



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

**[2026] CSIH 44
XA60/26**

Lord Malcolm
Lord Tyre
Lord Ericht

OPINION OF THE COURT

delivered by LORD TYRE

in the appeal under section 120 of the Enterprise Act 2002 against a decision of the
Competition Appeal Tribunal

by

ARAMARK LIMITED

Appellant

against

THE COMPETITION AND MARKETS AUTHORITY

Respondent

**Appellant: Byrne KC, McGowan; Shoosmiths LLP
Respondent: Anderson KC; Office of the Advocate General**

7 October 2026

Introduction

[1] The appellant (“Aramark”) appeals, with the permission of the court, against a decision of the Competition Appeal Tribunal dated 10 March 2026 refusing an application by Aramark for an extension of time in which to lodge an application for review of a decision by the respondent (“the CMA”). The circumstances giving rise to the present

appeal are not in dispute; the following summary is derived from the decision of the Tribunal (James Wolffe KC sitting as a tribunal in Scotland).

[2] Aramark is a subsidiary of a global food and facilities management service provider headquartered in the United States. On 24 January 2025, Aramark acquired 90% of the issued share capital of Entier Limited, a company incorporated in Scotland with its head office and place of business in Aberdeenshire. Aramark and Entier are both engaged in the supply of offshore catering and ancillary facilities management services to customers, including in the UK offshore continental shelf. On 23 May 2025, the CMA, exercising powers under the Enterprise Act 2002, launched a merger inquiry into the acquisition. At 4.52pm on Thursday 15 January 2026, the CMA published its final report recording its conclusions (i) that the acquisition had resulted, or might be expected to result, in a substantial lessening of competition in the relevant market; and (ii) that only a sale of Entier Limited to an approved buyer would effectively address the competition concerns.

[3] As a “person aggrieved”, Aramark was entitled to apply to the Tribunal, under section 120 of the 2002 Act, for a review of the CMA’s decision. Rule 25 of the Competition Appeal Tribunal Rules 2015 specifies the statutory time limit for making such an application. It provides, so far as material:

- “(1) An application under section 120(1) of the 2002 Act for the review of a decision in connection with—
 - (a) a reference ... in relation to a relevant merger situation ... shall be made by filing a notice of application within four weeks of the date on which the applicant was notified of the disputed decision, or the date of publication of the decision, whichever is the earlier.
- ...
- (3) The Tribunal may not extend the time limit provided under paragraph (1) ... unless it is satisfied that the circumstances are exceptional.”

[4] At 12.02pm on Friday 13 February 2026, Aramark’s solicitors sent the Tribunal Registry a notice of application for review of the CMA’s decision. The Registry took the view that the time limit specified in rule 25 had expired at 5.00pm on Thursday 12 February 2026 and that the notice was accordingly late. The Registry declined to register the notice.

[5] In a flurry of correspondence during the next few days, Aramark’s solicitors initially sought to contend that on a correct interpretation of the rules, the notice had been filed timeously, with a fall-back position that an extension of time should be granted. By Wednesday 18 February, however, Aramark accepted that the notice had been filed late and restricted its argument to an application for extension of the time limit. That application came before the Tribunal for a hearing on 19 February 2026.

Reasons for the late filing

[6] By way of evidence, the Tribunal had before it affidavits by Antonio Bavasso, a partner of Simpson Thacher & Bartlett, solicitors instructed by Aramark, and by Daniel Barnett, the CMA’s interim senior litigation director, together with email correspondence during the relevant period. Among the emails noted by the Tribunal were the following:

- On Monday 9 February, Simpson Thacher & Bartlett emailed the Tribunal as follows:

“This is to provide advance notice that we, on behalf of Aramark Limited, are seeking to submit a notice of appeal to the CAT on Thursday 12 February 2026 as regards the CMA’s final decision in Case ME/2241/25 (Completed Acquisition by Aramark Limited of Entier Limited. Final Report, 15 February 2026).”
- On Tuesday 10 February, Mr Bavasso advised Mr Barnett by email that

Aramark would proceed to lodge its notice of application “by the end of the

week” and invited the CMA to advise when counsels’ clerks could liaise about a hearing date. Mr Barnett did not reply to that email.

