Case No: HT-2014-000183

(formerly HT-14-393)

Neutral Citation Number: [2015] EWHC 604 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Rolls Building, 7 Rolls Buildings

London EC4A 1NL

Date: 20th March 2015

Before :

MR. JUSTICE EDWARDS-STUART

- -

Between :

Heron Bros Ltd	**Cla**
- and -	
Central Bedfordshire Council	**Defe**

- -

- -

Ms. Sarah Hannaford QC (instructed by **Quigg Golden Legal Ltd**) for the **Claimant**

Jason Coppel Esq, QC (instructed by **Geldards LLP**) for the **Defendant**

Hearing dates: 27th February 2015

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Judgment

Mr. Justice Edwards-Stuart:

Introduction

1.
This is an application to strike out a claim on the ground that the claim form was not served within the prescribed time limit. The claim is a procurement challenge in which the Claimant claims damages and a declaration of ineffectiveness in respect of the award of a contract by the Defendant for the construction of a leisure centre in its area. The contract has been signed and construction is underway.

2.
By regulation 47F(1) of the Public Contracts Regulations 2006 (“the Regulations”) a claim form has to be served within seven days of issue. The Regulations do not make any provision for an extension of this time by the court.

3.

At the hearing the Claimant was represented by Sarah Hannaford QC, instructed by Quigg Golden, and the Defendant was represented by Jason Coppel QC, instructed by Geldards.

The background

4.
The Claimant was notified that the contract had been awarded to another bidder by a letter dated 26 September 2014. On receipt of that letter it raised some questions with the Defendant and a meeting between the parties took place on 7 October 2014. Thereafter the following events occurred:

Date	Event
31 October 2014	Claimant's agent sends to the Defendant unsealed copies of the claim form and Particulars of Claim by recorded delivery. Claimant's agent sends three copies of the claim form and Particulars of Claim to the Court for sealing.
3 November 2014	Claimant's agent sends the Defendant by e-mail a copy of its letter of 31 October 2014, together with the enclosures. The Court seals and issues the claim form.
10 November 2014	The Court posts the issued claim form and Particulars of Claim to the Claimant for service.
14 November 2014	The Claimant says that it received the Claim Form from the Court (Connelly, para 10).
18 November 2014	This is the date on which the claim form and Particulars of Claim were deemed to be served, being the second business day after they were posted.

5.
The Claimant's agent who served the documents on its behalf is a company called Quigg Golden Legal Limited. Although its writing paper says that it practises in the fields of "Procurement Dispute Resolution Construction", it does not say that the company is regulated by the Solicitors' Regulation Authority. Although its precise status has been questioned by the Defendant's solicitors, they have not received an answer. From the correspondence it appears that the person acting in relation to the Claimant was a Mr. Jonathan Parker, who appears to have various legal and other qualifications. Quigg Golden's offices are in Southampton Buildings, off Chancery Lane. It is therefore a few minutes' walk from the TCC and Commercial Registry in the Rolls Building. No-one on behalf of the company has made a witness statement in relation to this application.

6.
Quigg Golden's letter to the Court dated 31 October 2014, a Friday, was in the following terms:

"Please find enclosed 3 copies of the Claim form and Particulars of Claim, together with the appropriate fee. We would be grateful if this could be sealed and returned to us for service upon the Defendant at your earliest convenience."

7.
In Quigg Golden's letter to the Defendant of the same date they said:

“We represent Heron Bros Ltd of 2 St Patrick’s Street, Draperstown, Northern Ireland, BT45 7AL in respect of a dispute with Central Bedfordshire Council, relating to the procurement process for a main contractor to construct the new Flitwick Leisure Centre.

As you are aware from our client’s previous correspondence, they have grave misgivings over how the procurement process has been conducted and fear that they have suffered prejudice as a result. In view of the limited timeframe for challenging a procurement process we have issued the enclosed Claim Form, Particulars of Claim and relevant fee to the High Court.

Naturally we will serve the sealed copies of forms upon you at our first available opportunity. However, we enclose copies of these forms by way of early warning and notification.”

8.
The claim forms (using Form N1, as required) enclosed with the letters of 31 October 2014 were, of course, unsealed and the boxes on Form N1 for the “Claim No.” and “Issue date” were left blank. The Particulars of Claim, consisting of eight pages, was signed with a Statement of Truth.

