IN THE COURT OF APPEAL FOR GIBRALTAR

Neutral Citation Number 2025/GCA/018

2024/CACIV/006

BETWEEN:

DESIREE DA SILVA PAULINO

Appellant

-and-

GIBRALTAR HEALTH AUTHORITY

Respondent

Christopher Marsh-Finch (instructed by **Verralls**) for the **Appellant**

Shane Danino (instructed by **Hassans**) for the **Respondent**

Judgment date: 30 September 2025

JUDGMENT

SIR NIGEL DAVIS, JA:

Introduction

1. By Notice of Motion dated 19 August 2025 the claimant in these proceedings seeks permission to appeal (and an appropriate extension of time for doing so) from an order of Mr Justice Restano, sitting in the Supreme Court, handed down on 16 July 2024. By his order, Mr Justice Restano declined to validate service of the claim form which had been issued in this case on 15 September 2023 and struck out the claim. The

consequence of such an order, if it stands, would be that any further claim would be barred by reason of limitation.

2. This application has been greatly complicated by procedural difficulties which I will have to come on to recount. But the essential issue for this court remains whether this is an appropriate case in which to grant permission to appeal and the required extension of time.

The background

3. The background facts are fully set out in the judgment of Mr Justice Restano and need only a relatively brief summary for present purposes.

4. The claimant is the widow and administratrix of the late Gil Vicente Da Silva Paulino, who died on 17 September 2020. She alleges that the death of her husband was occasioned by the negligence of the Gibraltar Health Authority, the defendant in the proceedings. It has been accepted that the facts relevant to the claim were known to the claimant at least by late November 2020.

5. In due course the claimant instructed solicitors, Verralls Legal Limited. They issued on behalf of the claimant a claim form on 15 September 2023, which was not served at that time. Verralls in fact wrote to the Gibraltar Health Authority a pre-action letter dated 28 September 2023, enclosing a medical report and autopsy report and among other things stating:

> "*… ignoring this letter may lead to our client commencing/ continuing proceedings against you and may increase your liability for costs."*

The letter, however, made no reference to the fact that a claim form had already been issued.

6. Thereafter, Verralls corresponded with Hassans, solicitors instructed on behalf of the Gibraltar Health Authority. The circumstances in which they did so are set out in the statement of a trainee barrister employed by Verralls

dated 16 February 2024. He states (albeit without exhibiting any attendance note) as follows in paragraph 3 of his statement:

> "*I commenced working on the case during September 2023. It was time sensitive and required urgent attention. A pre-action letter was dispatched to the GHA on the 28 September 2023. Shortly after we received a call from the GHA instructing us not to send any further communications and that we should deal with their legal representatives which in this case was Hassans. This was accepted and no further communications were sent to the GHA, instead they were sent to Hassans."*

That evidence was not countered by any evidence in response and the Judge therefore rightly proceeded on the basis it was to be accepted.

7. Requests for clarification of the claim were thereafter made to Verralls by Hassans. In due course, Hassans indicated by letter of 19 December 2023 that a letter of response would be sent by 27 February 2024; that being in accordance with the relevant protocol.

8. On 8 January 2024 Verralls sent a further letter to Hassans stating:

> *"Please find enclosed two copies (one for the defendant) of the NI Claim Form, response pack and a copy of the notice of issue."*

This was followed by a further letter dated 12 January 2024, enclosing two copies of the particulars of claim.

9. It was common ground that, under the applicable rules, time for service of the claim form issued on 15 September 2023 expired on 15 January 2024. The point was thereafter taken on behalf of the defendant that service in accordance with the rules had not been effected by that date.