- At 1803 hours on Thursday 12 February, a legal director of Shoosmiths, also acting for Aramark, emailed the CMA case officer in connection with the remedies process which was following upon the merger decision. The email sought an extension to a deadline for providing comments on proposed draft undertakings. The email intimated that “Aramark is also heavily engaged in finalising the appeal submission, which is due imminently”.
- At 1043 hours on Friday 13 February, Matthew Weighill, assistant director, mergers, of the CMA, responded to that email by agreeing to the request for further time in relation the draft undertakings. The email also said:

“As regards a potential appeal, having had regard to Rule 25(1) of the CAT Rules and paragraphs 4.15 - 4.19 of the Tribunal’s Guide to Proceedings, we consider that the deadline for filing an application for review under s 120 of the Enterprise Act 2002 was 5pm yesterday evening (12 February 2026), and that deadline has now passed”.
- At 1134 hours, Mr Bavasso emailed Mr Barnett to request a discussion. Following receipt of that email, Mr Barnett phoned Mr Bavasso who explained that, in “our view”, filing on 13 February was within the requirements of the Tribunal Rules, and asked Mr Barnett if he would consider not pursuing the point further. Mr Barnett said he would consider the matter internally and revert.
- At 1451 hours Mr Barnett emailed Mr Bavasso stating that the CMA’s position would be that it would not be open to Aramark to enter into any *inter partes* agreement to extend time, that being a matter for the Tribunal.

[7] After the Tribunal hearing, Aramark was permitted to lodge a statement by Shakamal Miah, Aramark's vice president and assistant general counsel. Mr Miah stated *inter alia* that Aramark had been informed by Simpson Thacher & Bartlett that the statutory deadline to file the notice was 5.00pm on 13 February 2026 and had no cause to doubt this position; that Aramark agreed to an internal administration plan with its legal advisors to file the notice on 12 February, a day ahead of what it understood to be the statutory deadline; that on 12 February, during a call at 2.00pm, Aramark discussed with its legal advisors whether any additional comments from its management team in the United States might be incorporated into the notice; and that the notice was submitted at 12.02pm on 13 February before Aramark had been informed by its legal advisors that the CMA had emailed them to express the view that the filing deadline had been missed.

[8] As the Tribunal noted, Mr Bavasso's statement did not address the reason why the statutory time limit had not been met. Mr Miah's statement confirmed that Simpson Thacher & Bartlett had advised Aramark that the statutory deadline was 5.00pm on Friday 13 February, but provided no insight into the reason why its solicitors had made that mistake. Nor did Mr Miah's statement disclose why, notwithstanding the internal administration plan, additional comments from Aramark's US management were being provided only after 2.00pm on the intended filing date; when those comments were provided; or whether any consideration was given at that time to any possible risks attendant on filing on what Aramark and its advisers believed (erroneously) to be the last day for filing.

[9] An explanation for the error was, however, provided in the oral submissions made to the Tribunal by senior counsel for Aramark. Those submissions were presented under

reference to rule 112 of the Tribunal Rules, concerning the computation of time. Rule 112 provides *inter alia*:

“(2) Where a period expressed in days, weeks or months is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place is not to be counted as falling within the period in question.

(3) A period expressed in weeks or months ends with the expiry of whichever day in the last week or month is the same day of the week or falls on the same date in the month, as the day during which the event or action from which the period is to be calculated occurred or took place...”

[10] According to senior counsel’s explanation, the reason why the deadline was missed was because the legal team working on the matter had been proceeding on an interpretation of rule 112 which Aramark now accepted was erroneous. This was not a case where there had been a careless failure to meet the deadline; “minds were applied” to rule 112. Simpson Thacher & Bartlett had understood the effect of rule 112(2) to be that the day on which the report was published and notified to the parties (ie Thursday 15 January) should not be counted at all. On that reading of rule 112(2), they took the phrase “day during which the event or action from which the period is to be calculated occurred or took place” in rule 112(3) as referring to Friday 16 January. This, it was submitted, was an honest mistake, involving “an unfortunate linguistic confusion” which had some basis in the language of the rule and was “not wholly irrational”.

[11] Senior counsel further stated that the reason why the internal plan to file the notice on Thursday 12 February was not adhered to was because:

“...people were commenting, their client’s in the States, there’s time difference, and different people were commenting on the document and it was believed, well that’s okay, because the deadline is 5 pm on the Friday and then the hope was always to submit several hours ahead of the deadline”.

