Neutral Citation Number: [2025] EWCA Civ 1347

Case No: CA-2025-000771

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
Master Dagnall
[2024] EWHC 1579 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/10/2025

Before:

LORD JUSTICE COULSON
LORD JUSTICE PHILLIPS
and
LADY JUSTICE ANDREWS

- -

Between:

Bellway Homes Limited	**Appellant**
- and -	
The Occupiers of Samuel Garside House	**Respondent**

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- -

Tim Calland (instructed by **DAC Beachcroft LLP**) for the **Appellant**
David Sawtell (instructed by **Edwards Duthie Shamash Solicitors**) for the **Respondent**

Hearing date: 8 October 2025

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Judgment Approved

LORD JUSTICE COULSON :

1. Introduction

1. This appeal is concerned with the procedural rights and obligations of a defendant in circumstances where, on the claimant's application, the court at first instance ruled that: a) the claim form was not served in accordance with the date set out in an earlier order; and b) the claimant is not entitled to an extension of time. There is a cross-appeal which argues that the judge was wrong to find that the claim form was not served in time.

2. The day before the hearing on 8 October 2025, a different constitution of this court handed down judgment in *Robertson v Google* [2025] EWCA Civ 1262 ("*Robertson")*. Unless it could be distinguished, that authority indicated that the appeal in this case was well-founded. Both the cross-appeal and the centrality of *Robertson* meant that it was sensible to hear first from Mr Sawtell, who appeared for the respondent.

3. Having heard Mr Sawtell's clear and focused submissions on those two issues, the court announced at the appeal hearing that it would dismiss the cross-appeal and allow the appeal, with detailed judgments to follow. This judgment sets out my reasons for joining in with that decision.

2. The Factual Background

4. The factual background is set out at length in the first judgment of Master Dagnall ("the judge") dated 25 June 2024 ([2024] EWHC 1579 (KB)) at [18]-[62]. However, for the purposes of this appeal, the relevant facts can be summarised much more shortly.

5. On 9 June 2019, there was a serious fire at Samuel Garside House, 2 De Pass Gardens, Barking in Essex ("the building"). The claimants, and respondents to this appeal, are occupiers of various flats within the building. The claims are for personal injury, physical damage and economic loss. The first defendant, Bellway Homes ("Bellway"), was the developer and constructor of the building. The second defendant was the architect. The proceedings against them have subsequently been settled.

6. The claim form was issued on 6 June 2022. There were delays in the preparation of the claim. Eventually it was agreed that the deadline for the claimants to file and serve the claim form and the particulars of claim would be extended to 4pm on 21 April 2023. That agreement was confirmed by an order of the court dated 1 November 2022.

7. The claimants' solicitors were Edwards Duthie Shamash ("EDS"). Bellway's solicitors at that stage were Gateley Legal LLP ("GL"). Both the Nazir email address, and the Johnson email address, referred to below, were email addresses of solicitors at GL. The second defendant's solicitors were Mayer Brown International LLP ("MB").

8. In relation to the service of the claim form, it appears that EDS were rather casual about the date of 21 April 2023. For instance, on the face of the correspondence, little if anything happened in the two months leading up to that critical date. Thereafter, as set out in the judge's judgment, the service of the claim was purportedly effected in the following way:

> "44. On 21 April 2023 at 2.17pm EDS emailed GL to the Nazir Email Address stating "The deadline for service of the claim is today. Can you confirm whether you will agree to execute a consent order to postpone the deadline by three months… We are due the final expert's report by the beginning of May…Forgive us for the time constraints but may we have your reply by 2.45pm after which time we will serve the claim and would be content to continue the discussions on the stay thereafter." At 15.22pm EDS emailed a proposed consent order. At 3.53pm a Roger McCourt of GL, with an email which bore the Leeds Telephone Number, responded to refuse in circumstances "where you are proceeding to serve a claim form…" At 4.18pm EDS responded to say that their Salma Hussain had confirmed with a "Barbara" at GL their fax number but that "That fax number has not been recognised." and said "given the issues with the fax at your end, can you confirm that our email timed at 15.44… can be accepted as service of the claim."
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> 45. On 21 April 2023, EDS sent or purported to send, by way of service, the Claim Form to GL by DX to the Leeds DX Address and by fax under cover of a letter of 21 April 2023 which also referred to Service by Fax (giving a Leeds Fax Number) and which stated that it was sent "(by way of copy only)" to the Johnson Email Address; and invited a stay. EDS contend that they sought to send the Claim Form to GL by fax at 4pm, but which failed, and by DX (and I deal with what actually happened further below).
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> 46. Also on 21 April 2023, EDS sought to send the Claim Form by fax (and also by email) to MB. EDS contend that they then sought to send the Claim Form to MB by fax at 15.49pm, but which failed, and by DX (and I deal with what actually happened further below).
> 47. On 27 April 2023, GL replied by emailed letter which bore the Leeds Address and did not have any fax number to say that: (i) the Claim Form had not been served in accordance with the November Order and where there had been no previous indication of a preparedness to accept service by fax or electronic means (ii) there was also a serious failure to serve Particulars of Claim in time and (iii) they would be applying to strike-out the claim under CPR3.4(2)(c).
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> 48. On 27 April 2023, MB sent EDS a letter referring to emails on 21 April 2023, and stating that they had not received any fax, and saying that the Claim Form (and Particulars of Claim) had not been served in time and any application for leave to serve them would be resisted and they would apply to strike out the Claim. They repeated that the Claimants had issued and attempted to serve the wrong entity.