9.
The Defendant’s application to strike out the claim was dated 11 December 2014.

The Regulations

10.
Regulation 47F (as amended in 2011) provides, so far as material:

“(1) Where proceedings are started, the economic operator must serve the claim form on the contracting authority within 7 days after the date of issue.

...

(5) In this regulation, ‘serve’ means serve in accordance with rules of court, and for the purposes of this regulation a claim form is deemed to be served on the day on which it is deemed by rules of court to be served.”

11.
Proceedings are started when a claim form is issued: see regulation 47D(6).

12.
It is common ground that the Regulations contain no power to extend the time for service of the claim form. If there is such a power, it must lie within the discretion of the court.

The submissions of the parties

13.
Mr. Coppel submitted that reading-in or reading across from the CPR an unconstrained power to extend time for service of a claim form would be inconsistent with the tight timetable set by the regulations, not only for starting proceedings but also for the issue of the claim form.

14.
He submitted, correctly in my view, that the power in the CPR to extend time for service of a claim form does not apply to the different time limit for service of a claim form contained in the Regulations.

15.

Although the CPR contain general case management powers to extend time for the taking of any step (CPR 3.1(2)(a)) and to "… rectify matters where there has been an error of procedure" (CPR 3.10), Mr. Coppel submits that these powers apply to failures to comply with the CPR rather than with separate legislation such as the Regulations.

16.
In support of this submission Mr. Coppel relied on the following statement by Lord Neuberger in Mucelli v Albania [2009] 1 WLR 276, a decision of the House of Lords in relation to the Extradition Act 2003, at paragraph 74:

"On the face of it, at any rate, there is a clear and unqualified statutory time limit, namely 7 days, and there would therefore seem to be no basis upon which it could be extended. In that connection, viewed from the English and Welsh perspective, I would refer to the CPR, which contain provisions whereby the court can extend time for the taking of any step, under CPR 3.1(2)(a), can make an order remedying any error of procedure, under CPR 3.10, or can make an order dispensing with service of documents, under CPR 6.9. However, these powers cannot be invoked to extend a statutory time limit or to avoid service required by statute, unless of course, the statute so provides. Apart from being correct as a matter of principle, this conclusion follows from CPR 3.2(a) which refers to time limits in 'any rule, practice direction or court order', and from CPR 6.1(a) which states that the rules in CPR 6 apply, 'except where any other enactment ... makes a different provision'."

17.
Even if there is a power to extend time for service of the claim form, Mr. Coppel submits that its exercise would not be justified for the following reasons:

i)
The fact that the Defendant had received a draft claim form during the relevant period cannot be a good reason for extending time. The Defendant would be prejudiced by having to face a claim which otherwise would be out of time.

ii)
Although there would appear to have been a delay in the TCC Registry in sending out the issued claim form, the Claimant's representative, with offices not far from the court, took an extraordinary risk in posting the draft claim form for issue by the court without any indication in the covering letter that service of the issued claim form would have to be undertaken with extreme urgency. It is said that a prudent representative would have taken the claim form to court by hand for issue.

iii)
Further, it would appear that the Claimant itself may have taken an unnecessary risk in instructing consultants to conduct the litigation who, it appears, may not be authorised to conduct litigation in this jurisdiction.

18.
In her skeleton argument, Ms. Hannaford relied on two grounds for resisting the application:

i)
The court's discretion to extend the time for service which it should exercise in these wholly exceptional circumstances.

ii)

Alternatively, if and in so far as the Regulations do not make provision for such discretion, they are not compliant with the principles of equivalence and/or effectiveness and must accordingly be disapplied and/or read in accordance with those principles.

19.
In the course of argument Ms. Hannaford also advanced a further ground, namely that a claim form had been served within seven days after the date of issue. She relied on the fact that the unsealed claim form and Particulars of Claim were sent to the Defendant by recorded delivery on 31 October 2014 and also by e-mail on 3 November 2014, the following Monday. The claim form, which had been sent to the court by recorded delivery on 31 October 2014, must have arrived on Monday, 3 November 2014 because it was sealed that day. I will take this last ground first.

