CA on appeal from QBD. Mr Justice Crane before Waller LJ; Dyson LJ; Neuberger LJ.

Lord Justice Neuberger : this is the judgment of the court to which all its members have contributed.

1. This is an appeal, coupled with a renewed application for permission to appeal, brought by a defendant against a decision of Crane J, who, on 10 February 2005, made an order under r 6.9 of the CPR, dispensing with the service of a claim form. The relevant facts are as follows.

2. The defendant, International Hospitals Group Ltd, entered into an agreement with Mr. Emmanuel Ashiagbor, under which he agreed to assist the defendant in procuring hospital construction contracts in Ghana. In 1996, one such contract was awarded to the defendant. A year later, Mr Ashiagbor killed himself. During 2000, a claim for over £300,000 was intimated to the defendant by the solicitors then acting for the claimants, Mr Ashiagbor's executors. Somewhat dilatory discussion ensued, following which, in 2003, the claimants instructed fresh solicitors, Humphrey Williams, of Vauxhall, London.

3. In October 2003, Humphrey Williams started more formal and fairly detailed negotiations directly with the defendant, which continued until about March 2004. Those negotiations appear to have been conducted between the claimants' solicitors and the legal department of the defendant at the defendant's main office in Rickmansworth, Hertfordshire. All the claimants' solicitors' letters in connection with these negotiations were sent by hard copy to the defendant's Rickmansworth office (sometimes by recorded delivery and sometimes by direct delivery) with copies also being sent by fax. The defendant's replies were sent on writing paper from its Rickmansworth office which recorded the fax number of the defendant at that office.

4. Around the middle of December 2003, it appears that the defendant instructed solicitors, Stephenson Harwood, who wrote to Humphrey Williams stating that they acted for the defendant. On the same day, Humphrey Williams wrote to Stephenson Harwood asking whether they had instructions to accept service on behalf of the defendant. Stephenson Harwood had no such instructions, and, although they sent a fairly detailed reply setting out the defendant's position so far as the claim was concerned, they did not reply to the request as to whether or not they had instructions to accept service. On the same day as that letter was sent, 19 December 2003, the claimants, through Humphrey Williams, issued proceedings against the defendant out of the Queen's Bench Division of the High Court.

5. The last day for service of the claim form in those proceedings in accordance with the provisions of r 7.5(2) was 19 April 2004. On that day, the claimants' solicitors telephoned the defendant's solicitors to enquire whether they had instructions to accept service, but received no reply as the individual solicitor acting for the defendant was out of the office for most of that day. Accordingly, on the same day, the claimants' solicitors:
   a) Sent a copy of the claim form to the defendant's solicitors by courier;
   b) Faxed a copy of the claim form to the legal department of the defendant at its Rickmansworth office at the fax number recorded in the defendant's letters for its Rickmansworth office.

6. Promptly thereafter, the defendant, through its solicitors, raised the contention that the claim form had not been properly served, and that the proceedings were accordingly ineffective. If correct, this contention would raise serious limitation problems for some, components of the claim.

7. On 7 May 2004, the claimants issued an application seeking an order that service of the claim form had been validly effected, either by its physical delivery to the defendant's solicitors, or by a copy having been faxed to the defendant's Rickmansworth office, or that time be extended for such service, or that service be dispensed with.

8. That application came before Master Eyre. On 10 November 2004, he made an order acceding to the application, holding that although there had been no service of the claim form in accordance with CPR Part 6, he would dispense with service pursuant to r 6.9, on the grounds that
   a) the claimants' solicitors, had taken reasonable steps to effect service of the claim form within the four month period laid down by r 7.5(2); and

b) *"the real difficulty was created by [the defendant's solicitors'] failure both on 19 December 2003 and on the 19 April 2004 to answer the claimants' solicitors' questions"* which led to consequences which were *"obviously completely contrary to the spirit of fair litigation".*

9. The defendant appealed against that decision. The appeal came before Crane J, who delivered a full and detailed judgment. He first concluded that the claimants' solicitors had not served the claim form in accordance with the requirements of CPR Part 6. Service on the defendant's solicitors was ineffective because neither had they been given instructions to accept service – see r 6.13 – nor had their address been given by the defendant as its address for service – see r 6.5. Service at the defendant's Rickmansworth office by fax was ineffective, because paragraph (e) of r 6.2(1), which identifies the permitted methods of service under the CPR, requires service by fax to be "in accordance with the relevant practice direction". In that connection paragraph 3.1(1) of Practice Direction - Service states that the party to be served must have given written confirmation "that he is willing to accept service by electronic means" and of his fax number.