> 49. On 28 April 2023, the Claimants applied for a declaration that the Claim Form had been served, alternatively for relief from sanctions for any failure to serve the Claim Form and Particulars of Claim in time and/or for an extension of time. The application was supported by a witness statement of Kavita Rana ("Rana") of EDS of 28 April 2023 and which referred to the past events and which I have considered in its entirety but which in particular (i) stated there had been an agreement to extend time for service to 8 June 2023 (ii) referred to the history (iii) said that Salma Hussain of EDS had spoken to a "Barbara" at GL at 15.22 on 21 April 2023 and asked for confirmation of the Leeds Fax Number, which Barbara gave (iv) stated that EDS sought to fax the Claim Form to GL at around 3.45pm but received an error message and then tried and failed again (v) stated that Ms Hussain confirmed the fax number with Barbara at about 3.45pm (vi) stated that the fax did not deliver to GL (vii) said that attempts had been made to fax the Claim Form to MB on 21 April 2023 but had failed (vii) stated that relief from sanctions was sought in relation to all matters, should such be required, and including because EDS were seeking to comply with a Protocol process but the Defendants had refused to accept the agreed extension to 8 June 2023."

9. One of the many issues that arose before the judge concerned what had been happening at EDS's offices on the afternoon of 21 April 2023. At [61], the judge said:

> "i) The third witness statement from Rana referred to: the documents being sent to both GL and MB by DX on 21 April 2023; the documents having been prepared for DX following 3.40pm then being placed in a designated area of the EDS office reception for collection by the DX courier and such usually occurring "after office hours" with the DX courier having a key to the office; a series of Fax transmissions having been sought to be made to the Fax numbers obtained for GL and MB before (MB) at (GL) and shortly after (MB) 4pm on 21 April 2023 and such having all failed; a print-out for the first (15.49pm to MB fax) with an error code ##280 which the relevant machine supplier indicated suggested an error at either the sending fax machine or the receiving fax machine or in between them; print-outs for the second and third faxes suggesting that the faxing failed because of feeding problems into the EDS system; the fax machine having sent faxes that day to other fax numbers successfully; and there having been on other subsequent days problems in sending faxes to GL and MB"

It appears that the attempts to send the claim form by fax took between 3.49pm and at least 4.03pm.

10. It was immediately apparent to EDS that there was or could be a dispute about valid service (and therefore the court's jurisdiction). That explains why just a week later, on 28 April 2023, they applied to the court for a declaration that the claim form had been served in time, alternatively relief from sanctions for any failure to serve the claim form in time and/or for an extension of time. It was that application that led to the judge's first judgment noted above.

11. The first issue for the judge in his first judgment concerned service by fax, which the judge dealt with between [95]-[103]. He concluded that the claim form had not been validly served by fax on Bellway [103], a conclusion he repeated in respect of the second defendant [122].

12. The next issue was whether the claim form had been served in time by DX. The judge considered the relevant material at [104]-[113] but concluded at [113] that valid service by DX on Bellway had not been effected in time. He made the same finding in respect of the second defendant at [123]. His crucial findings of fact were:

> "111. However, the second question is whether such a sending occurred within time; being by 4pm on 21 April 2023. Here the evidence from Rana is that the Claim Form was left in the EDS reception for collection by the DX courier which took place on the usual basis after office hours i.e. after 4pm. That evidence has not been challenged and I accept it and regard those matters as having been proved on the balance of probabilities. However, I note that Rana does not identify precisely when the documents were printed out and left for collection (although it would have been after 3.40pm).
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> 112. Nevertheless, even if the printing out etc. took place before 4pm, I do not regard that as sufficient for the relevant service step to have been taken in time under CPR7.5. The leaving of the material in the EDS reception cannot, in my judgment, amount to a "delivering to… the relevant service provider" and the "collection by the relevant service provider" only took place after the 4pm time limit contained within the November Order. While the position might be different (although I have reached no conclusion on the point) if the material had been placed in a box owned by the DX provider (and possibly to which only the DX provider had a key), Rana only states that the material was left in reception and that the DX courier had a key to the office enabling access after office hours."

3. The Judgment Below

13. I have identified above the judge's factual findings in his first judgment. As a result of those findings, he concluded at [124] that the claimants had failed to show that they had served the claim form by the date and time set out in the November order. The judge was then obliged to work through three different arguments advanced by the claimants as to how and why they were entitled to avoid the consequences of that default.

14. First, the claimants argued that time for service had been extended by agreement until 8 June 2023. At [125]-[133] the judge concluded that there was no such agreement. He therefore concluded at [134] that the claimants had failed to comply with CPR 7.5, and refused to grant the declaration sought by the claimants to the effect that the claim form had been validly served.

