



Neutral Citation Number: [2020] EWHC 3399 (Ch)

Claim Nos: HC-2017-001410,
CP-2019-000002

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 11/12/2020

Before:

MR JUSTICE MORGAN

B E T W E E N:

IDEAL SHOPPING DIRECT LIMITED AND OTHERS

Claimants

- and -

(1) VISA EUROPE LIMITED
(2) VISA EUROPE SERVICES LLC
(3) VISA UK LIMITED
(4) VISA INCORPORATED
(together "Visa")

Defendants

Claim Nos: HC-2017-000474,
HC-2017-001411,
CP-2017-000015,
CP-2018-000017,
CP-2018-000023,
CP-2018-000025,
CP-2018-000027,
CP-2018-000029,
CP-2018-000033,
CP-2019-000001,

AND BETWEEN:

IDEAL SHOPPING DIRECT LIMITED AND OTHERS

Claimants

- and -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SA
(4) MASTERCARD/EUROPAY UK LIMITED
(together “Mastercard”)

Defendants

Kassie Smith QC and Alexandra Littlewood (instructed by **Scott + Scott UK LLP**) for the
Claimants
Brian Kennelly QC, Daniel Piccinin and Isabel Buchanan (instructed by **Linklaters LLP** and
Milbank LLP) for the **Visa Defendants**
Mark Hoskins QC and Hugo Leith (instructed by **Jones Day**) for the **Mastercard Defendants**

Hearing dates: 19-20 November 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment is to be handed down by the judge remotely by circulation to the parties’ representatives by email and release to Bailii. The date for hand-down is deemed to be 10.30 am on Friday 11 December, 2020.

MR JUSTICE MORGAN:

Introduction

1. The applications before me are made in 16 different claims. In one group of claims, the Defendants are Visa Europe Ltd, Visa Europe Services LLC, Visa UK Ltd and Visa Inc. I will refer to these Defendants as “Visa” and to these claims as “the Visa claims”. There are two Visa claims. In the other group of claims, the Defendants are Mastercard Inc, Mastercard International Incorporated, Mastercard Europe SA and Mastercard/Europay UK Ltd. I will refer to these Defendants as “Mastercard” and to these claims as “the Mastercard claims”. There are 14 Mastercard claims.
2. One of the Visa claims is brought by Ideal Shopping Direct Ltd (“Ideal”). The second Visa claim is brought by 25 claimants who have been referred to collectively as “Vodafone”. The claim by Ideal was issued on 15 May 2017 and the claim by Vodafone was issued on 28 January 2019.
3. One of the Mastercard claims is brought by Ideal and another is brought by the Vodafone claimants. Apart from stating that many of the Mastercard claims have multiple claimants, it is not necessary for the purposes of this judgment to list all of the parties to those 14 claims. The first of the Mastercard claims to be brought was issued on 21 February 2017. Thereafter, the remainder of the Mastercard claims were issued at various times with the last of them being issued on 14 January 2020.
4. The claims made in these 16 cases were for breaches of competition law said to have been committed by Visa and Mastercard. The original claim forms are not all in the same terms. The claim forms appear to fall into two groups. One group alleged infringements of Article 101 and Article 102 of the Treaty on the Functioning of the European Union (“TFEU”) or the comparable provisions in Articles 53 and 54 of the Agreement on the European Economic Area (“the EEA”) or in Chapter I and Chapter II of the Competition Act 1998. A second group of claims alleged only infringements of Article 101 of TFEU, Article 53 of the Agreement on the EEA and Chapter I of the Competition Act 1998.
5. Insofar as the contentions put forward in these 16 claims relate to Article 101 of TFEU, they are broadly similar to other claims made against Visa and Mastercard that have already been litigated. I refer in particular to three pieces of litigation, one of which was tried in the Competition Appeal Tribunal and two of which were tried in the Commercial Court. Appeals in all that litigation were the subject of a combined appeal to the Court of Appeal and then a combined appeal to the Supreme Court. The Supreme Court gave its judgment in those cases on 17 June 2020: see *Sainsbury’s Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24. The Supreme Court held that the matters complained of were restrictive of competition within the meaning of Article 101(1) of TFEU.
6. The 16 claims with which I am concerned were issued at a time when the earlier litigation was proceeding. The Claimants issued the claims in order to be able to recover damages for damage suffered in the 6 years before the issue of a claim. Nonetheless, it was recognised by the Claimants, and also by Visa and Mastercard, that it was in all their interests for these 16 claims to await the outcome of the other

litigation. Accordingly, the solicitors for the Claimants sent copies of the issued claim forms to the Defendants' solicitors for information, and not by way of service, and invited the Defendants' solicitors to agree to an extension of time for service of the claim forms. The Defendants' solicitors did agree to extensions of time and when those extensions were due to expire they agreed to further extensions of time for service. In relation to these 16 claims, the last agreed extension of time ran until 17 July 2020.

7. In the period between the decision of the Supreme Court on 17 June 2020 and the deadline for service of 17 July 2020, the solicitors for the Claimants plainly made preparations to serve these 16 claims on the Defendants before the deadline. Whilst I do not know everything that was done by the solicitors, nor exactly when it was done, I was told that the solicitors for the Claimants prepared Particulars of Claim in these 16 cases, although I was not shown the various Particulars of Claim. The solicitors also wished to amend the claim forms in those cases where the original claim form had made a claim pursuant to Article 102 of TFEU as well as pursuant to Article 101 of TFEU; the reason for that appeared to be that, as the Supreme Court had held that the matters complained of were restrictive of competition within the meaning of Article 101(1), it was not necessary for the Claimants to take on the burden of relying on Article 102 in addition. Further, in some of the claims, the solicitors wished to remove some of the original parties and add others. I was not given a comprehensive list of all the cases in which there were changes in the identity of the Claimants but I can refer to the case of the Vodafone claimants in their claim against Visa as illustrative of this point. In that case, the original claim was brought by 25 Vodafone Claimants. Before 17 July 2020, it was decided to remove two of the original Vodafone Claimants and to add two further Vodafone Claimants. It also may be the case that the solicitors for the various Claimants took the opportunity to make other amendments to correct or tidy up the original pleadings.
8. The Claimants' solicitors were Scott+Scott UK LLP and the partner responsible for the work being done in the period from 17 June 2020 to 17 July 2020 was Ms Belinda Hollway. Ms Hollway has provided several witness statements in relation to the applications before me. She has made it clear in her evidence that she does not suggest that the tasks to be accomplished in the period from 17 June 2020 to 17 July 2020 were too onerous to be achieved in the time available.
9. The evidence indicates other steps that were taken by the solicitors for the Claimants in the period running up to 17 July 2020. On 7 July 2020, the solicitors wrote to the solicitors for Visa referring to a number of claims which were listed in an annex to that letter. That annex included the two claims against Visa with which I am concerned but it included other claims also. Each claim in the list was identified by reference to the parties and also by the number of the claim, which had of course been issued some time earlier. The solicitors for the Claimants stated, as the solicitors for Visa would know, that the identified Claimants were required to serve their claims by 17 July 2020. They therefore asked the solicitors for Visa to agree that service of documents in these claims could be served, by either side, by email.
10. On 10 July 2020, the solicitors for Visa replied and confirmed that, first, they were instructed to accept service on behalf of Visa and, secondly, Visa was willing to

accept service of the claim forms and the Particulars of Claim by email to specified email addresses at Visa's solicitors.