The law

10. The position for service under the rules needs no great exposition for present purposes. In cases where there is not personal service, Civil Procedure Rules

rule 6.7(1) provides that, in the circumstances there specified, the claim form is to be served on the solicitor acting for a defendant where the solicitor *"has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form…".*

11. Central to the present application are the provisions of rule 6. 15 of the Civil Procedure Rules. That provides as follows:

> *"(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.*
> *(2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."*

12. The circumstances in which relief may be granted under that rule and the required general approach are fully explored in the decision of the Supreme Court of the United Kingdom in the case of *Barton v Wright Hassall LLP* [2018] UKCS 12. That was a very striking case on the facts. There the claimant was a litigant in person. He was in correspondence by e-mail with solicitors instructed by the prospective defendant in the context of a professional negligence action. That correspondence had culminated in an e-mailed letter dated 17 April 2013 from the solicitors to the claimant, which concluded by stating *"I will await service of the claim form and particulars of claim"*. The claimant had previously issued a claim form and was required under the rules to serve it by midnight on 24 June 2013. On that day the claimant e-mailed to the solicitors the claim form and particulars of claim "*by means of service upon you"*.

13. The point was then taken that the solicitors had not confirmed that they would accept service by e-mail; that the claim form had therefore expired unserved; and that in consequence the claim had become statute barred. The principal issue thereafter became whether service should be validated under rule 6.15. The Supreme Court (by a majority) upheld the decision of the lower courts that it should not be.

14. Lord Sumption, in giving the judgment of the majority, set out the factors ordinarily to be regarded as of main relevance in the course of paragraph 10 of his judgment. He said this:

> *"In the generality of cases, the main relevant factors are likely to be;(i)whether the claimant has taken reasonable steps to effect service in accordance with the rules and (ii)whether the defendant or his solicitor was aware of the contents of the claim form at the time when it expired, and, I would add (iii) what if any prejudice the defendant would suffer by the retrospective validation of non-compliant service of the claim form, bearing in mind what he knew about its contents. None of these factors can be regarded as decisive in themselves.* The weight to be attached to them will vary with all the circumstances."

And a little later on he said this in paragraph 16:

> "*The first point to be made is that it cannot be enough that Mr Barton's mode of service successfully brought the claim form to the attention of Berrymans. As Lord Clarke pointed out in Abela v Baadarani, this is likely to be a necessary condition for an order under CPR rule 6.15, but it is not a sufficient one. Although the purpose of service is to bring the contents of the claim form to the attention of the defendant, the manner in which this is done is also important. Rules of court must identify some formal step which can be treated as making him aware of it. This is because a bright line rule is necessary to determine the exact point from which time runs for the taking of further steps or the entry of judgment in default of them. 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…"*

15. The outcome on the facts of that particular case can be said to be a very hard result on the claimant and indeed two members of the Supreme Court dissented. But it illustrates the relatively stringent approach required to be taken in this context, depending of course on the facts of the particular case.

The Judgment

16. In his very thorough reserved judgment, Mr Justice Restano carefully reviewed the relevant procedural rules, the facts and the applicable principles and authorities. After evaluating the facts he found, giving full

reasons, that the claimant had not taken reasonable steps to serve the claim form in accordance with the rules. He accepted that, before the expiry of the time for service, the defendant had by its solicitors become aware of the claims made against it; albeit noting that, as established in *Barton* this was not of itself a sufficient justification for validating service. As to prejudice, he considered that if service were validated the loss of a limitation defence was *"palpable"* prejudice (reflecting the like observations of Lord Sumption at paragraph 23 of his judgment in *Barton*) and was a powerful argument against validation.

17. The Judge concluded on this aspect of the case as follows at paragraphs 57 – 59 of his judgment:

> *"57. Weighing up all the relevant circumstances, with an eye on the three main relevant factors identified by Lord Sumption which should bear considerable weight in this evaluation, the clear conclusion to be drawn is that the claimant has failed to show good reason why the court should allow the purported service to stand as good service. As I have already observed, whilst each case turns on its own facts, there is little that separates this case from many others where similar mistakes have been made when attempting to serve a claim form and where the courts have refused to validate those steps.*
>
> *58. This is not therefore a case where the purported service should be permitted to be retrospectively validated. Applying the same logic, there is no exceptional reason for the court to dispense with service under CPR r 6.16.*
>
> *59. This is a conclusion that I have reached with little enthusiasm as it effectively ends this claim. It is, however, important to ensure that the regime for service which has significant consequences for litigants is not undermined…"*