15. Secondly, at [135]-[143] the judge refused to grant the claimants relief from sanctions. The judge made it clear that the relevant jurisdiction was CPR 7.6 and that CPR 3.9 and CPR 3.10 "cannot be used to evade the jurisdictional limits of CPR 7.6": see [139]. The judge noted that it had not been and could not be suggested that the

claimants had taken all reasonable steps to comply with CPR 7.5: see [140]. Thus at [144] he refused the claimants relief from sanctions. They were not entitled to an extension of time.

16. Just pausing there, although it was not an issue in this appeal, it is appropriate to confirm the correctness of the judge's approach to this issue. If a claim form has not been served in time, as the judge said, the only remedy for a claimant is to seek an extension of time pursuant to r.7.6. The relief from sanctions regime under r.3.9 and r.3.10 is irrelevant: see *Barton v Wright Hassall LLP* [2018] UKSC 12, [2018] 1 WLR 1119 at [8]; *R (Good Law Project Limited) v Secretary of State for Health and Social Care* [2022] EWCA Civ 355, [2022] 1 WLR 233, at [83]; and *Robertson* at [36] – [52].

17. Thirdly, the claimants had a further argument to the effect that, even though service of the claim form had been out of time, it had taken place later in April 2023 and, because of what they said were subsequent omissions by Bellway, the proceedings against them should be permitted to continue. This was, they said, the result of Bellway's failure to file an Acknowledgment of Service ("AoS") and/or their failure to make a CPR Part 11 application challenging the court's jurisdiction. The judge concluded as a matter of law that that submission was correct: see [158]. He said that Bellway were obliged to do both. Although he said that Bellway could apply to serve an AoS and/or make an application under Part 11 out of time, in his second judgment ([2025] EWHC 772 (KB)), dated 13 January 2025, he declined both applications. Of course, if he had been wrong to accede to the claimants' submissions as to Bellway's obligation to file an AoS and/or make a separate r.11 application, the second judgment was otiose.

4.The Appeal and Cross-Appeal

18. Bellway's appeal is advanced on three grounds. First, they say that, having found that the claim form was not served in time and that the claimants were not entitled to an extension of time, the judge should have found that this action could not proceed further against them. Secondly, they say that the judge was wrong to find that Bellway was required to file an AoS within the time set out in r.10.3 in circumstances where both the claim form and the particulars of claim were served outside the relevant period. Thirdly, they say the judge was wrong to hold that he could only find that the court had no jurisdiction to hear the claim in the event that Bellway had made a valid and timely application under Part 11 following the filing of an AoS.

19. The cross-appeal goes back a stage. The claimants argue that the judge was wrong to hold that they had not effected valid service of the claim form by DX by the stipulated date and time. They submit that, on the evidence, they had left the claim form out for collection by the DX by 4pm, and that that was sufficient to comply with the r.7.5. As Mr Sawtell rightly pointed out in his skeleton, if his cross-appeal was correct, it was unnecessary for the court of consider the three issues raised by the appeal itself. I therefore deal with the cross-appeal first.

5.The Cross-Appeal

20. CPR 7.5 provides as follows:

"**7.5**
(1) Where the claim form is served within the jurisdiction, the claimant must complete the step required by the following table in relation to the particular method of service chosen, before 12.00 midnight on the calendar day four months after the date of issue of the claim form.

Method of service	Step required
First class post, document exchange or other service which provides for delivery on the next business day	Posting, leaving with, delivering to or collection by the relevant service provider
Delivery of the document to or leaving it at the relevant place	Delivering to or leaving the document at the relevant place
Personal service under rule 6.5	Completing the relevant step required by rule 6.5(3)
Electronic method	Sending the e-mail or other electronic transmission

(2) Where the claim form is to be served out of the jurisdiction, the claim form must be served in accordance with Section IV of Part 6 within 6 months of the date of issue."

21. The claimants' argument is that the court should infer as a matter of fact that the claim form was left out for collection by the DX service before 4pm, and that this therefore constituted compliance with r.7.5. In my view, that argument fails both on the facts, and as a matter of law.

22. It is necessary first to focus on the claimants' core obligation in April 2023. By reason of the order of November 2022, that was to file and serve the claim form and the particulars of claim by 4pm on 21 April 2023. During the appeal hearing, Mr Sawtell confirmed that neither the claim form nor the particulars of claim were filed with the court until sometime after that date. Moreover, the document that was the subject of so much activity at the EDS office on the afternoon of 21 April 2023 was just the claim form, the response pack and so on. It did not include the particulars of claim, which were not provided until May 2023. Thus, on the afternoon of 21 April 2023, the claimants did not comply - and plainly had no intention of complying - with the court order of November 2022, which required the filing and service of both the claim form and the particulars of claim.

23. That conduct seems to be the result of a belief on the part of EDS that the defendants would agree to yet another extension of time. It is unclear where that belief originated. At all events, it was only at about 3.22pm on the afternoon of 21 April 2023 that EDS realised that a further agreed extension would not be forthcoming. In those circumstances, they were obliged to do what they could to comply with the order. That was limited to an attempt to serve the claim form by 4pm.

24. This is important when one comes to consider the factual evidence. As noted in paragraphs 8, 9 and 12 above, the only evidence concerning service by DX was that

the claim form was left at the EDS reception for collection by the DX courier which would have taken place on the usual basis after office hours (i.e. after 4pm). There was no evidence as to when the claim form was printed out and left for collection by the DX, although we do know that that would have been after 3.40pm.