The effect of sending the unsealed claim form to the Defendant

20.
In support of this further ground Ms. Hannaford relied on the observations of Lord Mance in Pomiechowski v District Council of Legnica, Poland [2012] 1 WLR 1604, with whose judgment the other members of the court agreed, although Lady Hale also delivered a separate judgment of her own.

21.
The cases under appeal concerned rights of appeal under the Extradition Act 2003, which had to be exercised within very short time limits. For example, section 26(4) provides that:

“Notice of an appeal under this section must be given in accordance with the rules of court before the end of the permitted period, which is seven days starting with the day on which the order is made.”

22.
Lord Mance pointed out that there had been a divergence of judicial opinion about the distinction between the requirements of the Act and the requirements of the rules, in accordance with which notices had to be served. In particular, there had been differences of opinion about whether or not service of an unsealed notice of appeal was a fatal defect because it was not a notice of appeal within the meaning of the section, or whether it was a procedural irregularity or error that could be corrected under the rules: see paragraphs [6] - [8].

23.
For example, in Dunne v High Court Dublin [2009] EWHC 2003 (Admin), Rafferty J said, at [14]:

“Nothing in the rules precludes service on the CPS or on the Respondent of an Appellant's Notice which has not been issued (or stamped as received) by the Administrative Court Office as Mr. Justice Collins pointed out in dialogue with counsel during a hearing on 6 April 2009 conducted by video link when, it appears to me, at least initially the CPS thought that it could waive service. Alerted by the court, counsel preserved the jurisdiction point and Mr. Justice Collins granted legal assistance so that it could be argued or at least ventilated.”

24.
Then in Sciezka v Court in Sad Okregowy, Kielce, Poland [2009] EWHC 2259 (Admin), Sullivan LJ said, at [21]:

“Lord Neuberger made it clear in paragraphs 75 and 82 of his opinion (see above) that the reference to the rules of court in section 26(4) ‘govern the manner, not the time of service’. Whereas the time

for both filing and serving the notice of appeal is fixed by the Act and may not be extended by the court (nor may the court dispense with filing or service of the notice of appeal, see paragraph 80 of Lord Neuberger's opinion), the Act leaves the manner by which both filing and service of a notice of appeal are to be effected to the rules of court, ie the CPR supplemented by the relevant practice directions. Where procedural requirements governed by the CPR have not been complied with, the court has power to remedy the procedural error (CPR 3.10) and will do so if it is necessary in order to give effect to the overriding objective (CPR 1.2). This must apply with particular force to the very detailed procedural requirements which are not prescribed by the rules themselves, but which are contained within supplementary practice directions."

25.
And in a further decision in the same year, Arunthavaraga v Administrative Court Office [2009] EWHC 18921 (Admin), Richards LJ said, at [25]:

"I have said that no decision on the point is necessary. I simply observe that I am not convinced on the basis of what I have seen that service would be defective if an unsealed copy of the notice were served within the seven-day period, provided of course that it were in identical terms to the notice as filed. Even if service of an unsealed copy is technically defective, it may well be that the remedial power in CPR rule 3.10 could be invoked to cure the defect without offending the strict requirements of the 2003 Act."

26.
Reverting to the decision in Pomiechowski, Lord Mance said, in relation to the decision of the House of Lords in Mucelli , that the form of notice, rather than the identity of the parties on whom it had to be served, was "not the focus of decision" (at [18]). In addition, he noted that in Scotland a note of appeal has to be served before it is lodged with the court, so that what had to be served was, in effect, a draft note of appeal. At [18] Lord Mance went on to say:

"The statute requires notice of an appeal to be given in accordance with the rules of court, so any failure to comply with the rules of court requires the appellant to seek relief from the court to cure the irregularity. But this does not answer the question what constitutes giving 'notice of an appeal' to the respondents which, if not in accordance with the rules, nonetheless satisfies the statutory requirement and is capable of being cured. In my view, a generous view can and should be taken of this, bearing in mind the shortness of the permitted period and the fact that what really matters is that an appeal should have been filed and all respondents should be on notice of this, sufficient to warn them that they should not proceed with extradition pending an appeal. This should not however be taken as a licence to appellants to give informal notices of appeal. Any potential appellant serving anything other than a complete copy of the sealed Form N161 will need to seek and will depend upon obtaining the court's permission to cure the position under the rules."