Had the legal team correctly interpreted rule 112, the notice could and would have been finalised and filed before 5.00pm on Thursday 12 February. The essential reason why the deadline was missed was accordingly the solicitors' good faith misinterpretation of rule 112.

[12] In the absence of opposition from the CMA, the Tribunal was content to proceed on the basis of the explanations provided by senior counsel, to the extent that these supplemented the evidence contained in Mr Miah's statement.

The Tribunal's decision

[13] The Tribunal began by noting that the time limit in rule 25 was not incompatible with Article 6 of the European Convention on Human Rights. The statutory time limit for initiating proceedings promoted legal certainty and finality. There was a public interest in any challenge to a relevant decision of the CMA being brought promptly. In relation to merger decisions, these were legitimate aims. The rules assumed that 4 weeks was generally sufficient time to allow an aggrieved person to initiate proceedings. There were no features of the case which meant that Aramark needed more than 4 weeks to file the notice.

[14] Rule 25(3) permitted the Tribunal to extend the time limit only if it was satisfied that the circumstances were exceptional. The word "exceptional" was an ordinary adjective.

It was common ground that the circumstances in question had to be "exceptional circumstances justifying an appeal out of time" (*Office of Fair Trading v Somerfield Stores Ltd & Others* [2014] EWCA Civ 400, Vos LJ at paragraphs 42 and 56). The Tribunal had repeatedly emphasised the importance of meeting the time limit. The Court of Appeal in *Somerfield* had approved a statement by the Tribunal in that case that it was probably impossible to produce any indicative, let alone comprehensive definition of what is meant by "the circumstances are exceptional". The court's observations in that case signalled that where

an applicant had failed to meet the statutory time limit and sought an extension of time under rule 25(3), in effect to relieve it from the consequences of that failure, the first question would always be: “why did the appellant not lodge an appeal in time?” The Tribunal should address its mind to whether there was a “justification” for the failure to meet the statutory time limit and to whether there were factors which “undermined the [appellant’s] ability to bring a timely appeal”. That was consistent with the approach taken in previous cases.

[15] As regards the reasons for late filing in the present case, the Tribunal, while accepting the explanation of how the error came to be made, did not itself consider that there was any room for reasonable doubt as to the effect of rule 112(3). Even if there had been doubt or ambiguity, that ought to have been resolved by filing before the earliest possible deadline, ie by 5.00pm on Thursday 12 February.

[16] The error had been compounded by the departure from Aramark’s internal administration plan which, it appeared, had been done to accommodate comments from its US management. The evidence did not disclose why Aramark had further comments to provide after 2.00pm on the day identified by its internal plan as the filing date, nor whether consideration was given to the risk attendant on departing from the plan and filing on Friday 13 February. In these circumstances, the Tribunal could not hold that Aramark itself bore no responsibility for the fact that the notice was filed on the Friday, even if Aramark, in reliance on its solicitor’s advice, believed that filing on Friday would be timeous. The Tribunal’s Guide to Proceedings strongly advised parties not to wait until the last possible moment to commence proceedings.

[17] The Tribunal rejected the suggestion that by not responding to Mr Bavasso’s email of 10 February, in which he intimated the intention to file “by the end of the week”, the CMA

bore some responsibility for Aramark's failure to meet the deadline. The expression was a broad one and did not call for an immediate response. In any event it was the sole responsibility of the parties and their lawyers to ensure that time limits were complied with. There was no basis for a finding that Aramark was diverted from filing timeously by reliance on anything said or not said by the CMA.

[18] At paragraph 97, the Tribunal summarised its reasoning as follows:

"The reasons why Aramark failed to meet the filing deadline were: (i) their solicitor's misinterpretation of the rules; and (ii) the decision to depart from the internal administration plan to file the Notice on 12 February. I accept that the solicitor's misinterpretation of the rules was a good faith error and that Aramark and its solicitors were earnestly working to comply with the deadline as they understood it. The solicitor's error was compounded by a late decision to defer filing until what was understood (erroneously) to be the last day for filing... (T)hese features do not distinguish the present case from other cases where a mistake – which will almost invariably be a good faith mistake – combined with filing on the last day results in a court deadline being missed. They are not exceptional circumstances such as to justify an extension to the statutory time limit."