25. Mr Sawtell asked this court to infer that the documents were left out for collection by 4pm. But there is no basis for such an inference, and I consider that the judge was right to reject it. In my view, the evidence points firmly the other way. The claim form and other documents were the subject of the frantic faxing between around 3.40pm and at least 4.03pm. Unless there were copies, if the claim form was still being faxed after 4pm, it could not have been simultaneously out for collection by the DX. The evidence does not say that there were copies: again, the only obvious inference from the evidence is that there were not. Accordingly, the claimants have failed to discharge the burden of showing that, as a matter of fact, they took the necessary steps for service by 4pm.

26. But even if that were wrong, and it could be shown that the claim form was left out for collection by the DX before 4pm, I would still reject the submission that the claimants had complied with r.7.5 as a matter of law. There are a number of reasons for that.

27. First, the document must be *left with* the DX service. In my view, that requires an act of transmission by the claimants: in essence, the passing on of the document from the solicitor into the possession of the DX service. You do not leave a document with the DX by having it in your reception for their collection at some point in the future. The concept of A leaving a document with the DX service implies that the document has left A and gone into the possession of the DX service. It would be a nonsense to suggest that a document that might sit in A's reception for 24, 48 or 72 hours (because 21 April 2023 was a Friday) had somehow been validly served on B by 4pm on that Friday.

28. Secondly, as my Lord, Lord Justice Phillips, pointed out during the course of argument, each of the methods of service identified in r.7.5 - posting, leaving with, delivering to or collection by the relevant service provider - constitutes not only a positive act, but also an irrevocable one. Once the document has been posted/left with/delivered to/collected by the DX, it cannot be taken back. It cannot be amended. By contrast, documents left on the receptionist's desk can always be taken back and further amended. That is not within even the widest concept of 'service'.

29. Thirdly, Mr Sawtell's argument relies on the proposition that a document which is 'left for collection' fits within one of the options in r.7.5. In my view, it does not. It is actually based on an elision between two different phrases in r.7.5: 'left with' the DX and 'collected by' the DX. Leaving a document out for collection by the DX is not therefore something which could constitute proper service under r.7.5 in any event.

30. Fourthly, the claimant's argument misses the whole point as to why service by way of DX is an approved method of service. That is because, as with first class post, it provides for delivery on the next business day. Accordingly, in order to serve these documents on Bellway by DX by 4pm on 21 April 2023 (as they were required to do by the terms of the November order), EDS had to leave them with the DX on 20 April

2023, so as to comply with r.7.5. Otherwise, on any view, service was going to be late and outside the terms of the November order.

31. In all those circumstances, therefore, I would reject the cross-appeal. That then brings us to the appeal.

6. The CPR

32. The relevant parts of the CPR that go directly to the appeal are Parts 9, 10 and 11. Rule 9.2 provides:

> "When particulars of claim are served on a defendant, the defendant may –
> (a) file or serve an admission in accordance with Part 14;
> (b) file a defence in accordance with Part 15,
> (or do both, if he admits only part of the claim); or
> (c) file an acknowledgment of service in accordance with Part 10."

33. Rule 10.1(3) provides that:

> "A defendant must file an acknowledgment of service if –
>
> (a) they are unable to file a defence within the periods specified in rule 15.4; or
>
> (b) they wish to dispute the court's jurisdiction.
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> (Part 11 sets out the procedure for disputing the court's jurisdiction)."

34. Failure to file an AoS within the periods specified in r.10.3 can lead to a default judgment (r.10.2). Any AoS must be filed 14 days after service of the Particulars of Claim (where the defendant is served with a claim form which states the particulars of claim are to follow) or 14 days after service of the claim form in any other case (r.10.3).

35. Rule 11 provides that:

> "(1) A defendant who wishes to –
> (a) dispute the court's jurisdiction to try the claim; or
> (b) argue that the court should not exercise its jurisdiction may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.
> (2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.
> (3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.
> (4) An application under this rule must –
> (a) be made within 14 days after filing an acknowledgment of service; and
> (b) be supported by evidence.
> (5) If the defendant –
> (a) files an acknowledgment of service; and

> (b) does not make such an application within the period specified in paragraph (4), he is to be treated as having accepted that the court has jurisdiction to try the claim…"

7. The Authorities

36. The rights and obligations of the parties in circumstances where a claimant has failed to serve a claim form properly and/or in time are dealt with in a number of authorities. They are largely fact-specific although, having set them out in this section, I attempt to summarise the principles that can be derived from them in Section 8 below.

37. The point in issue on this appeal arises out of the potential interplay between defective service by the claimants, on the one hand, and a defendant's consequential rights and obligations, on the other. If a defendant avers that the claim form had not been properly served, then he or she is raising a jurisdictional issue (see *Hoddinott,* cited below). The question is whether, in such circumstances, the defendant is required, notwithstanding the defective service, to take positive steps, such as to file an AoS and/or issue an application under Part 11, and whether, if he does not do so, he is deemed to have accepted the court's jurisdiction.