27.
From this I conclude that Lord Mance is to be taken as supporting the "relaxed" view of the statutory requirements, as set out in some of the extracts that I have quoted above, and rejecting the proposition that service of an unsealed notice of appeal within the prescribed time is fatal.

28.
As I have already mentioned, the unsealed claim form and Particulars of Claim were sent to the Defendant under cover of an e-mail dated 3 November 2014. By virtue of CPR 6.14 those documents are deemed to have been served on the second business day after the relevant step was taken - in this case the sending of the e-mail. Thus the documents attached to the e-mail of 3 November 2014 are

deemed to have been served on 5 November 2014. Since the claim form was issued on 3 November 2014, those documents were served within seven days of the start of proceedings. In my view this remains the case even if the documents are to be treated as having been served on 3 November 2014 - the day on which the proceedings were started.

29.
The question, therefore, is whether or not the unsealed claim form that was sent to the Defendant on 3 November 2014, which was identical to those sent to the court for issue, is properly to be regarded as a claim form for the purposes of regulation 47F.

30.
Mr Coppel also drew my attention to a decision of the Court of Appeal in Cranfield v Bridgegrove [2003] 1 WLR 2441, a hearing of five conjoined appeals. The relevant case was one where the claimant's solicitor served an unsigned and unsealed copy of the claim form on the penultimate day for service of the issued claim form. [1]

31.
The Court, in allowing an appeal from the judge, said that he took too liberal a view of the scope of the discretion conferred by the rule (as explained in Anderton v Clwyd County Council (No 2) [2002] 1 WLR 3174). One reason given, and the one relied on by Mr Coppel, was that the rule provided that after a claim form had been issued "it must be served on the defendant" (Court of Appeal's emphasis). The sealed claim form as issued was not served because the claimant's solicitor had left it at home, so he had to serve the draft.

32.
In my view, the outcome of that decision does not determine the outcome of this one for two reasons. First, that case precedes the decisions that I have already discussed in the preceding paragraphs and, in particular, the decision in Pomiechowski. Second, regulation 47F(1) refers to serving "the claim form", not to serving "it". This is to be contrasted with the wording of regulation 407F(1) as originally drafted: see paragraph 36 below.

33.
If a generous view is to be taken, as Lord Mance commends, I see no reason why the copy of the unsealed claim form that was served on the Defendant by e-mail, together with a copy of the signed Particulars of Claim with the Statement of Truth, should not be treated as a claim form that was served within the prescribed time. Of course it was not served in accordance with the rules because it was not a claim form that had been sealed and issued, but this is an irregularity that can be cured.

34.
This conclusion leads to the question whether the court should in its discretion cure the irregularity. I will address this question later in this judgment.

The time period for service of the claim form and the claim to extend time

35.
I should deal first with a tangential point that was raised in relation to the provisions relating to deemed service in CPR 6.14. The Defendant's case was that the person serving a claim form under the Regulations would have had to do it on the fifth day of the period in order for deemed service to take place within the seven days prescribed. This argument was founded on the wording of regulation 47F(5):

“In this regulation, ‘serve’ means serve in accordance with rules of court, and for the purposes of this regulation a claim form is deemed to be served on the day on which it is deemed by rules of court to be served.”

36.
It is worth mentioning that, when this regulation was first drafted, regulation 47F(1) read as follows:

“Where proceedings are to be started, the economic operator must, after filing the claim form, serve it on the contracting authority.”

It was then amended by The Public Procurement (Miscellaneous Amendments) Regulations 2011 (“the 2011 Regulations”) so as to read:

“Where proceedings are started, the economic operator must serve the claim form on the contracting authority within 7 days after the date of issue.”

37.
The rules governing the service of a claim form were amended in 2008 so as to introduce a requirement to complete the step required by the rule, which depends on the particular method of service chosen, by midnight on the calendar day four months after the date of issue of the claim form: CPR 7.5(1). Completion in time of the step required, for example posting the letter containing the claim form, constituted valid service of the claim form. When it arrived was irrelevant.

38.
At the same time the rule relating to deemed service, now CPR 6.14, was amended to provide that a claim form served within the United Kingdom was deemed to be served on the second business day after completion of the relevant step under rule 7.5(1).