11. In relation to the Mastercard claims, similar arrangements were agreed as to service of the claim forms on the solicitors for Mastercard, by email; I refer to the letter dated 7 July 2020 from the solicitors for the Claimants in those cases and the email reply dated 8 July 2020 from the solicitors for Mastercard.
12. I was also shown a letter written to the court by Scott+Scott, acting as solicitors for other claimants who had brought similar claims against Visa. In that letter, the court was informed that Visa had agreed extensions of time for service of the claim forms in 18 other cases. The letter stated that there had been earlier agreements as to the extension of time for service until 17 July 2020 and it was now being agreed that in one case time for service was extended to 17 August 2020, in another case time for service was extended to 28 August 2020 and in a further 16 cases, time for service was extended to 16 September 2020. Although the letter to the court was dated 17 July 2020, it seems at least likely that Scott+Scott had begun the communications which led to that letter before 17 July 2020.

The events of 16 and 17 July 2020

13. On 16 July 2020, Scott+Scott filed electronically two claims against Mastercard. Those two claims are not included in the 16 claims with which I am concerned but they were the same kind of claim. It seems likely that, in these two claims, claim forms had been issued some time earlier and that what was filed on 16 July 2020 were amended claim forms in the same way as this was done in the 16 claims with which I am concerned. The evidence stated that these two claims were filed electronically at 18.15 and 18.47 on 16 July 2020. Later evidence would suggest that these times were not the time when Scott+Scott sent the document for electronic filing but the times at which Scott+Scott received the notification referred to in paragraph 5.3(1) of PD51O acknowledging that the document had been submitted and was being reviewed by the court prior to "Acceptance" (as defined in PD51O). In relation to these two claims, the amended claim forms achieved Acceptance at 14.34 and 14.39 respectively on 17 July 2020 and I infer that the amended claim forms sealed by the court were served by email on the solicitors for Mastercard before midnight on 17 July 2020. Hence, it is accepted by Mastercard that these two claims were served in time.
14. On 17 July 2020, Scott+Scott continued the process of filing electronically the claims which included the 16 claims with which I am concerned. As regards the 14 Mastercard claims, the notifications under paragraph 5.3(1) of PD51O were received at various times on that day with the first being at 9.58 and the last being at 16.38. As regards the claim where the relevant time was 9.58, that claim achieved Acceptance at 15.52 on 17 July 2020. Accordingly, in that case, Scott+Scott had a sealed amended claim form at 15.52 which they could have served by email before midnight on 17 July 2020. They did not do so. The explanation was that, at 15.20, they had already sent to the solicitors for Mastercard the unsealed amended claim form in that case and they decided not to send the sealed amended claim form on 17 July 2020 as they wished to send it to Mastercard's solicitors later when they were able to send the sealed amended claim forms in the other claims against Mastercard.

15. Apart from the claim which achieved Acceptance at 15.52 on 17 July 2020, the other 13 claims against Mastercard achieved Acceptance on Monday, 20 July 2020, with one exception which achieved Acceptance on 22 July 2020. There was a special reason for this one being dealt with differently. The court initially rejected the amended claim form on the ground that the amendment could not be made without permission and, further, the amended claim form did not disclose the original wording struck out as well as the amended wording. The court later accepted that the claim form could be amended without permission and that it was not necessary for the amended claim form to show the original wording. All of these 13 claims (including the one which only achieved Acceptance on 22 July 2020) were correctly treated as having been issued on 17 July 2020 in accordance with paragraph 5.4 of PD51O.
16. In relation to the two Visa claims with which I am concerned, the claim by Ideal was notified pursuant to paragraph 5.3 of PD51O on 17 July 2020 at 12.43 and Accepted on 20 July 2020 at 9.38 and the claim by Vodafone was notified pursuant to paragraph 5.3 on 17 July 2020 at 15.23 and Accepted on 20 July 2020 at 11.45.
17. Ms Hollway gave evidence as to her firm's understanding of the time typically taken between filing of a document by Electronic Working and receipt of Acceptance coupled with the issued and sealed document. She said that her firm's experience showed that it could take anything from an hour to one business day or more for this to occur. It is not clear whether Ms Hollway was saying that this was also her own experience prior to 17 July 2020. Ms Hollway also stated that since the issue as to service had arisen in this case she had consulted the Rolls Building Courts Charter which gave an indication as to the time which would be taken between filing a document for an originating process and the issue of that document. The Charter referred to a period of not more than 90 minutes for such documents. A longer time was indicated for the issue of other documents. She confirmed that she was not aware of these statements in the Charter on or before 17 July 2020. Ms Hollway also referred to the CE-File log-in page which referred to the COVID-19 outbreak and which stated that the most urgent filings were being dealt with as a priority but the user might experience a delay in the processing of routine filings.
18. On 17 July 2020, after Scott+Scott had sent the amended claim forms and Particulars of Claim electronically for filing, they did not immediately send the unsealed documents to the solicitors for the Defendants. Ms Hollway said that she and her colleagues waited to allow time for the sealed amended claim forms to become available for service. However, by 15.00 on that day, when the amended claim forms which had been filed that day had not been issued, the decision was made to serve the unsealed amended claim forms and accompanying documents. Scott+Scott then sent to the solicitors for Visa or Mastercard, as the case may be, emails of which the following is an example:

“By way of service, please find attached the amended Claim Form, Particulars of Claim and response packs in relation to claim HC-2017-001410 Ideal Shopping Direct Limited v Visa Europe Limited ... and others. Please note, we do not yet have sealed copies of the documents, but will send these as soon as possible.”

19. All of the unsealed amended claim forms were sent to the Defendants' solicitors on 17 July 2020, the last of them having been emailed at 16.32.
20. In her evidence, Ms Hollway stated that the standard form of email sending an unsealed amended claim form was only sent after Scott+Scott had electronically filed that amended claim form. It was pointed out that in one case, with claim number HC-2017-000474, the evidence indicated that the email with the unsealed amended claim form was sent to Mastercard's solicitors, at 16.27, before the court had given its notification pursuant to paragraph 5.3 of PD51O at 16.38. Ms Hollway then adduced evidence which showed the following. Scott+Scott had done what it could at its end to file the amended claim form at some time between 16.09 and 16.18. Scott+Scott then sent an email with the unsealed amended claim form to Mastercard's solicitors at 16.27. At 16.40, Scott+Scott received a message pursuant to paragraph 5.3 of PD51O stating that the filing of the amended claim form had been submitted at 16.38.
21. Ms Hollway gave evidence as to her state of mind on 17 July 2020 as to what was needed to serve the amended claim forms. She stated that she believed that the amended claim form had to be filed electronically before it was served. She said that it did not occur to her or, as far as she was aware, to any member of the team working on these claims, that it was necessary to have the sealed amended claim forms in order to effect valid service. She added that if it had occurred to her that her method of proceeding would not be good service, then she would have done one of two things. The first thing would have been to contact the court to ask them to expedite the sealing of the amended claim forms. The second thing, if the first was not possible, would have been to serve the original sealed claim forms. She described this as a "simple expedient".
22. It may be helpful to refer, as examples, to the following three documents in the Ideal case. The first is the sealed original claim form, the second is the unsealed amended claim form and the third is the sealed amended claim form.
23. The sealed original claim form is a claim form in proper form and bearing claim number HC-2017-001410. It also bears the court seal with the date 15 May 2017. The unsealed amended claim form is a claim form in Form N1. It contains the text: "Amended Claim Form under CPR rule 17.1 dated 17 July 2020". It does not show the original wording struck out and as amended but sets out the details of the claim in a way which is not identical to that in the sealed original claim form. The unsealed amended claim form bears the claim number as before. It does not have any seal nor even a photocopy of the seal from the sealed original claim form. The sealed amended claim form is the same as the unsealed version of the document save that it has a court seal with the date 17 July 2020.
24. Some time after 17 July 2020, the solicitors for Visa and Mastercard took the point that the sending of the unsealed amended claim forms did not constitute good service. On 24 July 2020 (in the case of the Mastercard claims) and on 29 July 2020 (in the case of the Visa claims) Scott+Scott served the sealed amended claim forms on the relevant Defendants' solicitors. There ensued correspondence between the parties and various applications were made to the court.