38. In *Shiblaq v Sadikoglu* [2004] EWHC 1890, a claimant had failed to effect valid service out of the jurisdiction. Despite that, in the absence of an AoS from the defendant, he went on to obtain judgment in default. The claimant argued [14] that, if the defendant had wanted to raise an issue about the validity of service, then it could only do so by making an application under Part 11. It was said that the failure so to do meant that the claimant was entitled to judgment in default. Colman J rejected that argument, describing it as "bizarre". He went on to say at [20]:

> "The giving of judgment for lack of acknowledgment that a procedural step has been taken which has, in truth, never or has never effectively been taken would not appeal to many as a logical or, indeed, a fair feature of a system of civil procedure".

39. In *Hoddinott v Persimmon Homes* [2007] EWCA Civ 1203, [2008] 1 WLR 806 (CA) the claimants obtained, *ex parte*, an extension of time for service of the claim form. They sent a copy of the claim form and particulars of claim for information purposes to the defendant during the period of the extension. Subsequently, the defendant applied to set aside the extension order on the basis that the claimants did not have a good reason for the delay. When the claim form and particulars of claim were served on the defendant in accordance with the court order, the defendant filed an AoS indicating an intention to defend the claim but not indicating that it intended to contest jurisdiction. The order for an extension was subsequently set aside on the basis that it was unjustified. The claim was then struck out, the District Judge finding that the defendant did not need to make an application to challenge the court's jurisdiction in order to apply for the extension of time to be set aside.

40. That decision was overturned by this court. Dyson LJ (as he then was) found that the defendant had accepted jurisdiction, despite the setting aside of the extension order. He said that, on a proper reading of r.11(5), a defendant who filed an AoS but did not make an application under r.11(1) within 14 days to dispute the jurisdiction was

treated as having accepted the court's jurisdiction to try the claim. In particular, he said that:

> "22. In our judgment, CPR 11 is engaged in the present context. The definition of "jurisdiction" is not exhaustive. The word "jurisdiction" is used in two different senses in the CPR. One meaning is territorial jurisdiction. This is the sense in which the word is used in the definition in CPR 2.3 and in the provisions which govern service of the claim form out of the jurisdiction: see CPR 6.20 et seq.
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> 23. But in CPR 11(1) the word does not denote territorial jurisdiction. Here it is a reference to the court's power or authority to try a claim. There may be a number of reasons why it is said that a court has no jurisdiction to try a claim (CPR 11(1)(a)) or that the court should not exercise its jurisdiction to try a claim (CPR 11(1)(b)). Even if Mr Exall is right in submitting that the court *has* jurisdiction to try a claim where the claim form has not been served in time, it is undoubtedly open to a defendant to argue that the court *should not exercise* its jurisdiction to do so in such circumstances. In our judgment, CPR 11(1)(b) is engaged in such a case. It is no answer to say that service of a claim form out of time does not of itself deprive the court of its jurisdiction, and that it is no more than a breach of a rule of procedure, namely CPR 7.5(2). It is the breach of this rule which provides the basis for the argument by the defendant that the court should not exercise its jurisdiction to try the claim…
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> 27. In our judgment, the meaning of paragraph (5) is clear and unqualified. If the conditions stated in subparagraphs (a) and (b) are satisfied, then the defendant is treated as having accepted that "the court has jurisdiction to try the claim". The conditions include that the defendant does not make an application for an order pursuant to CPR 11(1) within 14 days after filing an acknowledgment of service. An application to set aside an order extending the time for service made before the filing of an acknowledgement of service is not an application under CPR 11(1) nor is it an application made within 14 days after the filing of the acknowledgment of service. The district judge (rightly) did not hold that the application to set aside the order extending time for service *was* an application under CPR 11(1). Rather, he said that the earlier application to set aside the order rendered it unnecessary to make an application under CPR 11(1). But in our judgment, there is no warrant for holding that, if an application is made before the filing of an acknowledgment of service to set aside an order extending the time for service, this has the effect of disapplying the requirement for an application under CPR 11(1). There is no such express disapplication, nor does one arise by necessary implication."

41. In *Dubai Financial Group LLC v National Private Air Transport Services Co Ltd* [2016] EWCA CIV 71, the court was dealing with the extent to which there were any obligations on a defendant in circumstances where the original service had been invalid, but where it had been retrospectively validated by the judge. The judge had failed to go on and indicate when time for the service of an AoS expired. Default judgment was obtained. This court set the default judgment aside. At [29], Treacy LJ

said there was considerable force in the point that the CPR impose no obligation on a defendant to take any steps in response to invalid or unauthorised service. He noted at [32] that default judgment was not available when the relevant time for serving an AoS had not expired. Where no such time had been identified following retrospective validation of the original defective service, it could not be said that time had expired. At [36], McCombe LJ said that the defendant "had simply not being served in accordance with the law and time for an acknowledgment of service had not begun to run against it at all". At [40] he said that "the time for acknowledgment of service had not expired, because none had ever become applicable".