10. In those circumstances, as we think was accepted by both parties, the time for service of the claim form could not be extended under r 7.3, because its strict requirements were not satisfied by the claimants in this case. Accordingly, in agreement with the Master, Crane J held that the only way in which the claimants could succeed in their application was if the Court exercised its power to make an order dispensing with service of the claim form under r 6.9.

11. Crane J went on to say that he could not accept that the Master was entitled to rely on either of the two grounds he identified for dispensing with service. So far as the first ground was concerned, the Judge concluded that the claimants' solicitors had not taken *"reasonable steps to effect service*". He said that they had not taken "*steps in reasonable time*" and that "*the steps … taken at the last minute*" were not "*steps which, on their knowledge at the time, were reasonable on that day"*. As to the Master's second ground, Crane J said that the defendant's solicitors' "*conduct is only relevant in the very limited sense that there was no notification in fact that instructions about service had been accepted"*, and that he did not consider that they could be "*criticised in a way that would be relevant to the exercise of the discretion*" to dispense with service under r 6.9.

12. The Judge also observed that the "***real difficulty***" was that the claimants' solicitors had "left service until the eleventh hour". He then stated that "*none of the evidence… justifies or begins to justify leaving service until the eleventh hour in the way it was*" and that they had *"brought the problems of 19 April on themselves."*

13. The Judge then said that, as the decision to dispense with service of the claim form could not be supported on the two grounds relied on below, he was free to consider the claimants' application afresh. In that connection, he considered that he should approach the matter in accordance with the principles laid down by this court in ***Vinos –v- Marks & Spencer plc*** [2001] 3 All ER 284, ***Godwin –v- Swindon Borough Council*** [2002] 1 WLR 997, ***Anderton –v- Clwyd County Council*** [2002] 3 All ER 813, ***Wilkey –v- BBC*** [2003] 1 WLR 1 and ***Cranfield –v- Bridegrove*** [2003] 1 WLR 2441.

14. As Mr Birts QC, who appeared for the claimants with Mr Hill, pointed out, those decisions were all concerned with cases where the claim form had, in fact, been served within the four month period identified in r 7.5(2), but, because of the deeming provisions of r 6.7, service had to be treated as effected outside that period. However, in agreement with Crane J, we do not consider that that can make any difference to the applicability of the principles laid down in those cases to the present case. In this case, as in those cases, service of the claim form was not effected in accordance with CPR Part 6 within the time permitted, albeit that the defendant had in fact received the claim form (or a copy thereof) within that period. If anything, the claimant's position could be said to be a little weaker here, as in the earlier cases, the claim form was properly served within the four month period, but the claimant was caught by a deeming provision, whereas here the claimant had simply not served the claim form in a manner which complied with the requirements of the CPR within the permitted period. However, such fine distinctions should not, in our view, be drawn in this area, where simplicity, clarity and certainty are particularly desirable.

15. In ***Godwin's*** case, May LJ said at paragraph [44], consistently with ***Vinos's*** case, that a claimant who serves a claim form one day late "***cannot normally appeal to the court's discretion to relieve him from the consequences".*** At paragraph [50], he went on to say that, in his view, "*r 6.9 does not extend to extricate a claimant from the consequences of late service of the claim where limitation is critical and r 7.6(3) does not avail the claimant."* Pill LJ agreed – see at paragraph [79].