The applications

25. On 5 August 2020, Visa applied for orders that the Claimants in the Visa claims had not served the claim forms by 17 July 2020, were out of time to do so and the court did not have jurisdiction in relation to those claims.
26. On 10 August 2020, Mastercard applied for essentially the same relief in the Mastercard claims as that sought by Visa in the Visa claims.
27. On 14 August 2020, the Claimants applied in the Visa claims and in the Mastercard claims for declarations that they had validly effected service of the amended claim forms on 17 July 2020, alternatively, for relief under CPR rules 6.15, 3.10, 6.16 or 3.9 to produce the ultimate result that there was no need for further steps to be taken to serve the amended claim forms.

The protective claims

28. On 19 and 20 August 2020, the Claimants in relation to the Mastercard claims issued, but did not serve, further proceedings against Mastercard duplicating the earlier claims (although there might be some differences, as I understand it) but designed to provide a fall-back position if they were to fail in the applications which are before me.

The rules

29. All references hereafter to a “rule” is to a rule of the CPR.
30. CPR Part 7 is headed “How to start proceedings – the claim form”. Rule 7.2 provides:
 - “7.2—(1) Proceedings are started when the court issues a claim form at the request of the claimant.
 - (2) A claim form is issued on the date entered on the form by the court.”
31. The CPR do not, as such, define “claim form” although there is a partial definition of claim form in rule 6.2(c) which is not of any real assistance in the present case.
32. Rule 2.6 provides that the court must seal a claim form on issue and that the seal may be placed on the claim form by hand or by printing a facsimile of the seal on the document, whether electronically or otherwise. A document purporting to bear the court’s seal is admissible in evidence without further proof. The Glossary to the CPR gives the following meaning for “seal” when used in the CPR:
 - “A seal is a mark which the court puts on a document to indicate that the document has been issued by the court.”
33. PD7A paragraph 5.1 repeats that proceedings are started when the court issues a claim form at the request of the claimant. That paragraph goes on to provide that where the claim form as issued was received in the court office on a date earlier than the date on which it was issued by the court, the claim is “brought” for the purposes of the Limitation Act 1980 and any other relevant statute on that earlier date. The paragraph is not directly relevant in the present case because this case is within PD510 – The

Electronic Working Pilot Scheme, to which I refer below. However, paragraph 5.1 of PD7A shows that the general rule is that the claim is not taken to be issued on the date on which the proposed claim form is received by the court office. The exception provided for by paragraph 5.1 of PD7A applies for the purposes of the Limitation Act 1980 and any other statute which refers to proceedings being “brought”: see *Barnes v St Helens MBC (Practice Note)* [2007] 1 WLR 879 and *Page v Hewetts Solicitors* [2012] CP Rep 40. The exception in paragraph 5.1 does not apply where the relevant statute does not refer to the “bringing of proceedings” but refers instead to “the beginning of proceedings”: see *Salford City Council v Garner* [2004] EWCA Civ 364.

34. Rule 7.4 deals with Particulars of Claim. The Rule provides that Particulars of Claim must be contained in or served with the claim form or served on the defendant by the claimant within 14 days after service of the claim form, save that they must not be served later than the latest time for serving the claim form.
35. Rule 7.5 provides for the time for service of the claim form. Where the claim form is served within the jurisdiction, the claimant must complete the step referred to in rule 7.5 before midnight on the calendar day four months after the date of issue of the claim form. In this case, the relevant step referred to in rule 7.5 was sending the claim form by email to the solicitors for the Defendants. Rule 7.6 allows a claimant to apply for an order extending the time for compliance with rule 7.5. I will refer to rule 7.6 again later in this judgment.
36. Rule 7.12 provides that a practice direction may be made providing for a claimant to start a claim by requesting the issue of a claim form electronically. PD7E – Money Claim Online provides for a scheme in which a request for a claim form to be issued may be filed electronically. Paragraph 5 of PD7E contains further provisions as to the issue of the claim form in accordance with that PD. More relevantly, PD51O – The Electronic Working Pilot Scheme provides for electronic filing of a request for the issue of a claim form.
37. PD51O was made under rules 5.5, 7.12 and 51.2. This PD applied to the proceedings with which I am concerned. Paragraph 2.1 of PD51O states that Electronic Working enables parties to issue proceedings 24 hours a day, every day, all year round, including out of normal court office opening hours and on weekends, subject to certain exceptions. Paragraph 2.2 of PD51O states that Electronic Working may be used to start claims. In the present cases, where the Claimants were legally represented, paragraph 2.A2 provided that Electronic Working must be used by the Claimants to start and/or to continue these claims. Paragraph 5 of PD51O lays down general rules regarding issue and filing of documents using Electronic Working.
38. Paragraph 5.4 contains more detailed rules as to the issue of claim forms. It provides:

“5.4

(1) Where payment of a court fee is required to accompany the filing of a document, the date and time of filing on Electronic Working will be deemed to be the date and time at which payment of the Court fee is made using Electronic Working.

(2) The date and time of payment will also be the date and time of issue for all claim forms and other originating processes submitted using Electronic Working.

(3) For all other document filings, the date and time of filing will be the submission date and time for the purposes of any direction under the appropriate rules or for the purposes of complying with an order of the Court, unless expressly provided otherwise by the Court.

(4) Once a document filing is accepted, a notification will appear on the Electronic Working online account registered to the filing party to confirm that the document has been accepted and to confirm the date and time of issue or the date and time of filing in accordance with paragraphs 5.4(1) to 5.4(3).

(5) The date and time of issue or the date and time of filing of a document submitted using Electronic Working will not be delayed by Acceptance, unless the submission fails Acceptance because the filing error is more serious than an error of procedure, or the Court orders that it has failed Acceptance for some other reason.

(6) If the submission fails Acceptance, notice of the reasons for failure will be given to the party on that party's Electronic Working online account and if the submission was of a claim form or other document requiring to be issued, it will be deemed not to have been issued.

(7) In cases where payment of the Court fee has already been made and a claim form or other originating application fails Acceptance, the fee will be refunded and a corrected claim form or originating application will have to be submitted and the Court fee paid again in order for proceedings to be issued. In such cases, the new submission will generate a new date and time of issue or date and time of filing in accordance with paragraphs 5.4(1) to 5.4(3)."

39. PD510 paragraph 5.4 refers to the filing of the claim form, notification of acceptance of the filing and the issue of the claim form. Paragraph 5.4(2) deals with the case where a court fee is required to be paid. In a case where there is no difference between the time of filing and the time of paying the court fee and the filing is accepted so that the claim form is issued, the date and time of issue of a claim form will be the date and time of filing the claim form.

40. PD510 paragraph 7 provides:

"7.1 When the Court issues a claim form or other originating application which has been submitted using Electronic Working and accepted by the Court, the Court will

electronically seal the claim form or originating application with the date on which the relevant Court fee was paid and this shall be the issue date, as per the provisions of paragraph 5.4.

7.2 The electronic seal may differ in appearance to the seal used on paper.”

41. PD51O paragraph 8.1 provides:

“**8.1** The Court will electronically return the sealed and issued claim form or originating application to the party’s Electronic Working online account and notify the party that it is ready for service.”

42. Rule 17.1 provides that a party may amend his statement of case at any time before it is served on any other party. A “statement of case” includes a claim form: see rule 2.3(1). The notes to rule 17.1 in *Civil Procedure* at paragraph 17.1.2 explain that a party amending a statement of case is not required to retain the superseded text in the amended document unless the court so directs. The notes also state that an amended statement of case must be filed as well as served.