42. In his judgment in *Pitalia & Anr v NHS England* [2023] EWCA Civ 657, [2023] 1 WLR 3584, Bean LJ (to my mind, correctly) described *Hoddinott* at [33] as authority for the (relatively limited) proposition that "if a defendant acknowledges service without making an application under CPR 11(1) for an order declaring that the court has no jurisdiction (or should not exercise its jurisdiction) to try the case, this is taken to be acceptance of jurisdiction". In *Pitalia*, the claim form was not served within the 4 month period. The defendant's solicitors replied by letter to say that the claim form had been served late and they intended to apply to strike out the claim. The subsequent AoS did not tick the box as to jurisdiction, although it did tick the box that all claims would be defended. This court concluded that, in all the circumstances, the failure to tick the box indicating an intention to contest jurisdiction was not fatal to the defendant's application to strike out the claim. It was not the case, given that errors in issuing and serving originating process were in a class of their own, that the same procedural rigour should be applied to the defendant as must be applied to the claimants. The failure to make express reference to r.11(1) was not a serious and significant transgression. It was clear from the surrounding material that jurisdiction was always challenged.

43. The difference in outcome between *Hoddinott,* on the one hand, and *Pitalia* on the other arose because, in the latter case, it was always apparent that jurisdiction was in issue and the court was content to treat the application to strike out as an application to dispute the jurisdiction under Part 11.

44. Neither of these two authorities addressed the position where no AoS was served at all. Nugee LJ (sitting at first instance) considered that issue, albeit *obiter*, in *Hand Held Products Inc & Anr v Zebra Technologies Europe Limited & Anr* [2022] EWHC 640 (Ch). He said at [78] that *Hoddinott* was authority for the proposition that if a defendant had been served and acknowledged service, it must make an application under r.11(4) to set aside the service. However he went on to say:

> "79. It is not obvious to me that *Hoddinott* stands as authority for the wider proposition that if the claimant claims to have served the defendant and the defendant denies that there has been any effective service, the defendant must still use Part 11 to challenge the effectiveness of the service. It is possible that that follows, but I do not think it necessarily follows. For example suppose a claimant serves not at the defendant's address but at his neighbour's. The defendant may be passed the claim form by his neighbour and may therefore be in a position to invoke Part 11 (although it is to be noted that before applying under CPR r 11(4) a defendant must by CPR r 11(2) first file an acknowledgment of service and it seems a bit odd for a defendant to

> acknowledge service when his contention is that there has been no service at all). But the neighbour may never tell the defendant, and the first the defendant may know of the proceedings is an attempt by the claimant to enforce a default judgment. Must the defendant then use Part 11 to challenge the default judgment? I do not regard that as obvious. The reasoning of Dyson LJ in *Hoddinott* is that where a defendant *has* acknowledged service and has not brought an application under CPR r 11(4) within 14 days thereafter, the consequences in CPR r 11(5) follow. But that does not necessarily apply where a defendant has *not* acknowledged service. The logic of Dyson LJ's judgment does not compel the conclusion that a defendant who has *not* acknowledged service can only raise the issue whether service has been effected at all by using Part 11."

45. A case on which the judge in the present case placed considerable reliance was *R (Koro) v County Court at Central London* [2024] EWCA 94, where the judgment was given by Stuart-Smith LJ. The tortuous procedural history more than justifies the characterisation of the case as a procedural dog's breakfast. Happily, that history does not need to be set out here. For present purposes, it is only necessary to note that the claimant was entitled to an in-person hearing of his application to set aside an order striking out his claim [24]. After lengthy delays and errors by the court, that hearing was fixed for 27 May 2022 [40]. However, at that hearing, the defendant attended by counsel and, for the first time, submitted that because of alleged errors in service nearly two years before, the claim was a nullity and that the court had no jurisdiction to hear it. The judge acceded to that application. The claimant appealed.

46. This court was first concerned with the nullity point, and whether proceedings which had been issued continued to exist, whether or not they had been properly served. At [64] Stuart-Smith LJ concluded that such proceedings do not cease to exist merely because they had not been served in time. He therefore concluded that they were not a nullity.

47. The main concern, however was the way in which the hearing before the judge had been hijacked by the defendant, who raised the point, unheralded at any point during the procedural skirmishes beforehand, that the court had no jurisdiction to continue to hear the claim. Stuart-Smith LJ said at [65] – [68] that *the* procedure for disputing the court's jurisdiction was laid down by Part 11, and the defendant could not bypass that so as to hijack the hearing before the judge. He did not, however, find that the absence of a Part 11 application was itself fatal; instead he set a procedural course for enabling the various disputes between the parties – including the jurisdiction dispute - to be resolved.

48. *Koro* was therefore a case where the question of the validity of the service had been raised by the defendant (months, if not, years out of time), rather than – as here - by the claimant almost immediately after the late service of the claim form. In those circumstances, I would respectfully agree with Stuart-Smith LJ: that the only procedure for the defendant in *Koro* to follow was Part 11. That was the way in which the defendant could fairly raise – for the first time - the question of jurisdiction with both the claimant and with the court. But that is far removed from the facts of the present case, where the defendant had no need to adopt that course because the

question of service, and therefore jurisdiction, had been expressly raised by the claimant within a week of the late service of the claim form (see paragraph 10 above).

