeing to this course.

Facts

5. Mr Walton wished to bring a claim in the High Court. It is not necessary to consider his claim in any great detail but I should give a brief summary. Mr Walton claims to have had the benefit of an agreement made in 2009 between him and a Mr and Mrs Llewellyn who owned a vacant plot of land with development potential in Kings Heath, Birmingham. His case is that under the agreement he was entitled to require the land to be contributed to a joint venture with him, where it would be developed and the profits split equally. Instead in 2014 the Llewellyns sold the property. Their solicitors were Pickerings Solicitors, who I will refer to as **"Pickerings"**. (There was an issue below concerning the precise entity involved and whether Mr Walton had sued the correct, or indeed any, legal entity which it is not necessary to go into). On 21 July 2014 Ms Sue Albini of Pickerings sent Mr Walton an e-mail informing him that contracts had been exchanged on 18 July with a contractual completion date of 22 August 2014 or earlier by agreement. She added:

> "If it is agreed that completion will take place before that date we will inform you in advance."

In fact completion took place on 29 July 2014. Mr Walton was first informed of this by an e-mail from Pickerings on 30 July 2014. The purchaser was Uber Urban Homes Ltd, a company part owned by a Mr Frank Brophy. He was an architect who had worked with Mr Walton to obtain planning permission for the land and who, according to Mr Walton, knew all about his agreement with the Llewellyns.

6. On these facts his claims are pleaded in his Particulars of Claim as follows:

   (1) His claim against Pickerings is that Ms Albini's e-mail constituted a solicitor's undertaking; that in breach of the undertaking they did not tell him in advance that it had been agreed that completion would take place early; and that as a result he had lost the ability to stop the sale and carry out the joint venture.

   (2) His claim against Mr Brophy is that by purchasing the land he knowingly procured a breach of contract by the Llewellyns, which again prevented him from carrying out the joint venture.

   (3) He claims damages against both of them representing his share of the profits that he would have received from the joint venture, assessed by him at £616,000.

7. Mr Walton was acting in person (although instructing counsel for specific matters). On 17 July 2020 he e-mailed the Fees Office at the Royal Courts of Justice and obtained an appointment for 20 July. We were told that this was the required procedure at the time due to covid restrictions. He attended the appointment with 5 copies of the claim form and paid the £10,000 issue fee. One copy of the claim form was retained by the person he dealt with, who said that it would be passed to the relevant office to be issued that day. Mr Walton had told her that he did not want the Court to serve it but wanted to serve it himself. That was because he had not yet had Particulars of Claim settled. The other 4 copies were returned to him, one of them endorsed with a receipt for the £10,000 timed at 13.28 on 20 July. He was also given a separate free-standing receipt.

8. There have been a number of iterations of the claim form which it is helpful to distinguish and I will call this first version **"claim form (1)"**. It was on a form N1 designed for use in the Financial List of the Commercial Court and indeed its title referred to the Queen's Bench Division, Commercial Court, Financial List. It is apparent on its face that there had originally been three defendants listed, in the order (1) Mr F Brophy (2) Luxe Homes Ltd and (3) Pickerings Solicitors. On the copy produced to us this has been amended in manuscript by striking through the name Luxe Homes Ltd, labelling Mr F Brophy and Pickerings Solicitors as Second and First Defendants respectively, and re-numbering them accordingly. Mr Walton explained in his evidence that Luxe Homes Ltd was the purchaser (formerly Uber Urban Homes Ltd) but he decided not to include it in the action. There is to my mind some room for doubt as to when Mr Walton made these manuscript changes, but his evidence was that he did so shortly before attending the Fees Office, and this was accepted by the Deputy Master.

9. On the back under "Brief details of claim" claim form (1) was endorsed with a narrative account of the claim. I will have to look at this in more detail in due course but for present purposes it is sufficient to note that although it included a claim that Mr Brophy had knowingly acted to procure a breach of contract, it contained no details of any claim against Pickerings, who are not mentioned in the narrative section at all. It did however claim relief against each of the First, Second and Third Defendants (with "Third Defendant" again being struck through in manuscript) in the shape of loss of profit, or alternatively 50% of the difference between the open market value of the land and the price of £340,000 for which it was sold on 29 July 2014.