43. Rule 19.4(1) provides that the court’s permission is required to remove, add or substitute a party unless the claim form has not been served. Ms Smith QC submitted that the adding of parties by amendment under rule 19.4(1) took effect from the date of the amendment and not from the date of the original issue of the claim form but that matter was not examined at the hearing.

44. CPR Part 6 deals with service of documents. Rule 6.3 and PD6A provide for the circumstances in which a claim form may be served by an electronic communication. Rule 6.7 provides for the circumstances in which a claim form may be served on the solicitor for a defendant.

45. Rule 6.15 provides:

“**6.15** (1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.

(2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.”

46. Rule 6.16 provides:

“**6.16** (1) The court may dispense with service of a claim form in exceptional circumstances.”

47. Rule 3.10 provides:

“3.10 Where there has been an error of procedure such as a failure to comply with a rule or practice direction—

(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and

(b) the court may make an order to remedy the error.”

Did the Claimants serve “claim forms” on 17 July 2020?

48. I have set out the various rules which deal with starting a claim, the issue and sealing of a claim form and the service of a claim. Rule 7.5 specifies that the thing which is to be served within the time permitted for service is a “claim form”.
49. As to the meaning of “claim form”, the parties cited *Hills Contractors and Construction Ltd v Struth* [2014] 1 WLR 1 and I have also considered the earlier decision of the Court of Appeal in *Murphy v Staples*, which was one of the appeals which are together reported as *Cranfield v Bridgegrove Ltd* [2003] 1 WLR 2441, see in particular at [87], cited in *Hills*. These cases show that a document which is in the form of a claim form is only a claim form for the purposes of the Rules if it bears an original court seal. Thus, where there is a sealed claim form, a photocopy of that document is not a claim form because what is shown as the seal is only a photocopy of the seal and not the original seal. This being the case, it is even more clear that a draft prepared by a solicitor and taken to the court for sealing is not a claim form until it is sealed.
50. Ms Smith submits that this general rule is displaced by the special provisions of PD51O. The argument, principally developed in Ms Smith’s reply submissions, was that PD51O is consistent with the view that a draft of a claim form prepared by a solicitor and filed in accordance with PD51O is issued when it is filed and the thing which is filed must itself be a claim form. She refers, for example, to paragraph 2.1 of PD51O which states that a party may “issue” proceedings 24 hours a day. She also refers to the references in paragraph 5.4 of PD51O which refer to the issue of proceedings and to the fact that when a filed document is Accepted, then the date of issue is the date of filing.
51. It is clear that, in the case of a filing which proceeds to Acceptance on a later date, the date of issue is the date of filing and not the later date of Acceptance. That is an important provision which allows a party to know that if the filing proceeds to Acceptance that party will not be adversely affected by the gap in time between filing and Acceptance, because the time of issue will be back-dated to the time of filing. None of this bears on the question as to the form of a claim form and whether one can have a claim form without a seal.
52. Paragraphs 7.1 and 8.1 of PD51O do bear on that question. Paragraph 7.1 provides that when the court issues a claim form, the court will electronically seal it. Paragraph 8.1 provides that the court will electronically return the sealed and issued claim form to the party’s online account and notify the party that it is ready for service. This

paragraph as to sealing and as to a claim form being ready for service are entirely in accordance with the general law in those respects. Thus, PD51O does not displace the general law as contended by Ms Smith.

53. I explained earlier that Ms Hollway believed that if she had filed the amended claim form pursuant to PD51O, then she was in a position to serve it as a claim form even before it was sealed. It may be that Ms Hollway's belief was in accordance with, or similar to, the submission made by Ms Smith as to the operation of PD51O. However, I consider that Ms Hollway's belief and Ms Smith's submission are not well founded. A draft claim form without a court seal is not a claim form even if it is subsequently sealed and even if the sealing and issue is retrospective to the date of filing under PD51O. Until the claimant's solicitor is in possession of a claim form bearing a court seal, they do not have a claim form capable of being served.
54. Ms Smith's principal argument was that where there existed an original claim form which had been issued and sealed, it was possible to amend the claim form so that the amended claim form did not need to be sealed. I have earlier referred to Rule 17.1 which allows a claimant, without needing permission, to amend a claim form before it is served. Further, Rule 19.4(1) allows the removal, addition or substitution of a party, without needing permission, before the claim form is served. Ms Smith submits that these rules say nothing about the need for a court seal to be placed on the amended document before it can be regarded as a claim form and therefore before it can be served as such.
55. This is not a case where a claimant has taken an original sealed claim form and made amendments to that document, possibly in manuscript, and added words to indicate that it had been amended pursuant to rule 17.1 and endorsed it with a fresh statement of truth. If a claimant did create such a document and served it there might be room for argument as to whether that document was a claim form in an amended form: see *Cant v Hertz Corporation* [2015] EWHC 2617 (Ch). It could be observed that that method of proceeding did not accord with the note in paragraph 17.1.2 of *Civil Procedure* which states that an amended claim form should be filed and served. If it were filed, it would be sealed by the court.
56. In this case, the form of the document which has been referred to as the amended claim form is a document prepared by the solicitors for the purpose of filing under PD51O and which does not bear a court seal. I do not see how, consistently with the general rule, such a document can be regarded as a claim form. I do not find anything in rule 17.1 or rule 19.4(1) which displaces the general rule. It may not matter but I note that Ms Hollway does not say that she believed that such a document was a claim form. Instead, she believed that such a document had to be filed with the court first before it could be served. If Ms Smith's submission in relation to amending a claim were correct, then it would not have been necessary to file the document under PD51O before it could be served.
57. Ms Smith made the general point that Electronic Working was compulsory in this case and in many other cases. If, in such cases, a claimant would not be in a position to serve a claim form until the document as filed is Accepted, issued and sealed, this might be some time after that document is filed. Thus, the use of Electronic Working might postpone the date at which a claim form can be served as compared with the

alternative of a solicitor attending the court office and immediately receiving a sealed claim form. Ms Smith is right about the gap between filing and sealing. Electronic Working differs in a number of ways from the alternative of a solicitor attending the court office and receiving a sealed claim form. However, there are obvious respects in which Electronic Working is superior to that alternative. A document may be filed 24 hours a day, on any day of the year, and when the document is Accepted, the date of issue will be the date of filing.

58. Accordingly, I hold that the documents served by the Claimants on 17 July 2020 were not claim forms and, accordingly, no claim form was served on the Defendants within the time permitted by rule 7.5 as extended by agreement to 17 July 2020.

The Claimants' applications

59. I now need to consider the Claimants' applications under rules 6.15, 6.16 and 3.10. The Claimants did not pursue an application under rule 3.9.
60. To place the Claimants' applications in context, it is helpful to consider rule 7.6 although the Claimants do not make any application under that rule. A claimant can apply for an extension of time for service of a claim form under rule 7.6 either before the time for service expires or even after it has expired. If a claimant applies after the time for service has expired, the claimant must show that it has taken all reasonable steps to comply with rule 7.5 but has been unable to do so and he has acted promptly in making the application.
61. It is perhaps implicit in the Claimants' non-application under rule 7.6 that they recognise that they could not show that they had taken all reasonable steps to comply with rule 7.5 or that they had been unable to comply. If they had applied under rule 7.6, no doubt the Defendants would have submitted that there had been a considerable time between the issue of the original claim form and 17 July 2020. Although it had been reasonable, and in the interests of both sides, to wait until the decision of the Supreme Court on 17 June 2020, there was still ample time between 17 June 2020 and 17 July 2020 to serve a claim form. It could be said that the Claimants could have served the original claim form without any difficulty, particularly where the Defendants' solicitors had agreed to accept service and, further, had agreed to service by email. Again, if the Claimants had wanted to amend the original claim form before service they had time in which to do so. They could have filed the amended claim forms by way of Electronic Working without leaving it to the last day, and in some of the cases to the afternoon of the last day, when it must have been obvious that the sealed amended claim forms would not have been available for service before midnight on the last day.