49. Finally, that leaves *Robertson*, to which I have already referred. There, the court considered all of the authorities noted above save for *Koro*. The court's conclusions on the AoS/Part 11 point were set out in my judgment at [70]–[74] as follows:

> 70 "As to the CPR, I consider that all the rules concerned with the service of the AoS presuppose that the claim form and/or particulars of claim have been validly served. The CPR build, one upon another, on the assumption that the previous applicable rule has been complied with. The claimant's obligations as to service are set out in Parts 6 and 7; the defendant's concomitant obligations are in Parts 9-11. The latter assume that the former have been complied with: otherwise the CPR would be five times as long, having to set out all the potential consequences if a previous step had not been validly taken. So r.9.2 (paragraph 61 above), which is the starting point of the defendant's obligations, only works if the claim form has been validly served in the first place. There is no obligation to serve an AoS in circumstances where the claim form has not been validly served.
>
> 71 Google were not therefore obliged to serve an AoS in the present case. In consequence, *Hoddinott* is of no application.
>
> 72 Moreover, also by reference to the CPR, there was no requirement for Google to make an application under r.11. Such an application is required in circumstances where a defendant decides, at the outset, that he wishes to make a challenge to the court's jurisdiction. If so, he is required to communicate that position to the claimant. Hence the importance of an application under r.11.
>
> 73 But in the particular circumstances of this case, that was unnecessary. Here, Google were responding to Mr Robertson's own application to rectify his invalid service. Google made it plain from the outset that they opposed that application. They were of course quite entitled to do so. It would have been apparent to everyone that, if Mr Robertson's application failed, the claim form was not validly served, these proceedings would be a nullity, and the court would have no jurisdiction. Accordingly there was no need for a separate r.11 application; that would have simply duplicated paper, time and costs.
>
> 74 In accordance with the analysis in both *Pitalia* and *Hand Held*, I do not consider that *Hoddinott* is authority for any contrary proposition. It is limited to where an AoS has been served in response to a claim form served in time, and where the absence of any indication of a jurisdictional challenge meant that the presumption of acceptance set out in r.11 must apply. That is simply not this case."

50. I should say in passing, that although *Koro* was not cited to the court in *Robertson*, the reasoning at [72]-[73] above makes plain why, on its facts, *Koro* was decided as it was, but why it had no bearing on the situation in *Robertson*.

8. Summary of Applicable Principles

51. I would summarise the applicable principles from these authorities as follows:

(a) If a defendant acknowledges service without making an application under CPR 11(1) for an order declaring that the court has no jurisdiction (or should not exercise jurisdiction) to try the case, that is taken to be a prima facie acceptance of jurisdiction: see *Hoddinott* at [22] – [27] and *Pitalia* at [33].

(b) However, even then, if it is plain that jurisdiction is in issue then, depending on the surrounding circumstances, the failure to tick the relevant box on the AoS form may not be fatal: see *Pitalia* at [34].

(c) Neither *Hoddinott* nor *Pitalia* are authority for the proposition that, if the defendant denies there has been any effective service and has not served an AoS, the defendant must still use Part 11 to challenge the effectiveness of the service: see *Hand Held* at [79].

(d) Where a court has concluded that a claim form has not been served within time and no extension of time can be granted, a defendant is not obliged to file an AoS: see *Shiblaq*, *Dubai Financial Group* and *Robertson*.

(e) The CPR operates on the basis that the defendant's obligation under Parts 9 and 11 are only triggered by the valid service of the claim form: see *Robertson* at [70]. If a claim form has not been validly served and an extension of time is refused then, if the defendant does not accept the court's jurisdiction, the proceedings that are the subject of the claim form cannot be pursued against that defendant: see *Robertson* at [69] – [77].

(f) The reason that cases such as *Hoddinott* and *Koro* stress the importance of the defendant making an application under Part 11 is because such an application makes plain to everyone that the defendant is taking a service - and therefore a jurisdiction - point. But such an application is unnecessary if the claimant has already unsuccessfully raised with the court the question of service, and therefore jurisdiction: see *Robertson* at [73].

9. Can *Robertson* Be Distinguished?

52. Mr Sawtell confirmed during his oral submissions that he did not say that *Robertson* was wrongly decided or was in any way *per incuriam.* His argument, by reference to a lengthy passage at [30] – [32] of the second judgment of the judge, was that there was a distinction to be drawn between a failure to serve a claim form using the right method, and a failure to serve a claim form on time. His argument was that *Robertson* fell into the former category, whilst this case fell into the latter category.

53. This was important because he said, by reference to r.6.14, that even if it was served late, a claim form that had been served was deemed to be served on the second business day after completion of the relevant step, and therefore obliged a defendant to file an AoS and, if appropriate, make an application under Part 11. In this way, he not only distinguished between service by the wrong method, and service that was 'merely' late, but he also submitted that *Robertson* was in the 'wrong method'

category, and so was not binding on this court. Again, attractively though these submissions were advanced, I consider that they must be rejected.

54. First, I consider that the submission is based on a misreading of the rules. The full text of r.6.14 is as follows:

> "**6.14** A claim form served within the United Kingdom in accordance with this Part is deemed to be served on the second business day after completion of the relevant step under rule 7.5(1)."

55. It seems to me that, on a proper interpretation of that rule, there is no question of service of the claim form having been deemed to have been valid even if it was late, so that somehow that default did not matter. Deemed service occurs on the second business day after completion *if* the relevant step under r.7.5(1) has been taken. If that step was not taken (because the mode of service was defective or service was effected late) then the deeming provision does not apply. Any other conclusion would mean that a failure to serve on time would not matter; that the time limits in r.7.5 could be ignored with impunity; and that a defendant would be forced to engage in proceedings that had not been validly commenced.