10. On the same day (20 July 2020) Mr Walton sent an e-mail to Pickerings, and on 26 July 2020 e-mails to Mr Brophy and to Luxe Homes Ltd's solicitors, in each case informing them that he had issued a claim and would serve it once counsel had drafted the Particulars of Claim.

11. Particulars of Claim were then settled by counsel, pleading claims against Pickerings for breach of undertaking, and against Mr Brophy for procuring a breach of contract, as referred to above. That had been done by 13 November 2020 as the Particulars contain a statement of truth which is dated with that date. But Mr Walton had still not received an issued claim form from the Court. So on 17 November 2020 he served both Pickerings and Mr Brophy with an unsealed copy of claim form (1) and the Particulars of Claim. Later that day he sent them a revised version of the claim form, again unsealed, which I will call **"claim form (2)"**. The only difference between this and claim form (1) is that on the back Mr Walton has not only struck through the reference to "Third Defendant" (as in claim form (1)) but also the relief claimed against it (loss of profit etc).

12. The response from Mr Brophy's solicitors on 18 November 2020 was to ask for a sealed claim form. On 23 November 2020 they told Mr Walton that they had checked with the Court which had no record of the claim or of Mr Walton as claimant. Mr Walton himself attended the Court on 25 November 2020 and was also told, by the person at the counter, that the Court did not have his claim on its system.

13. On 26 November 2020 he spoke to her manager, a Mr Abdul Musa, and sent him a copy of the claim form, the Particulars of Claim and the receipt for the issue fee. On 30 November 2020 he spoke again to Mr Musa who told him that he had used the wrong Form N1 for the claim form and that he would e-mail him the correct form. Mr Musa then sent him an e-mail with the correct version of the claim form to complete and return. Mr Walton returned it by e-mail at 5.30pm that day. I will call this **"claim form (3)"**. Unlike claim forms (1) and (2) the title refers to the Chancery Division. It names Pickerings Solicitors and Mr F Brophy as defendants. Under "Brief details of claim" it refers to an attached sheet. This expands the details of claim given on claim forms (1) and (2) and now does include reference to Ms Albini's e-mail and a claim that Pickerings had acted in breach of their undertaking in completing the sale without informing Mr Walton in advance.

14. Mr Walton received a sealed copy of claim form (3) from the Court on 7 December 2020. The date on the seal is 20 July 2020. We do not know the day on which the seal was actually placed on the claim form but it must have been between 5.30pm on 30 November 2020 and 7 December 2020.

15. On 8 December 2020 Mr Walton e-mailed the sealed claim form and Particulars of Claim to both defendants, and on 10 December served hard copies. Both defendants objected that service was out of time.

16. The Deputy Master accepted that the claim did, as he put it, "get lost, for want of a better description, in the court system." He suspected that that was because the claim was presented for issue in the Commercial Court as opposed to the Chancery Division.

It is not obvious to me why that should have caused the Court to lose the claim, but it does not matter. The undoubted facts are that Mr Walton left a claim form with the Court and paid the requisite fee on 20 July 2020, but did not receive what he was entitled to, which was the issued claim form, for many months; and that when he did, it was already too late for him to serve it as it bore a date of issue of 20 July 2020 and he did not receive it until 7 December 2020 when it had already ceased to be valid for service.

The proceedings below

17. In those circumstances each of the parties brought applications. Mr Walton's, dated 17 December 2020, was an application under CPR r 3.10 to extend the time for service of the claim form to 10 December 2020. There were cross-applications, that by Pickerings dated 18 December 2020 and that by Mr Brophy dated 17 March 2021, which effectively sought to have the proceedings dismissed as not having been served in time. Pickerings also took a point on whether the correct legal entity had been sued.

18. The applications came before the Deputy Master on 28 June 2021. He treated Mr Walton's application as being an application under CPR r 7.6 to extend time for service (rather than under CPR r 3.10 which deals with rectifying errors of procedure generally). He found that the preconditions for the exercise of the powers in that rule were not satisfied in that this was not a case where the Court had failed to serve the claim form (r 7.6(a)), and Mr Walton had neither taken all reasonable steps to comply with rule 7.5 (r 7.6(b)), nor acted promptly in making the application (r 7.6(c)). In those circumstances he held that he had no discretion to exercise, but even if he had had a discretion, he would not have exercised it in Mr Walton's favour. The result was that Mr Walton's application was dismissed, the claim had therefore not been served in time on either Defendant, and was a nullity and of no effect. He did not therefore deal with Pickerings' point on the entity sued.