The applications under rule 6.15

62. I have set out the wording of rule 6.15 earlier in this judgment. It is accepted that rule 6.15 is, in principle, available to be relied on by a claimant even where the claimant would not be able to succeed under rule 7.6. Rule 6.15 turns on different considerations, at least to some extent, from those relevant to rule 7.6.

63. Rule 6.15(1) allows the court to permit service by a method which is not otherwise permitted by CPR Part 6. In this case, the method of service used (as distinct from the thing which was served) was permitted by CPR Part 6. Further, the method of service used could not have been more convenient, namely, service on the Defendants' solicitors by email. The Claimants do not ask for an alternative method of service which is more convenient than that. What the Claimants seek is not a change in the method of service but a change in the thing which has to be served. Rule 6.15(1) also allows the court to permit service at an alternative place but that is not relevant in this case. The Claimants rely more on rule 6.15(2) than on rule 6.15(1). However, rule 6.15(2) only applies to "an application under this rule" and that is an application which asks the court to permit service by an alternative method or at an alternative place. Further, the thing which has to be served would appear to be the claim form and not something else.
64. Mr Hoskins QC for Mastercard submitted that rule 6.15(2) did not apply in this case because the court is not able under this rule to permit service of something which is not a claim form and then to say that there has been service of a claim form. There is considerable force in that submission. If it were right, that would be the end of the application under rule 6.15.
65. However, I will approach rule 6.15 on the somewhat liberal assumption that Mr Hoskins' submission is not a complete answer and on the basis that the court could use this rule to say that service of an unsealed amended claim form was a step taken to bring the sealed amended claim form to the attention of the Defendants by an alternative method to serving a sealed amended claim form. Rule 6.15 only applies where there is "good reason" for the court to exercise the power conferred by the rule.
66. In connection with rule 6.15, I was referred to *Abela v Baadarani* [2013] 1 WLR 2043 and *Barton v Wright Hassall LLP* [2018] 1 WLR 1119. Both *Abela* and *Barton* were cases where the claimant was asking the court to permit service of a sealed claim form by an alternative method. In *Abela* the claimant succeeded and in *Barton* the claimant failed.
67. In *Abela*, the principal judgment was that of Lord Clarke with whom the other members of the Supreme Court agreed; Lord Sumption added a short judgment of his own. I can take the decision in *Abela* relatively shortly as it was fully considered in *Barton*. In *Abela*, Lord Clarke stressed that the test to be satisfied for the application of rule 6.15 is whether there is "good reason" to make an order under this rule. Whether there is a good reason is essentially a matter of fact: see at [33]. On an application under rule 6.15, a court need not spend undue time analysing the decisions in other cases which turned on their own facts: see at [35]. The mere fact that the defendant learned of the existence and content of the claim form cannot, without more, constitute a good reason but it is a critical factor: see at [36]. The most important purpose of service is to ensure that the contents of the claim form are communicated to the defendant: see at [37]. The relevant focus is upon the reason why the claim form cannot or could not be served within the period of its validity: see at [48].
68. In *Barton*, a litigant in person had served the defendant with a sealed claim form by email believing that to be good service. It was not good service. He was thereafter out

of time to serve the claim form and a new claim would be statute barred. He applied for an order under rule 6.15 that service by email should be treated as good service. A majority of the Supreme Court declined to make such an order. Lord Sumption (with whom Lord Wilson and Lord Carnwath agreed) represented the majority view and Lord Briggs (with whom Lady Hale agreed) were in the minority.

69. At [8], Lord Sumption explained that the rules as to service did not impose a duty, coupled with a sanction, on a litigant. Instead, those rules imposed conditions to be satisfied so that the defendant was made subject to the jurisdiction of the court. At [9], Lord Sumption adopted the general approach in *Abela*. At [10], it was said:

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

70. At [15], Lord Sumption said that the lower courts had not erred in principle and had been entitled to reach the conclusion that there was not a good reason for the court to make an order under rule 6.15.
71. At [16], Lord Sumption discussed the significance of the fact that the defendant was aware of the contents of the claim form within the time for service of it. He said that that fact was a necessary condition but not a sufficient one for an order under rule 6.15. He added that it had never been enough that the defendant was aware of the contents of a claim form; otherwise, any unauthorised mode of service would be acceptable, notwithstanding that it fulfilled none of the other purposes of serving a claim form.
72. At [21] and [23], Lord Sumption said:

“21. Like the Court of Appeal, I would readily accept [counsel’s] submission that the claimant need not necessarily demonstrate that there was no way in which he could have effected service according to the rules within the period of validity of the claim form. The Court of Appeal rejected this suggestion in *Power v Meloy Whittle Robinson Solicitors [2014] EWCA Civ 898*. That, however, was a case in which the problem was that the court itself had failed to effect proper service because of an administrative error. The submission that the Court of Appeal rejected was that this did not justify relief under CPR r 6.15 because it had been open to the claimant’s solicitor to effect personal service. However, I agree with the general point that it is not necessarily a condition of success in an application for retrospective validation that the claimant

should have left no stone unturned. It is enough that he has taken such steps as are reasonable in the circumstances to serve the claim form within its period of validity. But in the present case there was no problem about service. The problem was that Mr Barton made no attempt to serve in accordance with the rules. All that he did was employ a mode of service which he should have appreciated was not in accordance with the rules. I note in passing that if Mr Barton had made no attempt whatever to serve the claim form, but simply allowed it to expire, an application to extend its life under CPR r 7.6(3) would have failed because it could not have been said that he had “taken all reasonable steps to comply with rule 7.5 but has been unable to do so.” It is not easy to see why the result should be any different when he made no attempt to serve it by any method permitted by the rules.

...

23. Naturally, none of this would have mattered if Mr Barton had allowed himself time to rectify any mishap. But having issued the claim form at the very end of the limitation period and opted not to have it served by the court, he then made no attempt to serve it himself until the very end of its period of validity. A person who courts disaster in this way can have only a very limited claim on the court’s indulgence in an application under CPR r 6.15(2) . By comparison, the prejudice to Wright Hassall is palpable. They will retrospectively be deprived of an accrued limitation defence if service is validated. If Mr Barton had been more diligent, or Berrymans had been in any way responsible for his difficulty, this might not have counted for much. As it is, there is no reason why Mr Barton should be absolved from his errors at Wright Hassall’s expense.”

73. The minority in *Barton* approached the matter very differently. I refer in particular to Lord Briggs’s judgment at [32] and [40]. That approach would have been much more helpful to the Claimants in the present case but those views in a dissenting judgment cannot, of course, be taken as a statement of the correct legal principles in relation to rule 6.15.
74. In the present case, I have to ask whether there is good reason for the court to make the order sought by the Claimants under rule 6.15. I will begin by approaching the matter in the way which Lord Sumption said, at [10], should apply to the generality of cases.
75. In that way, the first question is whether the claimant has taken reasonable steps to effect service in accordance with the rules. In this case, the Claimants did not take steps to effect service in accordance with the rules. The step which they took, sending an unsealed amended claim form to the Defendants’ solicitors was not in accordance with the rules. It would have been straightforward for the Claimants to have served the original claim forms, or the amended claim forms, in accordance with the rules.