39.
The apparent inconsistency between these two rules was considered by Flaux J in T&L Sugars Ltd v Tate and Lyle Industries Ltd [2014] EWHC 1066 (Comm). Having pointed out that the effect of CPR 7.5, which is headed “Service of a claim form”, is that completion of the requisite step under that rule constitutes valid service, he said that CPR 6.14 is looking at when service will be deemed to have taken place for the purpose of other steps in the proceedings thereafter. He held that valid service will take place if and when the requisite step is completed within the four month period of validity of the claim form and that it is not necessary for the deemed day for service also to fall within the four month period (at [34]). CPR 6.14, therefore, is not concerned to fix the time when actual service takes place in the context of compliance with any time limit. I agree, and I gratefully adopt his reasoning.

40.
However, in that case Flaux J was considering the meaning of the phrase “issued and served” in the context of a share sale agreement. He was not considering the Regulations. It seems to me that there is no escaping the fact that sub-paragraphs (1) and (5) of regulation 47F do not sit easily with CPR 7.5 and 6.14. Read literally, sub- paragraph (5) appears to be saying that CPR 6.14, not CPR 7.5, determines when a claim form is served and therefore whether or not service occurs within the seven-day period for service in sub-paragraph (1).

41.
Regulation 12 of the 2011 Regulations made various amendments to regulation 47D, and substituted one new sub-paragraph in each of regulations 47E and 47F. The principal amendment to regulation 47D was to introduce a new time-limit for starting proceedings, namely 30 days beginning with the

date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen. This change, which made knowledge of the infringement the trigger for starting the running of time, followed the decision of the Court of Justice of the European Union in Uniplex (UK) Ltd v NHS Business Services Authority (Case C-406/08) [2010] PTSR 1377. Although the Explanatory Note to the 2011 Regulations says that the changes introduced by regulation 12 resulted from the Uniplex decision, it is not obvious to me why that decision required any alteration to regulation 47F. However, there is another possible explanation for this which I mention below.

42.
I am left with the impression that the draughtsman of the 2011 regulations did not appreciate the potential conflict between sub-paragraphs (1) and (5) of regulation 47F that was introduced following the amendments made by regulation 12. To reduce the already short period of seven days to five days, which is the effect of the Defendant's construction of regulation 47F, has the potential in my view to create difficulties. By way of example one can modify the facts of this case. Suppose that the letter written and posted on 31 October 2014, a Friday, reached the court office (as it did) on the following Monday, 3 November 2014. The claim form is not sealed until late that afternoon, with the result that it then misses that evening's post. The following day the office is short staffed owing to sickness and, although the covering letter was marked urgent, the claim form is not posted back to the Claimant until Wednesday. If it reaches the Claimant on the following day, Thursday, the Claimant must get it in the post that day in order to achieve service in time. However, if it takes two days to reach the Claimant, so that it arrives on Friday, 7 November 2014, the Claimant will find itself out of time even if the claim form is posted on to the Defendant immediately. There is nothing particularly implausible about this scenario. Further, I take judicial notice of the fact that a letter sent by first class post does not invariably arrive on the following day.

43.
In my view a reading of regulation 47F that produces such a state of affairs is profoundly unsatisfactory and so, adopting a purposive approach, I would construe the regulation so that "… serve in accordance with rules of court" is treated to mean that valid service is achieved when the relevant step mentioned in CPR 7.5 (1) is completed. Provided that is done within the seven-day period the requirement of the regulation is met. For the purposes of acknowledging service and other steps in the action, the deemed date of service is to be as provided in CPR 6.14.

44.
Further, I consider that to construe the regulation in the manner contended for by the Defendant would constitute a breach of the principle of effectiveness. [2] This is because there could be situations, such as that given in my example, where a claimant simply cannot comply with the time limit for service even though it has taken all possible steps to do so. Accordingly, regulation 47F must be read so that service within the seven-day period is achieved if completion of the step required to effect service occurs within that period. Whilst seven days is not generous, it does at least provide a small amount of leeway for unanticipated delay.