19. Mr Walton appealed his order, and the appeal came before the Deputy Judge. He handed down judgment on 2 August 2022 at [2022] EWHC 2073 (Ch). Contrary to the decision of the Deputy Master he held that Mr Walton did meet the precondition in r 7.6(b) as this only required him to take all reasonable steps to comply with r 7.5 once the sealed claim form was in his possession, which he had done. That meant there was a discretion under r 7.6. But he upheld the Deputy Master's decision that if there were such a discretion it should be exercised against granting an extension of time, both because there was no flaw in that decision and because he would have reached the same view himself. He also rejected an application by Mr Walton under r 6.15 (which allows the Court to authorise service of a claim form by alternative means). By his Order dated 18 August 2022 he therefore dismissed the appeal.

Ground 1 of appeal – backdating the claim form

20. Mr Walton appeals to this Court, with permission granted by Arnold LJ. There are three grounds in his Grounds of Appeal. The first is that the Court has no power to backdate the date of issue of the claim form.

21. I will first set out the relevant rules of the CPR. CPR r 7.2 provides as follows:

> "**7.2 How to start proceedings**
>
> (1) Proceedings are started when the court issues a claim form at the request of the claimant.
>
> (2) A claim form is issued on the date entered on the form by the court."

22. CPR r 2.6 provides as follows:

> "**2.6 Court documents to be sealed**
>
> (1) The court must seal(GL) the following documents on issue—
>
> (a) the claim form; and
>
> (b) any other document which a rule or practice direction requires it to seal.
>
> (2) The court may place the seal(GL) on the document by hand, by printing or electronically.
>
> (3) A document appearing to bear the court's seal(GL) shall be admissible in evidence without further proof."

23. The (GL) after "seal" indicates that it is included in the Glossary. The Glossary is a guide to the meaning of certain legal expressions used in the rules, but is not to be taken as giving them a different meaning from that which they have in the law generally (CPR r 2.2(1)). The entry for "seal" in the Glossary is as follows:

> "A seal is a mark which the court puts on a document to indicate that the document has been issued by the court."

24. The submission of Mr Richard Turney, who appeared for Mr Walton (and who did not appear below) was a very simple one. The rules treat the act of sealing the claim form and the issue of the claim form as a single act which takes place at the same time. There is no express power to seal the claim form with a date other than that on which it is in fact sealed. CPR r 7.2(2) is not to be read as conferring a discretionary power on the Court to enter some different date on the claim form, but as requiring the Court to enter the date when the claim form is in fact issued.

25. I accept these submissions which seem to me to be well founded. As appears from r 7.2, proceedings are not "started" until the Court issues the claim form. On issue the Court must seal the claim form (r 2.6(1)(a)), and the very purpose of the seal is to indicate that the claim form has been issued by the Court (see the Glossary). So until the claim form is marked with the seal the document has not been issued and the proceedings have not been started.

26. That can be tested in the present case by assuming the seal was in fact placed on the claim form on 1 December 2020 (as set out above, we do not know the actual date but it was undoubtedly some time between 5.30pm on 30 November 2020 and 7 December

2020). That means that if the question had been asked on 20 July 2020, or on any date between then and 30 November 2020, "Have the proceedings been started?" the only answer that could have been given would have been "No", because the claim form had not yet been sealed and issued.

27. In those circumstances, in the absence of any express power in the rules, I have great difficulty in seeing how the Court by sealing the claim form on 1 December could change the answer to that question. Backdating the seal to 20 July 2020 clearly does

not mean that the proceedings were in fact issued on that date as we know for certain that they were not. So to read r 7.2(2) as conferring a power on the Court to select some date other than the actual date of sealing is to read it as in effect conferring a deeming power on the Court under which a claim form in fact issued on 1 December 2020 can be deemed to have been issued on 20 July 2020.