Permission to appeal

18. It is at this stage that the procedural difficulties arose.

19. Initially the claimant's solicitors sought permission to appeal directly from the Court of Appeal. It was then pointed out that they first needed to seek permission to appeal from the Supreme Court. The matter came back before

Mr Justice Restano and on 27 November 2024 he granted permission to appeal in these terms; *"The claimant is granted leave to appeal, such leave being conditional upon the claimant making a payment on account of the defendant's legal costs in the sum of £13,500, the payment to be made on or before 11 December 2024".* We were told that although the quantum of the defendant's costs had been discussed before the Judge the Judge imposed this condition of his own motion.

20. The claimant was most aggrieved at this outcome. She took the stance that she was in no position financially to meet that condition. Thus, on her case whilst the Judge had, on the one hand, given permission to appeal he had, on the other hand, then immediately stifled the appeal for which he had given permission by imposing a financial condition which she simply could not meet.

21. The claimant then sought to appeal against the imposition of this condition. There were various delays which it is not necessary to enumerate. The matter became before Chief Justice Dudley, sitting in the Court of Appeal. He expressed the provisional view that, on the proper interpretation of the applicable rules (see Civil Procedural Rules rule 52.18) and in the light of the English Court of Appeal decision in the case of *R(Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 269, it was not open to the claimant to seek to appeal against such a condition in this way. Either she accepted the condition or she did not; and if she elected not to accept the condition then she was to be taken as treating the decision of Mr Justice Restano of 27 November 2024 as a refusal of permission to appeal: and thus should make a fresh application for permission to appeal to the Court of Appeal itself. The Chief Justice after further argument confirmed that view by decision of 22 July 2025. The Notice of Motion dated 19 August 2025 was then issued, which on its face is indeed a fresh application for permission to appeal made to the Court of Appeal.

Disposal

22. In his skeleton argument, Mr Marsh-Finch for the claimant initially sought to renew an argument to the effect that the permission to appeal granted by Mr Justice Restano should stand and that this court should simply quash the condition as to payment of costs. That is, however, not open to him, as when pressed he in effect conceded. First, that is not the relief sought by this Notice of Motion; and second, he has made no application under rule 17.6 of the Court of Appeal Rules 2006 to set aside the decision of Chief Justice Dudley of the 22 July 2025 or to renew that issue before the full court. I might perhaps also add that nothing in the arguments sought to be presented displaced, to my mind, the application of rule 52.18 and of the decision in the *Medical Justice* case to this present case.

23. Then Mr Marsh-Finch said that this court should just act on and follow the decision of Mr Justice Restano that this was an appropriate case for permission to appeal to be granted and this court should, without more, itself grant permission to appeal, albeit without attaching any condition. That cannot be sustained either, as the *Medical Justice* case itself confirms (see paragraph 26 of the judgment of Lord Neuberger MR). This is a fresh application and this court must therefore make its own appraisal as to whether there are realistic prospects of success for the proposed appeal such as to make it appropriate to grant permission to appeal. Whilst the court will of course give weight to the view of the Judge as to the grant of permission to appeal this court is in no way bound by it.

24. By reference to his current written grounds, Mr Marsh-Finch then argued that the claimant's solicitors had been misled by the defendant orally instructing them in the telephone conversation not to send any further communications to them but that they should deal with Hassans. He submitted that that misled Verralls into believing that service should be upon Hassans. He further argued that Hassans then deliberately allowed time to pass without saying that they had no instructions to accept service until after expiry of the service period, thereby intending to gain tactical advantage in

obtaining for their client a limitation defence. He complained that Hassans in this regard were *"in breach of their professional duty imposed by the overriding objective"*.

25. However, I am in no doubt, and in agreement with the submissions of Mr Danino for the defendant, that the Judge reached the right conclusion and did so for the right reasons.