[19] Reliance was placed by Aramark on the speedy response to the error, and the shortness of the extension sought. The Tribunal did not consider the present case analogous to those where a *prospective* extension had been sought because the applicant needed more time to file a notice. The shortness of the extension was intrinsic to the error, and the fact that steps were taken without delay to seek an extension did not amount to exceptional circumstances justifying the extension.

[20] Aramark relied also on the absence of prejudice to the CMA. The Tribunal did not accept that no prejudice would be caused by an extension of time. Were the appeal to be allowed to proceed, the CMA and others would incur time and expense, and there would be uncertainty until the litigation was finally determined. The Tribunal was not invited to, and did not, take any preliminary view on the merits of Aramark's challenge to the decision. So far as prejudice to Aramark was concerned, despite the significant consequences of the loss

of the opportunity to challenge the decision, those consequences did not justify characterising the circumstances as exceptional.

[21] After the hearing, the Tribunal instructed the Registry to draw to parties' attention certain authorities on what was referred to as the "surrogacy principle", ie the principle which imputes to a party the actions of its legal representative, and to invite parties to lodge written submissions on that principle. Having considered the parties' submissions, the Tribunal accepted that the principle was not universal, and in particular that it would not be applied where to do so would be incompatible with Article 6. The Tribunal held, however, that in proceedings to which rule 25 applied there were compelling considerations of legal policy for proceeding, as a general rule, on the footing that errors made by a solicitor would be imputed to the client. It did not consider that the circumstances of the present case justified a departure from the general rule. The reported cases in which the court had departed from the principle concerned natural persons facing significant personal consequences such as potential loss of liberty or professional status. Aramark was a corporate entity whose interests were essentially economic and commercial.

[22] In any event, the Tribunal could not hold that Aramark itself bore no responsibility for the fact that the filing did not take place until 13 February. The Tribunal was not convinced that a professional negligence action against Aramark's solicitors would be an inadequate remedy for the loss of an opportunity to challenge the CMA's decision. In all the circumstances it was not unjust to fix Aramark with the consequences of its solicitors' error. It was not incompatible with Aramark's Article 6 rights to apply the statutory provision in accordance with its terms by holding that the circumstances of this case were not exceptional.

[23] Finally the Tribunal considered Aramark's submission that it was the cumulative effect of all of the circumstances referred to that justified the characterisation as "exceptional". The Tribunal recognised that a combination of circumstances, none of which in itself was exceptional, might fall to be characterised as exceptional. It held, however, that the combination of circumstances here was not "exceptional" in the context of a failure to comply with the time limit in rule 25. They were all ordinary and natural consequences of a failure to comply with the time limit and were a combination of circumstances that were liable to occur in such a case. It followed that the Tribunal had no power to grant an extension of time under rule 25(3).

Grounds of appeal

[24] Aramark appeals against the Tribunal's decision on the following grounds:

"1. The Tribunal erred in law when it applied the exceptional circumstances test under Tribunal Rule 25(3). In particular, the Tribunal erred: (i) in treating the solicitors' honest mistake in construing the counting rule as equivalent to cases of deliberate or careless conduct; (ii) in finding that the appellant itself also bore responsibility for the missed deadline; (iii) in finding that the severe consequences for the appellant did not support a finding of exceptional circumstances; (iv) in its approach to the impact on the market and third parties; and (v) by failing to give due consideration to the combination of circumstances relied upon by the appellant.

2. The Tribunal erred in law in its application of the surrogacy principle. The Tribunal's analysis of the precise scope of the surrogacy principle, and its applicability to the present case, was vitiated by a number of errors of law. Firstly, the Tribunal misconstrued the surrogacy principle as it erred in law when it held that: (i) it was not permissible, under Tribunal Rule 25(3), to disapply the surrogacy principle on the basis that it would be unjust to fix the client with its solicitor's mistake; and (ii) the mere fact that it is inevitably the client which will bear the consequences of an error by the applicant's solicitor would not, generally speaking, be an exceptional circumstance. Both of these findings are wrong in law. Secondly, the Tribunal erred in law in refusing to disapply the surrogacy principle as it: (i) erroneously held that there was a relevant distinction between natural and corporate persons; (ii) erroneously concluded that the appellant bore some responsibility for the missing the filing deadline; and (iii) erroneously held that a

professional negligence action against the appellant's solicitors would be an adequate remedy for the loss of its chance to challenge the CMA's decision."