28. But that is not what it says expressly, and I see no reason to read the rule as impliedly conferring such a power. The far simpler reading of the rule is that it directs the Court to enter the date of actual issue. We know from the Glossary that the purpose of sealing the claim form is to indicate that it has been issued, and it seems to me a simple and straightforward reading of the rules to regard the purpose of adding the date as being to indicate *when* it has been issued, and hence when the proceedings have started. If that is the purpose, which to my mind it plainly is, it seems more natural to regard the rules as requiring the Court to enter the true date when the claim form was sealed and issued rather than a false date.

29. I have reached this view on a simple reading of these rules by themselves. But Mr Turney put forward two further reasons why the rules should be read in this way. The first is that the only reason for identifying the date of issue of the claim form under the CPR is to start time running for service.

30. This is different from the position under the RSC. Under the RSC, it was critical to identify the date of issue of the proceedings because this was the date when the action was "brought" for the purposes of the Limitation Acts and similar time-bars. Under the CPR however the position is different. This is the effect of Practice Direction 7A para 6.1, which provides as follows:

> "Proceedings are started when the court issues a claim form at the request of the claimant (see rule 7.2) but where the claim form as issued was received in the court office on a date earlier than the date on which it was issued by the court, the claim is "brought" for the purposes of the Limitation Act 1980 and any other relevant statute on that earlier date."

In *Barnes v St Helens Metropolitan Borough Council* [2006] EWCA Civ 1372 this Court held that this paragraph correctly reflected the law: see per Tuckey LJ at [16][20].

31. The date of issue under the CPR is therefore not significant for limitation purposes. So what is its significance? The answer is that it starts time running for service of the claim form. By CPR r 7.5(1) the claimant has to take the requisite step to serve a defendant within the jurisdiction "before 12 midnight on the calendar date four months after the

date of issue of the claim form" and by r 7.5(2) where the claim form is to be served out of the jurisdiction it must be served "within 6 months of the date of issue".

32. I am hesitant about asserting that this is the *only* significance that the date of issue has under the rules, as that would require an exhaustive search of the rules which is not an exercise that has I think been carried out. But our attention was not drawn to any other rules where the date of issue of the claim form is significant, and I readily accept that the primary function of the date of issue is to mark the beginning of the period (4 or 6 months as the case may be) for service of the claim form.

33. That does seem to me another reason why the rules should not be interpreted as permitting the date of issue to be backdated: if the purpose of putting the date of issue on the claim form is to mark the beginning of the period for service, the effect of backdating the date of issue, as the facts of the present case demonstrate in dramatic fashion, is to give the claimant less time to serve than the rules on their face permit him to have. Even if the backdating is only a matter of a day or two it still reduces the time available to the claimant to serve; if, as here, the backdating is more than 4 months, the effect is that the claimant cannot serve within the period specified by r 7.5 at all.

34. I do not think an interpretation of the rules that permits this to happen should be adopted unless there is some compelling reason why the Court should have the power to cut down, or even eliminate altogether, the claimant's period for service in this way. But there is to my mind no such compelling reason, indeed no reason at all, why the Court should be able to do this. The rules posit a simple sequence in which (1) the claimant takes his claim form to the Court Office, (2) the Court seals and issues the claim form, and (3) the claimant then has 4 (or 6) months in which to serve. If there is a gap between (1) and (2) – something that PD7A para 6.1 expressly contemplates might happen – then whether it is of a few days or of several months, there is to my mind no reason why that should be treated as abridging, or enabling the Court to abridge, let alone eliminate altogether, the period between (2) and (3).

35. The other point that Mr Turney relied on is the decision of this Court in *Harrison v Touche Ross (a firm)* [1995] CLC 377. As its date shows, this was a decision under the RSC rather than the CPR. It therefore needs to be treated with some caution, as it was established very soon after the introduction of the CPR that, being "a new procedural code" (CPR r 1.1(1)), the rules in the CPR are to be interpreted and applied by reference to their own terms and not by reference to the authorities that had accumulated over many decades on the RSC: see for example *Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926 per Lord Woolf MR.