16. In ***Anderton's*** case at paragraph [36], Mummery LJ, who gave the judgment of the court, said that "*Justice and proportionality require that there are firm procedural rules which should be observed".* At paragraphs [56] to [59], he identified a distinction (which he said had not been "*analysed or recognised in* ***Godwin's*** *case"*) between cases where the claimant *"has not even attempted to serve a claim form by one of the methods permitted by r 6.2*" (in paragraph [56]) and those where the claimant *"has in fact made an ineffective attempt in time to serve a claim form by one of the methods allowed by r 6.2"* (in paragraph [57]). In the latter type of case, Mummery LJ pointed out that a claimant had already achieved service, albeit out of time, and that there was therefore a stronger basis for invoking the court's jurisdiction under r 6.9. Nonetheless, he emphasised, in paragraph [2], that, following *Godwin's* case, "*there will be very few (if any) acceptable excuses for future failures to observe the rules for service of a claim form".*

17. In ***Wilkey's*** case, at paragraphs [16] to [18], Simon Brown LJ distinguished between "pre-*Anderton*" and "post-*Anderton*" cases of the second type identified by Mummery LJ. He suggested that, in the former cases, the discretion to dispense with service would normally be exercised unless there was a good reason not to do so; in the latter cases, however, "a *'strict approach' should generally be adopted",* a view with which Carnwath LJ agreed at paragraph [28].

18. In ***Cranfield's*** case, the court considered five "pre-*Anderton*" applications to extend time under r 6.9. At paragraph [32] of the judgment of the court, Dyson LJ referred to another type of circumstance, which *"the court did not have to consider*" in ***Anderton's*** case, where r 6.9 might be properly invoked, namely, "where there has been some comparatively minor departure from the permitted method of service" The example he gave was of service by second class post, effected on the right person in time, which would not be strictly compliant with the CPR, as r 6.2(1)(b) requires "***first class post***". However, in the same paragraph, Dyson LJ emphasised *"the exceptional nature of the power to dispense with service in such cases"* and the importance of "*the* ***Godwin*** *principle*" which "*must not be subverted*."

19. The Judge discussed these authorities in a little detail. He then turned to consider whether, in the light of the two non-compliant attempts to effect service in this case, he could, and should, grant the claimants the relief they sought under r 6.9. In relation to the service of the claim form on the defendant's solicitors, he said that it was not appropriate to grant such relief. However, he decided that he could and should grant such relief in the light of the faxing of the claim form to the defendant's offices. He reached this conclusion on the basis that the failure to obtain the defendant's advance written consent to service of the claim form by fax, as stipulated by paragraph 3.1(1) of the Practice Direction, was, at least on the facts of this case, a "comparatively minor departure" from the requirements of r 6.2(1).

20. More specifically, Crane J reasoned as follows. First, the stipulation in paragraph 3.1(1) of the Practice Direction was included because a defendant might not want to be served by fax owing to the risk that his fax machine might be switched off or in some way disabled, and because faxes are less secure than most other means of communication. Secondly, there had been previous fax communications between the defendant and the claimants' solicitors. Thirdly, as a matter of fact, the faxed claim form was received by the defendant, indeed by the defendant's legal department, within the four month period stipulated by r 7.5(2). Fourthly, no prejudice had been suffered by the defendant as a result of its having been served with the claim form by fax without compliance with the provisions of the Practice Direction. Accordingly, the Judge concluded that "*it would be entirely proper to dispense with service of the claim form"*, and he did so.

21. The defendant applied for permission to appeal to the Court of Appeal, and, even though this would be a second appeal so that r 52.13 applied, I thought it appropriate to grant such permission, albeit that I refused permission on one point. As the application for permission on that point has been

renewed by Mr Richard Coleman, who appears for the defendant, it is convenient to turn to that renewed application before dealing with the appeal itself.

22. Permission to appeal is sought in order to argue that the relaxations to the strict approach in *Godwin's* case, which were identified, first, in paragraphs [56] to [59] of ***Anderton's*** case as refined in paragraphs [16] to [18] of ***Wilkey's*** case and, secondly, in paragraph [32] of ***Cranfield's*** case, were *per incuriam* and inconsistent with the earlier and binding decision in *Godwin's* case. In our judgment, this argument has no prospect of success, and permission to appeal should be refused.