The questions of law identified by Aramark for the opinion of the court are:

1. Whether the Tribunal erred in law in its application of the exceptional circumstances test under rule 25(3) of the Tribunal Rules.
2. Whether the Tribunal erred in law in its application of the surrogacy principle.
3. Whether the Tribunal erred in law in refusing to disapply the surrogacy principle.

Argument for Aramark

[25] The written notes of argument lodged on behalf of Aramark for both the application for permission to appeal and for the substantive hearing largely consisted of elaboration of the two grounds of appeal above. In oral submissions, however, the argument was presented somewhat differently. Senior counsel submitted that the "acid test" was whether a litigant had personally done all that he reasonably could do to comply with the filing deadline. If so, that amounted to exceptional circumstances requiring the Tribunal to grant an extension of time. Application of this test avoided the inherent arbitrariness of allowing a blameless client an extension of time in some circumstances (such as the occurrence of an accident) but not in others (such as an error on the part of his solicitor). The Tribunal had erred in law in failing to apply a line of authority which required it to ask whether the litigant bore personal responsibility for the failure to meet the deadline.

[26] It was further submitted that the Tribunal had erred in finding that Aramark bore some of the responsibility for the late filing. The Tribunal had confused cause with culpability. Aramark could not be faulted for relying on advice received from specialist

solicitors that the deadline for filing was 5.00pm on Friday 13 February and ought not to have been criticised for continuing to provide input to the appeal during Thursday 12 February. (The court was informed that the amendments made on the Thursday were of the nature of correction of typographical errors. This is not entirely on all fours with the evidence given to the court by Mr Miah in his affidavit, which referred to “additional comments from [Aramark’s] management team based in the United States”.) Since Aramark was relying on specialist advice, it ought not to be criticised as “courting disaster” by leaving the filing until the last day. Once the error had been identified, Aramark did everything it could to minimise any effect of the late filing.

[27] Aramark relied for its acid test proposition on three authorities. First, in *Graham v John Tullis & Son (Plastics) Ltd (No 1)* 1992 SLT 507, which also concerned an error by a solicitor as to the deadline for marking an appeal, the court held that the circumstances were “sufficiently exceptional” to justify exercising the court’s general dispensing power (now in RCS rule 2.1): the delay was very short and arose not because the solicitor was ignorant or forgetful of the rule, but simply because of a miscalculation when he was taking steps to perform his duty. Secondly, in *Pomieczowski v District Court of Legnica, Poland* [2012] 1 WLR 1604, the Supreme Court heard four cases in each of which the appellant had failed to serve notice of his appeal against an extradition order within the short period of time allowed by the relevant statutes. The Supreme Court held that the statutory provisions had to be read subject to the qualification that the court had a discretion in exceptional circumstances to extend time for both filing and service, where the provisions would otherwise operate to prevent an appeal in a manner conflicting with the Article 6 right of access to an appeal process. Thirdly, in *Thillaiayagam v General Medical Council* [2025] 4 WLR 75, a case concerning disciplinary proceedings against a doctor, the appellant’s

solicitors filed a notice of appeal with the wrong court and thus missed the deadline for filing it with the correct court. Lang J held that where the late filing was entirely the fault of the appellant's solicitors and the appellant had personally done all he could to bring the appeal in time, this was an exceptional case and granted an extension of time. Applying the principles in, *inter alia*, *Pomiechowski*, application of the surrogacy principle would have had the effect of unjustly impairing the appellant's right of access to the court in breach of Article 6. Reference was also made in Aramark's submissions to observations by the court in *Neilly v Nursing and Midwifery Council* 2019 SC 565 at paragraph 10 as to the meaning of "exceptional circumstances" in the context of the rules applicable to that case.

[28] The Tribunal had erred in law in attaching weight to the decision to depart from the internal plan to file the notice on the Thursday; in failing to attach weight to the shortness of the extension sought; and in seeking to distinguish the cases in which the courts had declined to apply the surrogacy principle on the ground that those cases involved natural persons facing significant personal consequences such as a potential loss of liberty or professional status, whereas the present case concerned a corporate entity whose interests were economic and commercial, and thus capable of financial compensation.