36. Mr Turney relied on a statement in *Harrison* by Sir Thomas Bingham MR, giving the judgment of the Court (himself, Rose and Morritt LJJ), at 384 to the effect that it was not open to the Court to treat a writ as issued months before or after the date it was in fact issued. At first sight that seems quite apposite, and Mr Turney submitted that the same should apply to the issue of a claim form under the CPR.

37. Nevertheless the position is not quite as simple as that. In a subsequent decision of this Court, *Riniker v University College London* (31 March 1999), it was held that in certain limited circumstances the Court did have an inherent jurisdiction to direct that a writ should be treated as having been issued on the date when it was left in the custody of

the Court. That was a jurisdiction that could be exercised for the purpose of preserving the limitation position for a plaintiff if the writ should have been issued when it was left with the Court: see per Evans LJ at [21]. That particular problem has, as already explained, ceased to be a problem under the CPR, and indeed Evans LJ noted that the CPR, which had already been drafted and were about to come into force, contained a provision similar to that now in PD 7A para 6.1 and said that "the same sensible result" could be achieved by the route he had described under the existing rules.

38. In those circumstances I think it is overstating matters to say that under the RSC the Court could never treat a writ as issued earlier than it in fact was. But we were not shown anything to suggest that this was ever done except for the purpose of preserving

the limitation position for the plaintiff (or historically to justify the grant of an injunction when it was thought that an injunction could only be granted once proceedings had been brought). Since the position on both points is different under the CPR, I think it safer not to place any reliance on the pre-CPR cases.

39. Nevertheless for the reasons I have given I accept Mr Turney's overall submission that there is no power in the Court to seal a claim form with a date other than the date on which the claim form is in fact sealed.

40. Mr Henry Bankes-Jones, who appeared for Pickerings, did not advance any particular argument against Mr Turney's submission. Instead, as explained below, the thrust of his submission was that Mr Walton was caught in a dilemma. Either there was no power to backdate the claim form, in which case it inevitably followed that the claim against Pickerings was statute-barred; or there was a power to do so, in which case Mr Walton needed an extension of time and there was no reason to overturn the exercise of the discretion by the Deputy Master and Deputy Judge.

41. Mr Brown, who appeared for Mr Brophy, pointed to the fact that the arguments put forward for Mr Walton had shifted. Mr Walton had initially relied in his application on CPR r 3.10, and then before the Deputy Master on CPR r 7.6; before the Deputy Judge he had also sought to rely on CPR r 6.15 and r 6.16. Mr Brown suggested that the point that the claim form could not be backdated was a further new point that had effectively been conceded below by Mr Howard Elgot, who appeared for Mr Walton before the Deputy Judge.

42. What the Deputy Judge says about this in his judgment is as follows (at [91]):

> "I should mention briefly Mr Elgot's submission that the Court made a further error in dating the sealed claim form 20 July 2020 instead of 7 December 2020, being the date when it was in fact sealed. He could however point to no requirement for the Court to insert on the claim form the date it is actually sealed. Indeed, he accepted that CPR Rule 7.2(2) might indicate to the contrary given that this provides that the claim form is issued on the date inserted by the Court which appears to give the Court discretion."

That shows that the point was taken by Mr Elgot below, and although he seems to have been willing to accept there were arguments against it, I do not read this passage as indicating that he had conceded the point. As Mr Turney pointed out, he very shortly afterwards put it at the forefront of his argument when seeking permission to appeal.

43. Mr Brown also submitted that there was no evidence why the Court had dated the claim 20 July 2020. It was, he suggested, quite possible, if indeed not probable, that this is because this is what Mr Walton asked Mr Musa to do when he spoke to him. If so it would be inequitable for him now to take the point that the Court should not have done it.

44. I do not accept this submission. If the true position is, as I consider it is, that the Court has no power to backdate the issue of the claim form then it does not matter why it did it, or whether this was as a result of a request from Mr Walton or not. The question whether the Court does have such power is a pure question of the interpretation of the rules. In those circumstances I think it is open to Mr Walton to take the point on appeal regardless of the lack of evidence as to why it was done and even if (which Mr Turney told us on instructions Mr Walton denied doing) he had himself suggested it to Mr Musa.