As to the original claim forms, Ms Hollway confirmed that Scott+Scott had retained those forms and she herself volunteered in her evidence that service of the original claim forms would have been a “simple expedient”. Further, there ought not to have been any difficulty in obtaining sealed amended claim forms in time for them to be served by midnight on 17 July 2020. Ms Hollway did not give any evidence to demonstrate that the steps which Scott+Scott were taking on 17 July 2020 could not have been done earlier. Her evidence was that her firm’s experience had been that it could take anything from one hour to one business day, or more, for the court to provide a sealed document via Electronic Working. In the light of that experience, it was not reasonable for her to leave the filing of the amended claim forms until the last day for service. Further, Ms Hollway explained that if she had understood what had to be done in terms of service, she could have contacted the court to ask them to expedite the sealing of the amended claim forms. In addition, in one case, Scott+Scott did have the sealed amended claim form at 15.52 on 17 July 2020 and they chose not to serve it, having already sent the unsealed amended claim form to the Defendants’ solicitors. The reason that things went wrong in this case was that Ms Hollway had formed the belief that it was sufficient for her to file the amended claim form by Electronic Working and then to send the unsealed amended claim form by email to the Defendants’ solicitors. That was not a reasonable belief. Ms Hollway did not suggest that her belief was based on any textbook or guidance as to the operation of Electronic Working. Her belief did not make the steps which she took “reasonable steps” to effect service in accordance with the rules.

76. The second question is whether the Defendants or their solicitors were aware of the contents of the claim form at the time when it expired. The Defendants’ solicitors were aware of the contents of the original claim forms as they had been sent to them for information. They were aware that the claim forms had been issued and they knew the nature of the claim being made. They knew the claim numbers. As to the amended claim forms, they were aware of their contents from the unsealed copies which were emailed to them. There was an issue as to whether the Defendants’ solicitors would have known on 17 July 2020 that the Claimants had filed the amended claim forms. Ms Hollway suggested that the covering emails which contained the sentence, “Please note, we do not yet have sealed copies of the documents, but will send these as soon as possible”, would have informed the Defendants’ solicitors that the Claimants had filed the amended claim forms. I do not think that that is right. The sentence in the email states that Scott+Scott do not have sealed copies of the documents. The reference to “not yet” deals with the time at which they do not have sealed copies of the documents. The sentence does not convey to me any information as to why Scott+Scott do not have sealed copies. One is left to speculate: is it because they have not yet applied for sealed copies or is it because they have filed the amended claim forms and are waiting for the court to issue and seal them?
77. The Defendants argued that because their solicitors would not know if the amended claim forms had been filed, they could not know if the amended claim forms would be issued before the end of 17 July 2020. That may be so. Nonetheless, I would be prepared to hold, in answer to the second question posed in *Barton* at [10], that in this case the Defendants’ solicitors were aware of “the contents of the claim form” by the end of 17 July 2020. As explained in *Barton* at [16], such knowledge is a necessary but not a sufficient condition for an order under rule 6.15.

78. The third question is: what if any prejudice would the Defendants suffer by the retrospective validation of a non-compliant service of the claim form, bearing in mind what the Defendants knew about its contents. The prejudice referred to is the prejudice which would flow from the court making an order under rule 6.15. In this way, the comparison is between the position of the Defendants if no order is made with their position if an order were made. This is a different question from asking: what prejudice did the Defendants suffer by reason of the Claimants, on 17 July 2020, emailing unsealed amended claim forms as compared with what should have happened, which was that the Claimants ought to have served sealed claim forms?
79. The Defendants say that they will suffer prejudice if the court makes an order in favour of the Claimants under rule 6.15. In the absence of an order, these proceedings are now at an end. In the Mastercard cases, the Claimants were able to issue new claim forms and they have done so on 19 and 20 August 2020. In the Visa cases, there is an issue as to whether the Claimants are able to issue new claim forms; I will discuss that issue later in this judgment.
80. If the Claimants issue new claim forms, then they will be able to claim for damage occurring in the six years before the date of issue of the new claim forms. If an order is made in their favour under rule 6.15, then they will be able to claim for damage occurring in the six years before the issue of the original claim forms. Accordingly, in the absence of an order under rule 6.15, the Defendants have a limitation defence as regards a period of time. The length of that period varies from case to case but the point applies in all of these cases. This means that the Defendants will be prejudiced by an order in favour of the Claimants under rule 6.15. Ms Smith submitted that although the Defendants will be deprived of a limitation defence, that defence is not a total answer to any claim by the Claimants as it was in *Barton*. However, that does not affect the position that the Defendants will be prejudiced by the order sought under rule 6.15. The loss of a limitation defence is just the sort of prejudice which is relevant in this context: see *Barton* at [23].
81. Ms Smith also referred to the evidence of the solicitors for Visa as to their reaction if they had been asked on 17 July 2020 to grant a further short extension of time for service of the claim forms. In his first witness statement, Mr Cassels, the solicitor for Visa, said that if Visa had been asked to agree an extension of time in relation to the Ideal and Vodafone claims, Visa would have been willing to do so. In his second witness statement, Mr Cassels said that if the Claimants had requested an extension of time (seemingly in the Ideal and the Vodafone claims), his firm and Visa would have considered the request and, if good reasons had been offered for a short delay, they would have been likely to treat the request favourably.
82. Based on that evidence, Ms Smith submitted that the attitude of Visa to a request for an extension showed that Visa did not suffer any prejudice as a result of a short delay in serving a sealed amended claim form and that Visa was now seeking to take advantage of a windfall resulting from the Claimants' error. I do not see how this evidence produces the result that Visa would not be prejudiced by an order in the Claimants' favour under rule 6.15. In the absence of an order under rule 6.15, Visa has a limitation defence, at least to some extent. If an order is made in the Claimants' favour under rule 6.15, then Visa loses that limitation defence. It is understandable that Visa's position now is that it wishes to avail itself of its limitation defence. Visa

is not prevented from taking that position by the fact that it would have been prepared to extend time if it had been asked to do so in advance of its acquiring its limitation defence. The limitation defence is a windfall for Visa but that does not mean that Visa would not suffer relevant prejudice by an order in the Claimants' favour under rule 6.15.

83. I have now addressed the three questions identified in *Barton* at [10]. The answers are that the Claimants did not take reasonable steps to effect service in accordance with the rules and that the Defendants would suffer prejudice if an order in the Claimants' favour were made under rule 6.15 but, conversely, the Defendants' solicitors were aware of the contents of the claim form before the time for service expired. I now need to stand back and ask: is there a good reason to treat the service of an unsealed claim form as good service? My conclusion is that there is not a good reason to do so. The reason why the Claimants are in this position is the mistake made by their solicitors. That is not a good reason for making an order under rule 6.15. I consider it to be a bad reason for the suggestion that I should make such an order.

The applications under rule 6.16

84. In the alternative to its case in relation to rule 6.15, the Claimants ask for an order under rule 6.16 dispensing with service of a claim form. I have set out rule 6.16 earlier in this judgment. The court can make such an order "in exceptional circumstances". I have considered all of the circumstances of the case when I asked whether there was a good reason to make an order under rule 6.15 treating the service of an unsealed claim form as good service. In view of my conclusion that, in all the circumstances, there is not a good reason to make an order under rule 6.15, I do not consider that this is a case where I should find that there are exceptional circumstances which justify the making of an order under rule 6.16. This was the approach taken by the Court of Appeal in *Bethell Construction Ltd v Deloitte and Touche* [2011] EWCA Civ 1321 at [28] and followed in *Piepenbrock v Associated Newspapers Ltd* [2020] EWHC 1708 (QB) at [69].
85. For the sake of completeness, I add that I have considered a number of cases which concerned the power to dispense with service originally conferred by rule 6.9. That rule did not itself lay down any criteria as to the exercise of that power but the case law made it clear that an order under rule 6.9 should only be made in exceptional circumstances or even, as it was said in one case, in "truly exceptional circumstances". I have considered what was said about the operation of rule 6.9 in *Anderton v Clwyd County Council (No 2)* [2002] 1 WLR 3174 (and in a number of later cases which discussed *Anderton*), in *Olafsson v Gissurarson (No 2)* [2008] 1 WLR 2016 and in *Phillips v Symes (No 3)* [2008] 1 WLR 180. The facts of those cases are all different from the present case and I do not find any parallel in the facts of those cases to persuade me that the present case involves exceptional circumstances which would justify the court in making an order dispensing with service of the claim form under rule 6.16.