45.
I derive support for these conclusions from the observations of Lord Neuberger in Mucelli at [82], where he said, in response to a submission that the provisions of CPR 6.7 relating to deemed service (the predecessor to CPR 6.14) were applicable to the statutory time limits:

"In my view, that general assumption is wrong. Section 26(4) requires the appellant's notice to be issued and served within seven days, and I can see no warrant for the CPR being invoked to cut down

that period. If a statute permits something to be done within a specific period, it is hard to see how that period can be cut down by subordinate legislation, as a matter of principle. In relation to the first two points of principle raised by these appeals, it is part of the prosecutor's case, indeed it is part of my reasoning, that the reference to rules of court in the section govern the manner, not the time, of service. In the circumstances, it is particularly hard to see how invocation of provisions of the CPR can be justified in order to curtail that period. The point is reinforced by practical considerations: the seven-day period laid down by section 26(4) is short, and it does not seem very fair to cut it down, even if only by a few hours. Although the 14 days permitted by section 103(9) is somewhat longer, the same reasoning applies.

46.
Of course Lord Neuberger was not addressing a provision in terms similar to regulation 47F(5), which specifically referred to the deeming provisions in the rules of court. But his comment about cutting down the statutory time limit not being very fair can be applied with very much more force when the reduction is by a period of two days rather than a few hours.

47.
Reverting to the power to extend time, in both Pomiechowski and the decision of the Court of Appeal in Adesina v The Nursing and Midwifery Council [2013] 1 WLR 3156, the court held that, in order to achieve compliance with article 6.1 of the Convention for the Protection of Human Rights, the relevant statutory time limit was capable of being extended but only in exceptional circumstances.

48.
In Pomiechowski, which concerned a person's freedom of movement, one can readily see why the court was prepared to hold that to deny an extension of time in any circumstances could in some cases constitute a breach of article 6.1.

49.
In Adesina, which concerned an individual citizen's right to pursue her vocation, the position was less clear: not only because the right at stake was less fundamental but also because the time limit was much longer (28 days, rather than seven). Nevertheless Maurice Kay LJ concluded that there could be cases where the "very essence" of the right of appeal might be impaired and so he held that a discretion to extend the statutory time limit did exist but that it would only fall to be exercised in a very small number of cases. He said, at [15]:

"A discretion must only arise 'in exceptional circumstances' and where the appellant 'personally has done all he can to bring [the appeal] timeously'."

50.
However, as Maurice Kay LJ pointed out, in the two cases under appeal the nurses did not come "within a country mile" of satisfying the test. Both had simply left it too late.

51.
In the present case the conduct of Quigg Golden has been criticised by Mr. Coppel at almost every stage. Further, Mr. Coppel was strongly critical of the fact that there was no witness statement from Mr. Parker, the author of the relevant correspondence, to explain what he did. In my view, Mr. Coppel's criticisms are amply made out.

52.

First, the covering letter of 31 October 2014 simply requested the court to seal and return the claim form “at your earliest convenience”. That is in my view a formulaic expression: it does not connote any degree of urgency. Those acting for litigants cannot assume that members of the court staff are aware of every particular time limit, particularly in the rather less well known regulations. The onus is clearly upon the person lodging the claim form with the court to point out in very clear terms that the documents are required as a matter of urgency. This was not done.

53.
Second, Mr. Coppel submitted that in circumstances where those acting for a claimant were only a few minutes’ walk away from the court, a prudent solicitor would take the claim form and Particulars of Claim to the court in person and wait for the documents to be sealed and issued. Quigg Golden could plainly have done this, but they did not.

54.
Third, having not received the documents within a day or two, Quigg Golden took no steps to find out what had happened to them. Given the time frame, I would have expected any competent person in its position to telephone the court office on Wednesday, 5 November, to ask what had happened or, an alternative option in this case, to go to the court in person. Quigg Golden’s failure to take any of these steps suggests that Mr. Parker may have simply overlooked the requirement to serve the claim form within seven days of its issue.

55.
The decision in Agardi v Penitentiary Judge of the Metropolitan Court, Budapest [2014] EWHC 3433 (Admin) shows that where the failure to comply with the time limit is entirely the result of a failure by the applicant’s lawyers to take prompt action, the fact that the applicant himself was blameless may not of itself be sufficient to make the case “exceptional”.

56.
Whilst I am prepared to accept that the retention by the court of the sealed claim form for the entire period available for its service is capable of constituting exceptional circumstances, in my judgment that can only assist the claimant if it and its agent had done all they could to obtain the return of the claim form from the court in order to serve it in time. Plainly that did not happen and so the conclusion must be that the application to extend time in this case simply does not cross the threshold of the court’s jurisdiction.