45. Mr Brown referred to *Barton v Wright Hassall LLP* [2018] UKSC 12 at [16] where Lord Sumption said that rules of court had to identify some formal step that constituted service of the claim form on the defendant, adding:

> "Service of the claim form within its period of validity may have significant implications for the operation of any relevant limitation period, as they do in this case. Time stops running for limitation purposes when the claim form is issued. The period of validity of the claim form is therefore equivalent to an extension of the limitation period before the proceedings can effectively begin. It is important that there should be a finite limit on that extension."

But that was addressing a different point which is the power of the Court to extend time for service. It was not addressing the question that arises in the present case which is when the period for service starts to run.

46. Mr Brown further submitted that the Court did have the power to place the date of 20 July on the claim form. That was, he said, a rational thing to do as it was the date when the claim form was received by the Court. I have already given the reasons why I do not accept this submission. 20 July was indeed the date when the claim form was received by the Court; but it was not the date when the claim form was in fact sealed and issued, and that in my judgement is the date that the Court should have used for the seal. Whatever that date was it was between 30 November and 7 December 2020, and the service of the claim form on both defendants was therefore in time.

47. I add that although we were not referred to it, there is an interesting parallel to the present case in another decision of this Court, *Stoute v LTA Operations Ltd* [2014] EWCA Civ 657. There too there was a significant gap between the claim form being received by the Court (on 10 February 2012) and being issued (on 8 March 2012). The

claim form was initially sealed with the date of 8 March, but, as Underhill LJ records at [17]:

> "Mr Stoute attended the Central London County Court in person on 14 May 2012 and managed to persuade a clerk – wrongly – to amend the issue date from 8 March to 10 February."

He goes on to explain that this was because of a concern about the limitation position but the concern was misplaced because the issue date was immaterial for limitation purposes, the relevant date being the date of receipt.

48. The actual decision in the case was concerned with a different point and it is not clear whether there was any argument on the backdating point, but it can be seen that Underhill LJ's reaction to the successful attempt to persuade the Court to backdate the issue date was that this was wrong. For the reasons I have given above that accords

with my own analysis.

49. In those circumstances I would allow the appeal and declare that the claim form was served in time on both defendants.

The position of Pickerings

50. A further point was raised by Mr Bankes-Jones which was that if Mr Turney was right about the backdating point, as I have held he was, it would do him no good as the claim against Pickerings would inevitably be statute-barred. In my draft judgment I considered this submission and expressed my views on it. But in response to our draft judgments Mr Turney submitted that this was unfair. The point had not been raised below or in the skeleton arguments but was first raised in Mr Bankes-Jones' oral submissions. Although Mr Turney did make some submissions in response he did not have time to research the point, and he submitted that he did now have various arguments in answer to it. On this basis he sought permission to appeal to the Supreme Court.

51. I have concluded that the better course in the circumstances is to withdraw that part of my draft judgment. It would not be appropriate to grant permission to appeal on a point of procedure on which the Supreme Court would not have the benefit of any consideration by a lower Court of the arguments Mr Turney now wishes to deploy. On the other hand I am persuaded that the point is more intricate than at first appeared and that to rule against him without his having the opportunity to deploy his arguments would indeed be unfair. The Court has undoubted power to withdraw its draft judgments in whole or in part, which are of course only drafts, and although this is not something the Court is readily persuaded to do, it is in my view the better course in the circumstances. I therefore say no more about the limitation point that Mr Bankes-Jones raised. Our draft judgments should be regarded as if they had not been written: they are, as the rubric on every draft judgment says, unapproved and not to be used in Court.
Conclusion

52. As against both Defendants I would allow the appeal and declare that the claim form was duly served on them.

53. Mr Brown has asked for 56 days for Mr Brophy to serve his Defence. I do not myself think that any more than the usual 28 days has yet been shown to be justified. I would therefore direct that the Defendants serve their Defences within 28 days of today, that is by 4pm on Tuesday 4 July 2023, but without prejudice to any further application either Defendant may make to the Court below for an extension of time. It is also without prejudice to any application Pickerings may make for the limitation point to be determined and any consequential stay on the necessity of serving their Defence pending resolution of any such application. **Lady Justice Falk**

54. I agree. **Lady Justice Asplin**

55. I also agree.