23. First, in all three later cases, this court considered *Godwin's* case in some detail, so in those cases no fewer than eight members of this court believed that they were not reaching a decision inconsistent with binding authority. Secondly, in ***Anderton's*** case, a decision followed and applied in ***Wilkey's*** case, the court was expressly refining, rather than contradicting, the approach in ***Godwin's*** case, just as in ***Cranfield's*** case, the court was refining, or adding to the refinement to, the approach in ***Anderton's*** case. Thirdly, as we have said, in this area certainty and clarity are of the essence, and there is little that could be less desirable than this court now changing the rules by going back on what it said not just in one, but in three, earlier cases. Fourthly, if (which we very much doubt) those three cases caused more uncertainty than before, that would be a strong argument for not compounding the uncertainty by going back on the principles they decided; if those cases have not increased uncertainty, then there is no reason to reconsider them.

24. We turn to the issue on which permission to appeal has been given. Mr Coleman suggests that the appeal raises two questions, namely whether Crane J had discretion to dispense with service, and, if so, whether he exercised such discretion properly. We consider that, not least because of the short and simple way in which r 6.9 is expressed, namely by providing that "the court may dispense with service", there is only one question. That question is whether, in the light of the principles and approach laid down in the five cases whose effect we have summarised above, Crane J could properly have dispensed with service of the claim form on the facts of this case. He had a discretion to dispense with service; that discretion had to be exercised within the parameters laid down by this court; the issue therefore must be whether the exercise of discretion in this case was within the ambit of those parameters. If it was within those parameters, then (unless he failed to take a relevant factor into account or took an irrelevant factor into account), we cannot interfere with the Judge's conclusion – even if we would have exercised the discretion differently. If his decision was outside the ambit of the parameters, then it must be reversed.

25. The Judge proceeded on the basis that service of the claim form at the defendant's office by fax without obtaining the defendant's confirmation required by paragraph 3.1(1) of the Practice Direction was a "*comparatively minor departure from the permitted method of service*", as described in paragraph [32] of ***Cranfield's*** case, and that, in the circumstances of this case, he should exercise his power to dispense under r 6.9.

26. In our view, the effect of the reasoning of this court, at least in "post-*Anderton*" cases, in the decisions to which we have referred, is as follows. First, it requires an exceptional case before the court will exercise its power to dispense with service under r 6.9, where the time limit for service of a claim form in r 7.5(2) has expired before service was effected in accordance with CPR Part 6. Secondly, and separately, the power is unlikely to be exercised save where the claimant has either made an ineffective attempt in time to serve by one of the methods permitted by r 6.2, or has served in time in a manner which involved a minor departure from one of those permitted methods of service. Thirdly, however, it is not possible to give an exhaustive guide to the circumstances in which it would be right to dispense with service of a claim form.

27. In this case although the Judge correctly asked the question whether there was a "***minor departure***" in the service of the claim form by fax, we consider that he went wrong in two respects. First, he gave the wrong answer to that question. Secondly, he did not ask (and therefore probably did not answer) the additional question whether this was an exceptional case: had he done so, the answer ought to have been in the negative.

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28. In our view, the failure to comply with paragraph 3.1(1) of the Practice Direction cannot fairly be characterised as no more than a "minor departure" from the provisions of r 6.2(e). In principle, that rule, which refers in terms to the Practice Direction, effectively precludes service by fax unless the written consent of the person to be served is first obtained. For the reasons identified by the Judge, there are good practical grounds for this requirement. Accordingly, the method of service employed here, namely by fax, was, on the facts of this case, not permitted by the CPR, whereas service by second class post would involve a permitted method, namely through the post, but with a departure from the stipulated machinery.

29. The Judge relied on the facts that the faxed copy of the claim form was received by the defendant in time, that the claimants' solicitors had had prior communications with the defendant at the fax number in connection with the case, and that the defendant's in-house legal department was contactable on that fax number. We do not consider that any or all of those facts would be sufficient to render the failure to comply with paragraph 3.1(1) of the Practice Direction a minor departure from r 6.2(e), especially when the claimants' solicitors had not even attempted to ask the defendant for consent to effect service by fax, as they could so easily have done.