56. Secondly, as a matter of principle, it is usually unprofitable to distinguish between the failure to take a relevant procedural step in time, and the taking of a relevant step timeously but defectively. Both *Vinos v Marks and Spencer PLC* [2001] 3 All ER 784 (CA) and particularly *Ideal Shopping Direct Limited v Mastercard Inc* [2022] EWCA Civ 14, [2022] 1 WLR 1541 at [145] – [150], make that point. In any event, in disputes about service, it will often be the case that the relevant defaults are in respect of both the method and time of service.

57. This case is a good example of that. It might be said that the claimants used the wrong method of service because they left the claim form out for collection by the DX service rather than leaving it with the DX service. In consequence it was not served in time. It is artificial to distinguish between those two defaults, and even more so to say that one default would lead to the court having jurisdiction over the proceedings against the defendant, whilst the other would not. Mr Sawtell realistically conceded that, if there was no reason to distinguish between the two types of default, he could not distinguish *Robertson* and the appeal should be allowed.

58. Thirdly, it was no part of the reasoning in *Robertson* that it was a 'wrong method' case, or that there was any distinction to be drawn between such a default, on the one hand, and late service, on the other. On its facts, *Robertson* was also a case about both wrong method and late service. Again, therefore, it cannot be distinguished.

59. Fourthly, I acknowledged in *Robertson* that there will be many cases of late service in which a defendant will have to go down the Part 11 route. An example of this is provided by *Koro* itself: the defendant could not be allowed to raise a jurisdictional issue for the very first time at a hearing that was intended to deal with something else, without having made an application under Part 11.

60. But that is not this case. And, again, it was not the position in *Robertson* either. In both cases, the question of service - and therefore jurisdiction - was before the court within days of the defective service, because the *claimant* was rightly concerned that

service may have been invalid, and was therefore seeking the necessary relief from the court. The issue of jurisdiction was therefore front and centre before the judge at first instance in both *Robertson* and the present case. As Mr Sawtell properly accepted, in the present case he could have had no complaint now if Bellway had simply served an AoS with the jurisdiction challenge box ticked. Nothing else was required because the claimants were always aware that Bellway challenged the validity of service, and therefore jurisdiction. In those circumstances, as I said in *Robertson*, a separate Part 11 application would simply have duplicated paper, time, and costs and would have served no practical purpose: the issue of jurisdiction was already in play.

61. For these reasons, it seems to me that *Robertson* is entirely on all fours with the appeal in the present dispute. It is binding on us, and it means that the appeal must succeed.

10. Other Considerations

62. Standing back from *Robertson* and the principles to be derived from the other authorities, it seems to me that, as a matter of common sense, where a claimant has not served a claim form in time, and no extension of time has been granted by the court, the defendant is not the subject of the court's jurisdiction. It would be absurd to suggest that, in circumstances where all the default is on the part of the claimant in failing to serve the claim form in time, he or she can obtain some sort of "get out of jail free" card, by suggesting that the proceedings can continue - as if the invalid service had never happened - because the defendant failed to acknowledge that invalid service and/or failed to make an application under Part 11.

63. Again as a matter of basic intuition, it would seem to be wrong to provide the claimant with a remedy for its own default simply on the basis that the defendant should have pretended that the service of the claim form was valid and so should have served an AoS. Such a scenario was described 20 years ago by Colman J as bizarre, illogical and unfair. I respectfully agree with that.

64. Importantly, the authorities – and the principles that I have summarised in section 8 above - do not cut across these common sense conclusions. In the present case there was no AoS for the very good reason that the claim form had not been served in time. The claimants sought unsuccessfully to rectify that before the judge. In those circumstances, the defendant was not obliged to pretend that it had been served in time, and serve an AoS in order to be allowed to take the jurisdiction point. Neither was the defendant obliged to serve a Part 11 application. In circumstances where the claimants themselves had unsuccessfully raised the question of service with the court, a separate Part 11 application was redundant and entirely unnecessary. As noted above, *Robertson* so decides, and is binding authority for that proposition.

65. Accordingly, for those reasons, I consider that the judge was wrong to conclude that Bellway was required to serve an AoS and/or was required to make an application under Part 11. Bellway was obliged to do neither of those things. Accordingly, the entirety of the second judgment was based on a fundamental misapprehension by the judge.

66. For these reasons, I concluded that we must allow the appeal and set aside both of the judge's orders.

Lord Justice Phillips

67. I concurred in the decision to dismiss the cross-appeal and to allow the appeal for the reasons given by Coulson LJ.

Lady Justice Andrews

68. I also agree with my Lord, Lord Justice Coulson's reasoning and conclusions on both matters. I particularly endorse his comments at [62] and [63]. The decision of Colman J in *Shiblaq* makes it plain that a defendant is not obliged to acknowledge service when service has not been validly effected. It would be absurd if the rules of civil procedure operated in such a way as to effectively force a defendant to submit to the jurisdiction of the court despite the fact that the claim form had never been validly served on him, especially if, as in this case, an extension of time for service had been applied for and refused. The decision in *Koro* does not mandate such a result.