26. There can, I consider, be no doubt that the claim form was not properly served in accordance with the rules within the prescribed time limit. At no stage had the defendant in the telephone conversation indicated that Hassans had instructions to accept service. Indeed the defendant did not even know at that time that a claim form had been issued. At no stage thereafter did Hassans state, whether in writing or at all, that they had instructions to accept service either. Accordingly, in so far as the letter of 8 January 2024 to Hassans purported to be by way of service (and I note incidentally that it did not even explicitly say that) it was contrary to the rules and ineffective for that purpose.

27. In deciding whether or not there was good reason to validate service, the Judge properly weighed the relevant factors, not least the three main factors identified by Lord Sumption in the *Barton* case. In particular, the Judge was, in my opinion, wholly justified in holding that reasonable steps had not been taken to effect service in accordance with the rules. Like the Judge, I reject the argument that Verralls had been misled in this regard, in circumstances where no indication had been given that Hassans were instructed to accept service. The fact that Verralls had been told to direct communications to Hassans cannot be equated with an indication that Hassans were instructed to accept service; as the facts of the case of *Barton* itself and as cases such as *Piepenbrock v Associated Newspapers* [2020] EWHC 1708 QB (see in particular paragraph 61 of the judgment of Nicklin J) confirm. If Verralls were misled, that as I see it is because Verralls had misled themselves. It was in fact perfectly open to them either to serve the defendant directly or to ask Hassans if they had instructions to accept service. But they did not

take either course. Further, they knew of the expiry of the limitation period and of the consequent need for timely service. They also, as solicitors, ought to have known of the requirements of the rules and indeed, ought to have known of the potential pitfalls in informality in attempted service, by reason of the decision in *Barton,* which had been widely reported and has been much commented on.

28. The further argument that Hassans were in breach of some obligation in failing to alert Verralls prior to expiry of the time limit that they had no instructions to accept service is misconceived. First, Hassans in principle were under no duty or obligation in this respect to Verralls or to the claimant; rather Hassans owed a duty to their own client. They could not properly have alerted Verralls to the potential problem without at least first taking instructions from their own client; which (given the limitation position) would scarcely have been forthcoming. Second, and reflecting the first point, such an argument is in any event contrary to authority (see paragraph 22 of the judgment of Lord Sumption in *Barton*).

29. It is usually a difficult task for any would be appellant to seek to attack an evaluative decision of a Judge on a procedural matter made upon an appraisal of the facts and circumstances. Here no error, even arguably, has in my judgment been identified in the approach or appraisal of Mr Justice Restano. However, I would not simply refuse permission to appeal on the basis that the decision of Mr Justice Restano was one properly and reasonably open to him: although that would suffice. I do so on the basis that his decision was, given the circumstances of this case, positively correct and the contrary is not realistically arguable.

30. In conclusion, I add three points:

    (1) First, the Judge rejected a further argument by reference to the Limitation Act 1960. He was plainly correct on that, and the contrary has not been argued in the grounds of appeal.

(2) Second, I should not be taken as in any way endorsing or approving the imposition of the condition as to costs as appears in the order of 27 November 2024 granting permission to appeal. On the contrary, I regard a condition of that sort as undesirable. If the Judge considered that the case merited permission to appeal, he should simply have granted permission without any such condition. The question of costs could, for example, have been met by an order for payment of costs, with an order for interim payment, as part of the substantive order refusing the claimant's application for relief; and such an order for costs would then be capable of being stayed pending appeal on cause shown (for example, as to the financial inability to pay). Certainly, such a condition as here imposed should not be imposed as a kind of quasi-security for costs; and questions of security for costs of an appeal are a matter for the Court of Appeal itself.

(3) Third, I would say this. It may be that the claimant may feel aggrieved that she has been deprived of a substantive appeal, for which the Judge himself had given permission, by reason of the condition imposed as to costs and as to the procedural consequences resulting. But such a complaint would be without substance; even had Mr Justice Restano not imposed that condition a substantive appeal would inevitably have failed, for the reasons I have sought to outline in this present judgment.

31. I therefore would for my part refuse permission to appeal. In consequence, all other applications raised in the Notice of Motion likewise fall away.

SIR COLIN RIMER, JA:

32. I agree.

SIR MAURICE KAY, P:

33. I also agree.