30. Mr Birts argued that, even if this case was not one which involved a "***minor departure***", it was one where there had been an ineffective attempt to serve by one of the permitted means within the four month time limit. In other words, he said that this was a case within paragraph [57] of ***Anderton****'s* case, even if it was not within paragraph [32] of ***Cranfield****'s* case. The Judge appears to have rejected that contention, and we consider that he was right to do so. Service by fax without the written consent of the defendant, as required by paragraph 3.1(1) of the Practice Direction cannot be described as service "*by one of the methods allowed by r 6.2*", given that service by fax is permitted by r 6.2(e), which, as we have mentioned, specifically requires compliance with the Practice Direction.

31. Quite apart from this, we do not consider that this case can be said to be exceptional in any event. The fact that the claimants' solicitors had been in fax communication with the defendant about the case cannot help the claimants. First, every faxed communication from the claimants' solicitors seems to have been accompanied by the sending of a hard copy. Secondly, the fact that a party is prepared to receive faxed letters in connection with a claim cannot reasonably be said to lead to the assumption that he will be prepared to be served by fax with originating court proceedings. Thirdly, the very fact that there was a well-established means of communication with the defendant, when and after the claim form was issued, makes it all the harder to justify not using that means to obtain the consent required by paragraph 3.1(1) of the Practice Direction well ahead of the final date for service. Fourthly, given that the claim form was sent by courier to the defendant's solicitors in London, and the defendant's office was on the outskirts of London, there was no good reason why the claim form could not have been sent by courier to the defendant's offices.

32. Nor are we impressed with the fact that the claim form, or at least a faxed copy of the claim form, was received by the defendant within the four month period. That cannot make this an exceptional case. Otherwise, the facts of all the cases considered by this court in the five decisions discussed above would have been exceptional, and the claimants would have succeeded in each of the cases, and without difficulty (not least because they were all "pre-*Anderton*" cases). The fact that the offices in question contained the defendant's legal department makes no difference.

33. Despite Mr Birts's contention to the contrary, we do not consider that the claimants can rely on the absence of prejudice to the defendant as a reason for letting the Judge's decision stand. In our view, for the reasons given in ***Vinos's, Godwin's*** and ***Anderton****'s* cases, the time limits in the CPR, especially with regard to service of the claim form where the limitation period may have expired, are to be strictly observed, and extensions and other dispensations are to be sparingly accorded, especially when applied for after time has expired. While there may be exceptional cases, we consider that prejudice is only relevant in this sort of case to assist a defendant, where the court would otherwise think it right to dispense with service. In other words, prejudice to the defendant is a reason for not dispensing with service, but the absence of prejudice cannot usually, if ever, be a reason for dispensing with service.

34. Mr Birts alternatively contended that, contrary to the conclusion of the Judge, the service of the claim form on the defendant's solicitors could and should be treated as effective service sufficient to justify the court dispensing with service. On this issue, we agree with Crane J. We think he was right to conclude that the defendant's solicitors could not be treated as being blameworthy or acting contrary to the spirit of the CPR, as the Master thought. Realistically, Mr Birts did not press the contrary view.

35. Service on the defendant's solicitors was ineffective under the CPR, and it cannot be said to have been a "***minor departure***" from the permitted methods of service to serve on solicitors who had not been nominated by the defendant. In any event, for the reasons already given, this would not have been an exceptional case. Quite apart from any other point, it can fairly be said that it would have been only too easy for the claimants' solicitors to ask the defendant, with whom they had been in fairly close contact, to nominate its solicitors' address as its address for service in accordance with r 6.5(2), but they never did so.

36. In summary, this is a case of a claimant's solicitor who waited until the very last day to serve a claim form, and then, despite knowing the address of the defendant's offices and being able to effect service in accordance with a method permitted by r 6.2, failed to do so, and, after the time for service had expired sought the assistance of the court under its power to dispense with service. The court should not accord such relief, where there is nothing exceptional about the facts, and it is not even a case where there can be said to have been no more than a minor departure from a permitted method of service or that there was an ineffective attempt to serve by a permitted method within the time limit.

37. Accordingly, we allow the defendant's appeal, and set aside the order dispensing with service of the claim form.

Peter Birts QC and Mark Hill (instructed by Humphrey Williams) for the Defendant
Richard Coleman (instructed by Stephenson Harwood) for the Claimants