Curing the irregularity

57.
With these considerations in mind, I return to the question of whether the court should cure the irregular service of the unsealed claim form. In my view it should. The purpose of the tight time limits in the Regulations is to enable the parties to procurement disputes to know exactly where they stand at the earliest opportunity: the objective of rapidity. If a procurement process is to be challenged, it must be done quickly so that the contracting authority can take whatever steps are necessary to protect its position. In this case the Defendant could not have been in any doubt, as from 3 November 2014, that the Claimant had sent a claim form and Particulars of Claim to the court, together with signed Particulars of Claim, with the result that the claim form would probably be issued within the next working day or two.

58.

I can find nothing in the judgment of Lord Mance in Pomiechowski that suggests that the threshold of "exceptional circumstances" should apply to an application to cure an irregularity. Paragraphs [19] and [20] of his opinion suggest that a general merits test is sufficient. In addition, of course, the court should only do so where it is consistent with the overriding objective.

59.
Ms. Hannaford submits that in the present case the "root cause" of the failure to serve the claim form in time was the failure of the court office to return the documents promptly. I do not agree. In my view, there were two effective causes: the failures of Quigg Golden that I have already mentioned, and the failure of the court office to return the documents promptly. Whilst the Claimant is clearly not responsible for the latter, it is responsible for the former.

60.
The irregularity in relation to the service of the claim form did not consist only in the fact that it was not sealed (and dated), as the rules require, but also that it did not bear the claim number (as required by CPR 7APD4). However, neither of these shortcomings deprived the Defendant of any knowledge of the nature of the claim against it or of the fact that proceedings had been or were about to be started.

61.
Since there was a clear failure by the TCC Registry to return the documents promptly it seems to me that it would not be right for the court to decline to cure the irregularity notwithstanding the fact that the problem was brought about in perhaps equal measure by the failures of Quigg Golden.

The principles of equivalence and effectiveness

62.
The principle of equivalence requires that the procedural rules governing the enforcement of rights derived from directly effective EU law must be no less favourable than the rules governing similar domestic actions. The European Court of Justice summarised the position in BS Levez v Jennings (Harlow Pools) Ltd [1999] 2 CMLR 363, at paragraph 18:

"... according to established case law, in the absence of Community rules governing the matter it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness)."

63.
In relation to the principle of equivalence, the court went on to say this, at paragraphs 43 and 44:

"In order to determine whether the principle of equivalence has been complied with in the present case the national court - which alone has direct knowledge of the procedural rules governing actions in the field of employment law - must consider both the purpose and the essential characteristics of allegedly similar domestic actions.

Furthermore, whenever it falls to be determined whether a procedural rule of national law is less favourable than those governing similar domestic actions, the national court must take into account

the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts."

64.
Ms. Hannaford's submission was that proceedings under the Regulations are closely analogous to judicial review proceedings. She said that both types of proceedings involve a challenge to an executive decision premised on procedural or other unfairness with the possibility of setting aside the decision if it is determined to have been made unlawfully. Indeed, she submitted that a number of procurement law challenges are brought by way of judicial review. She said that the seven-day time limit imposed by regulation 47F(1) was intended to bring proceedings under the Regulations into line with judicial review proceedings.

65.
I note that under the Regulations (as amended in 2009), regulation 47J provides that the only remedy where the contract has been entered into, and none of the three grounds for ineffectiveness applies, is by way of an award of damages. By contrast, in proceedings for judicial review a claim for damages alone cannot be made: see CPR 54.3(2). A claim for judicial review is defined by CPR 54.1(2) as a claim to review the lawfulness of (i) an enactment or (ii) a decision, action or failure to act in relation to the exercise of a public function. So, unless one of these remedies is being claimed at the same time, a claim for damages cannot be made by way of judicial review.

66.
Mr. Coppel submits that a claim by way of judicial review and a claim under the Regulations have a different juridical basis. The Regulations create a private law right of action as between the economic operator and the contracting authority. As I have already explained, judicial review is essentially a public law remedy to review the lawfulness of actions by public bodies.