The applications under rule 3.10

86. The Claimants then sought to rely on rule 3.10. I have set out rule 3.10 earlier in this judgment. The Claimants submit that what happened here was "an error of procedure"

within rule 3.10 so that the effect of rule 3.10 is that the error of procedure does not invalidate the step taken in the proceedings, namely, the step which involved the service of an unsealed claim form on the Defendants. The Claimants accept that it would be open to the court to make an order, pursuant to rule 3.10(a), invalidating that step but if the court did not make such an order then the step taken was valid. The Claimants also say that it would be open to the court to make an order under rule 3.10(b) to remedy the error, if for some reason an order of that kind were thought to be desirable.

87. There is clear Court of Appeal authority for the proposition that rule 3.10 does not have the effect contended for by the Claimants: see *Vinos v Marks & Spencer plc* [2001] 3 All ER 784 at [27], followed in a number of cases including *Elmes v Hygrade Food Products plc* [2001] CP Rep 71 at [13]-[14] and *Steele v Mooney* [2005] 1 WLR 2819 at [18]-[19] and [24]. Rule 3.10 is to be regarded as a general provision which does not prevail over the specific rules as to the time for, and the manner of, service of a claim form.
88. Notwithstanding these decisions of the Court of Appeal, the Claimants refer to what was said by Lord Brown in *Phillips v Symes (No 3)*. It is not necessary to summarise the more complex arguments which were considered in that case save to say that, in a case involving service out of the jurisdiction, a defendant was served with a translation of the claim form but not the original claim form itself. In the course of his judgment, Lord Brown considered whether this was an error of procedure within rule 3.10 and/or whether the court could dispense with service under the former rule 6.9 (now rule 6.16) on the ground of exceptional circumstances. In the event, Lord Brown held that the court should dispense with service under the former rule 6.9. Before considering the former rule 6.9, he commented that it seemed to him to be “at least arguable” that the court could simply order under rule 3.10(b) that the defendants were to be regarded as properly served.
89. The Claimants accept that Lord Brown’s comment as to the scope of rule 3.10 was *obiter* but they say it should be considered to be strongly persuasive on that point. The Defendants submitted that the earlier decisions of the Court of Appeal, *Vinos*, *Elmes* and *Steele*, were not cited to the House of Lords in *Phillips v Symes*. It is true that the Weekly Law Report of that case does not list these earlier decisions of the Court of Appeal as having been cited in argument but *Phillips v Symes* was an appeal from the decision of the Court of Appeal in *Phillips v Nussberger* [2006] 1 WLR 2598 and in his judgment in the Court of Appeal, at [63], Neuberger LJ had cited and applied *Vinos* and *Elmes* as to the scope of rule 3.10. Accordingly, Lord Brown’s comments must be seen as having been made in the knowledge of the earlier decisions of the Court of Appeal. Although the parties did not make submissions as to whether *obiter* comments in the House of Lords could overrule the ratio of earlier decisions of the Court of Appeal, my own view would be that the comments did not have that effect.
90. Lord Brown’s *obiter* remarks in *Phillips v Symes* have been applied at first instance. In this respect I was referred to *Integral Petroleum SA v SCU-Finanz AG* [2014] EWHC 702 (Comm), *Bank of Baroda, GCC Operations v Nawany Marine Shipping FZE* [2017] 2 All ER (Comm) 763 and *Dory Acquisitions Designated Activity Co v Frangos* [2020] EWHC 240 (Comm). The Defendants submitted that each of these cases at first instance was distinguishable from the present case. However, if the

authorities had stopped there, I might have felt that I ought to follow a line of first instance authority on the scope of rule 3.10, whatever doubts I may have had.

91. In fact, the line of first instance authority has since moved on. The scope of rule 3.10 was considered again in *Piepenbrock v Associated Newspapers Ltd*, to which I referred earlier. In *Piepenbrock*, the judge referred to *Vinos*, *Elmes* and *Steele* before considering *Phillips v Symes*, *Integral Petroleum* and *Bank of Baroda*. The judge did not refer to *Dory* which had followed *Integral Petroleum* and *Bank of Baroda*. In *Piepenbrock*, the judge applied the earlier decisions of the Court of Appeal and distinguished *Integral Petroleum* and *Bank of Baroda*.
92. Having considered the authorities, I conclude that I should follow the approach in *Piepenbrock* and hold that rule 3.10 does not enable me to find (under rule 3.10(a)) that there has, after all, been valid service on the Defendants or that I should make an order (under rule 3.10(b)) remedying the Claimants' error as to service. If it is not possible to distinguish *Integral Petroleum* or *Bank of Baroda* as to the scope of rule 3.10, then I would have to choose between those two decisions and the decision in *Piepenbrock*. I find the reasoning in *Piepenbrock* to be more persuasive and I would follow it. It may be that it is my duty to follow *Piepenbrock* unless I considered that it was wrong: see *Colchester Estates v Carlton plc* [1986] Ch 80. As to that, I do not think *Piepenbrock* is wrong.
93. I also heard submissions as to the approach to be adopted if rule 3.10 was capable of applying in this case. Mastercard submitted that I ought not to make an order under rule 3.10 in favour of the Claimants as that would deprive Mastercard of its limitation defence. However, as I have held that rule 3.10 is not capable of applying, it does not seem to me to be appropriate to discuss the matters which might need to be considered if rule 3.10 did apply.

The overall result as to service

94. The overall result is that I hold that the claim forms in these proceedings have not been served and I decline to grant relief to the Claimants under rules 6.15, 6.16 or 3.10.
95. This result applies in all of the cases before me. I add that in the specific case where the Claimants had the sealed amended claim form at 15.52 on 17 July 2020 and still did not serve it on that day, the Claimants had no real case for saying that there was a good reason for being given relief under rule 6.15; further, the circumstances in that case were not exceptional for the purposes of rule 6.16.
96. This conclusion also means that I do not need to analyse those cases where the amended claim forms removed some claimants and added further claimants.

The undertakings in the Visa claims

97. In the Visa claims, the parties do not agree as to whether Ideal and Vodafone are now free to start fresh proceedings seeking substantially the same relief as they claimed in the original claim forms or the amended claim forms. Visa contends that Ideal and

Vodafone are not free to do so because of undertakings which they gave to Visa. The dispute relates to the meaning and the effect of those undertakings.

98. As explained earlier, Ideal and Vodafone were granted by Visa extensions of time for the service of claim forms against Visa. These extensions of time were expressed to be in consideration of undertakings given by the solicitors for Ideal and Vodafone which provided:

“Our client hereby undertakes to each of the Defendants and to the Court not, at any point in the future, to discontinue, withdraw or otherwise bring to an end the Proceedings and issue a further claim (or claims) in substantially the same or equivalent form, whether to seek some form of perceived advantage under Directive 2014/104/EU, as implemented by Member States in due course, or otherwise.”