67.
Mr. Coppel also points to the longer time period (six months in all cases but two) that applies to applications for a declaration of ineffectiveness provided by regulation 47E(2)(b). As a package, he submits, it cannot be said that the Regulations are less favourable in terms of time limits than the rules relating to judicial review.

68.
Finally, Mr. Coppel submitted that Ms. Hannaford's submissions were unsustainable in the light of the decision of the Court of Appeal in Matra Communications v Home Office [1999] 1 WLR 1646. At page 1660 Buxton LJ concluded that judicial review was not an appropriate comparator with a claim under the Public Services Contracts Regulations 1993, a predecessor of the Regulations. It is not necessary to analyse this case in any detail, since I understood that Ms. Hannaford was prepared to concede this point.

69.
Even without this concession, I would still have accepted the submissions of Mr. Coppel. Although the Regulations have been much amended since 1993, it seems to me that the conclusion of Buxton LJ in Matra is still relevant. In addition, I agree with Mr. Coppel - largely for the reasons he gave - that a claim under the Regulations is different in character from a claim made by way of judicial review.

70.
So far as the application of the principle of effectiveness is concerned, there is in my judgment no arguable case. There is nothing intrinsically difficult about serving a claim form within seven days of

its issue (that is the full period of seven days - now that I have rejected the argument that it has to be sent on the fifth day). Since I have reached the conclusion that this is a time limit that can be extended in exceptional circumstances, this will meet the rare case where through no fault of a claimant or its agents it is prevented from serving the claim form in time (for example, perhaps because the office of the issuing court has lost it). It is perhaps a little ironic that, according to the Explanatory Memorandum to the amendments to the Regulations made in 2011, to which Ms. Hannaford drew my attention, the requirement to serve the claim form within seven days of issue was one suggested by the Procurement Lawyers' Association in response to a public consultation (at paragraph 7.5). Evidently the possibility of a breach of the principle of effectiveness had not occurred to them.

71.
Of course it means that legal advisers have to be on their toes, but if they are in a position to prepare and issue a claim form it is hard to see why they should not be in a position to serve it in time. To some extent this view is borne out by experience: there are about 50 claims by way of procurement challenges issued each year in the TCC and, so far as I am aware, this is the first occasion on which there has been a problem with service. For the reasons that I have already given, it is a problem that could and should have been prevented.

Conclusions

72.
For the reasons that I have given I consider that the Claimant did serve the claim form within seven days of starting proceedings as regulation 47F(1) required, but it did not serve it in accordance with the rules of court in that it had not been sealed and did not bear the claim number. This amounted to an irregularity.

73.
In all the circumstances I consider that it would be fair and proportionate, as well as being in accordance with the overriding objective of the CPR, to cure the irregularity so that these proceedings can be regarded as having been properly brought. Accordingly the application to strike out the claim fails.

74.
In the circumstances I will extend time for service of the Defence by 21 days.

75.
In the ordinary way, the Claimant having been the successful party on the application, I would be prepared to award it its costs. However, the Claimant, or more precisely its agent Quigg Golden, failed to serve the claim form in accordance with the rules of court and so the Claimant would have had to make an application in any event in order to cure the irregularity. In the ordinary course of events it would have had to bear the costs of that application. My provisional inclination, therefore, is that there should be no order for costs in relation to this application.

76.
However, if the parties wish to make submissions in support of a different order for costs I am prepared to hear counsel or, if both parties agree, I will entertain short written submissions and deal with the question of costs on paper.

77.

It may be that the regularisation of the service of the claim form should be reflected in some form of brief declaration. If the parties cannot agree on a suitable form of relief, then submissions can be made in writing and I will deal with that question on paper.

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[1] Although Mr Coppel referred me to the decision in Cranfield both during his oral submissions and in a post-hearing note, I did not mention it in the draft of this judgment that was prepared for handing down. This was an oversight because when preparing this judgment I did in fact consider that decision and, in particular, paragraph 57 on which Mr Coppel specifically relied. I reached the conclusion then that I have now set out in paragraphs 30–33 of this judgment. In the circumstances, I consider that it is appropriate that I should amend the judgment to reflect the conclusion that I had in fact reached on this point, rather than leave the omission as a potential ground of appeal.

[2] I discuss this principle in more detail in the section which deals with the principles of equivalence and effectiveness.