99. The undertakings referred to Directive 2014/104/EU. The provision in the Directive which is relevant is Article 10 which required Member States to lay down rules applicable to limitation periods for bringing actions for damages for breach of competition law, whether under Article 101 or 102 of TFEU or national competition law. Article 10(2) provided that limitation periods should not begin to run before the infringement of competition law had ceased and the claimant knew, or could be reasonably expected to know, certain facts as to its ability to make a claim.
100. The United Kingdom complied with Article 10 of the Directive by introducing schedule 8A into the Competition Act 1998 on 8 March 2017. Paragraphs 18 and 19 of schedule 8A introduced a limitation period which complied with Article 10 of the Directive but, by paragraphs 42 to 44 of schedule 8A, it was provided that the new limitation period should apply only to the extent that a claim related to loss or damage suffered on or after 9 March 2017, as a result of an infringement of competition law which took place on or after 9 March 2017. Thus, if Ideal and/or Vodafone were now to bring fresh proceedings against Visa, they would be restricted to claiming for damage suffered in relation to the six years before the issue of the fresh proceedings. This means that Ideal and Vodafone would not gain any advantage in terms of the limitation period by taking action to bring the original claims to an end and starting new proceedings. So far, I have summarised the position in this jurisdiction but Visa says that the position might be different if Ideal and/or Vodafone were to bring claims in other Member States which have implemented Article 10 of the Directive in a different way.
101. Mr Cassels, the solicitor acting for Visa, gave evidence as to the reason why Visa had requested these undertakings from Ideal and Vodafone. He explained that the undertakings were originally requested from various claimants at a time before the United Kingdom had implemented Article 10 of the Directive (on 8 March 2017). At that time, it was not known whether the United Kingdom would provide that the change in the limitation period was, or was not, to have retrospective effect. Although Ideal and Vodafone issued their proceedings after the United Kingdom had introduced schedule 8A into the Competition Act 1998, Visa still required the undertakings out of abundance of caution and just in case Article 10 was implemented in a retrospective way in another Member State which might mean that Ideal or Vodafone could bring

its claims in the United Kingdom to an end and then start new proceedings in another Member State in order to benefit from the new limitation period in that Member State.

102. Although Mr Cassels' evidence describes the thought processes of the solicitors for Visa, Ms Smith for Ideal and Vodafone accepted that I could proceed on the basis that this explanation was indeed part of the background against which the undertakings were to be construed.
103. As to the effect of the undertakings, Mr Kennelly QC for Visa submitted that the failure by Ideal and Vodafone to serve a claim form on or before 17 July 2020 meant that Ideal and Vodafone had brought those proceedings to an end. He then submitted that fresh proceedings relying on the causes of action relied on in the earlier proceedings or on Article 101 of TFEU alone would be proceedings in substantially the same or equivalent form to the earlier proceedings. Finally, he submitted that the case came within the phrase "whether to seek some form of perceived advantage under [the Directive] ... or otherwise"; he accepted that the failure to serve the earlier proceedings was not done to seek a perceived advantage under the Directive but that the case came within the words "or otherwise".
104. Ms Smith submitted that, in the circumstances of this case, the issue of fresh proceedings would not be contrary to the undertakings. She submitted that Ideal and Vodafone had not taken steps to bring the earlier proceedings to an end. This was because, until the issues raised before me are determined against Ideal and Vodafone, the current proceedings are not at an end. Thus, if the court finds for Visa on these issues, it will be the court and not Ideal and Vodafone which has brought the current proceedings to an end. Secondly, it was submitted, if Ideal and Vodafone lose on the current issues, they would wish to bring fresh proceedings but not to seek an advantage under the Directive or otherwise; this was because Ideal and Vodafone would be worse off with fresh proceedings as compared with the earlier proceedings because the claims in the fresh proceedings would only allow Ideal and Vodafone to recover damages for a shorter period of time.
105. The undertaking refers to two things. The first is bringing proceedings to an end and the second is issuing a further claim. The undertaking is only broken if both of these things are done. Thus, there would be no breach by discontinuing the first set of proceedings if further proceedings were not issued. The undertaking contains a purpose element. The undertaking is only broken if the thing or things which are done are for the purpose of seeking a perceived advantage under the Directive or otherwise.
106. The first point is: did Ideal or Vodafone "bring to an end" the earlier proceedings? On the findings made in this judgment, the failure of Ideal and Vodafone to serve the claim forms on the last day for service means that the proceedings are at an end. Although Visa has applied for orders which seek a determination on this point, it will not be the court's order on that application which brings the proceedings to an end. The question then is: did Ideal and Vodafone "bring to an end" the proceedings by omitting to serve them in time. The undertaking is expressed as a negative stipulation i.e. "not to" do something. The undertaking also refers to the possibility of discontinuance or withdrawal of the proceedings which would involve positive acts by the Claimants which would be contrary to the negative stipulation. Visa argues that the undertaking is not restricted to positive acts by Ideal or Vodafone but extends to

omissions which have the effect of bringing the proceedings to an end. Although the point is not wholly clear, I agree that Ideal or Vodafone would commit a breach of the undertaking if they deliberately failed to serve the claim forms in time in order to produce the result that the proceedings were at an end so that they could then achieve an advantage by bringing fresh proceedings in the way described in the undertaking. It is more arguable whether Ideal and Vodafone “bring to an end” the proceedings when their omission to serve the claim forms was the result of a mistake and where they have applied to the court under rules 6.15, 6.16 and 3.10 in order to avoid the proceedings coming to an end and where that result is opposed, successfully, by Visa. I am inclined to the view that Ideal and Vodafone do not bring to an end the proceedings in those circumstances.

107. However, I will assume in favour of Visa that the omission on the part of Ideal and Vodafone to serve the claim forms means that they did bring to an end the proceedings. The question then is: if Ideal and Vodafone were now to bring fresh proceedings in substantially the same form, could it be said that they brought to an end the first proceedings and issued further proceedings in circumstances which come within the phrase “whether to seek some form of perceived advantage under [the Directive], as implemented by Member States in due course, or otherwise”?
108. It is clear that Ideal and Vodafone did not bring to an end the first proceedings to seek some form of perceived advantage under the Directive. Similarly, they do not wish to issue further proceedings to obtain an advantage under the Directive. So, did they bring to an end the first proceedings and do they wish to issue further proceedings in a way which comes within the words “or otherwise”?
109. “Otherwise” can mean “in a different way” or “in different circumstances”. These two meanings might produce different results in this case. If I held that “or otherwise” in the undertaking meant “in different circumstances” then it would seem to follow that if Ideal or Vodafone bring to an end the first proceedings and issue further proceedings in any circumstances, then they are in breach of the undertaking. Conversely, if “or otherwise” means “in a different way” then the undertaking might only apply where Ideal or Vodafone bring to an end the first proceedings and issue further proceedings to seek some form of perceived advantage (i) under the Directive or (ii) in a different way. With this interpretation of the undertaking, Ideal and Vodafone would not act contrary to the undertaking by bringing to an end the first proceedings and issuing further proceedings, in the present circumstances, because they are not seeking a perceived advantage in any way. There may also be other possible interpretations of the undertaking.
110. To construe the undertaking so that it only applies where Ideal and Vodafone act or fail to act in order to seek some perceived advantage gives a reasonable commercial meaning to the undertaking. To construe the undertaking in the way contended for by Visa does not make commercial sense. This is particularly so if the undertaking is read, as Visa contends, so that Ideal and Vodafone commit a breach of it even where they are trying not to bring the proceedings to an end and Visa is opposing that attempt in order to produce the result that the proceedings are at an end.
111. In these circumstances, I prefer the construction which means that, in the circumstances of this case, Ideal and Vodafone will not be in breach of the

Approved Judgment

Ideal Shopping Direct Ltd and ors v Visa Europe Ltd and
ors
Ideal Shopping Direct Ltd and ors v Mastercard Inc and
ors

undertaking if they issue further proceedings seeking substantially the same relief. That construction is readily available as a matter of the ordinary meaning of the words and produces a sensible commercial result whereas Visa's construction does not produce a sensible commercial result.