Argument for the CMA

[29] On behalf of the CMA it was submitted that no error of law by the Tribunal in the application of its own rules had been identified. In order to extend time, the Tribunal had to be satisfied that the circumstances were exceptional. Its decision was not a hard-edged question of law; it was rather an exercise of evaluative judgment with a high factual component. The starting point for the court was to consider whether there was a sufficiency of evidence to justify the Tribunal's finding in law.

[30] In its exercise of evaluative judgment the Tribunal made the following findings:

- It was incumbent upon Aramark when seeking an extension to provide the Tribunal with a full, specific and acceptable account of the factual position explaining why the deadline had not been met.
- The reason for the late application was Aramark's solicitors' misinterpretation of the rules on the computation of time, compounded by Aramark's late decision to depart from its internal administration plan and to delay filing until 13 February.
- On the basis of Aramark's own evidence, the Tribunal was unable to find that Aramark itself was entirely blameless and had no responsibility for the fact that the notice was filed on 13 February.
- On the material before it, the Tribunal was not able to find that a professional negligence action would be an inadequate remedy for the loss of the opportunity to challenge the merger decision.

The Tribunal's core finding on the evidence adduced was that there were no exceptional circumstances to justify extending time where the failure to apply on time was principally due to solicitor error. That finding was open to it. There was no error of law in its evaluation.

[31] As regards Aramark bearing responsibility for the late filing, the evidence failed to explain why Aramark had comments which it wished to provide to its solicitors only after 2.00pm on 12 February, or whether any consideration was given at that stage to the risk attendant on departing from the internal plan and delaying filing to 13 February. In those circumstances, the Tribunal could not make a positive finding that Aramark itself had no responsibility for the fact that the notice was filed on 13 February rather than 12 February.

That was a conclusion which reflected the limitations of the evidence adduced by Aramark and was reasonably open to the Tribunal. The position was further confused by the rather different explanation presented to the court.

[32] In any event, personal blamelessness of the client was not necessarily sufficient of itself to constitute exceptional circumstances. The surrogacy principle was well recognised. The Tribunal had acknowledged that the principle was not a universal one and correctly considered whether the circumstances justified a departure from the general principle. The context in which lawyer error had to be considered in a merger case was the statutory scheme in which urgency was an inherent feature, the allocation of risk between solicitors and their clients, and the need for legal certainty in the market. The question whether it would be unjust to apply the surrogacy principle was an evaluative decision for the Tribunal.

[33] The cases founded upon by Aramark did not support the proposition that exceptional circumstances existed whenever the client had personally done all he reasonably could to assure timeous filing. *Graham* was in essence a first instance decision on the exercise of the court's dispensing power. The reference to the circumstances being "sufficiently exceptional" did not assist with the construction of the test in rule 25(3). The *Pomiechowski* and *Thillaiinayagam* cases were concerned with reading a power to disapply a deadline in exceptional circumstances into statutory requirements which contained no such provision. Whether such a power should be exercised in favour of a late applicant was a matter of judgment. In the present case the Tribunal was entitled to draw a distinction in the application of the surrogacy principle as between natural persons and corporate entities. It was difficult to identify a limit to Aramark's proposition. The purpose of the principle was to permit all circumstances, and not merely the blamelessness or otherwise of the client,

to be taken into account. Reference was made by way of analogy to the decision of the European Court of Justice in *Internationale Fruchtimport Gesellschaft Weichert GmbH & Co KG v European Commission*, Case C-73/10P, refusing to extend a time limit where the appellant's lawyers misinterpreted a provision of the Rules of Procedure of the Court of First Instance (as it then was).

Decision

The role of the court

[34] In terms of section 120(6) of the 2002 Act, an appeal lies from the Tribunal to the court "on any point of law". It would not be accurate to categorise the Tribunal's decision as made in the exercise of a discretion; the Tribunal itself saw the matter as whether, given the terms of rule 25(3), it had power to extend the time limit. The appellant must satisfy the court that in holding that it did not, the Tribunal erred in law. It is not enough that the court would or might have reached a different decision from that of the Tribunal.

Application of the "surrogacy principle"

[35] The alleged error of law principally founded upon by the appellant is the Tribunal's refusal to grant an extension of the time limit where the reason for the missed deadline was a bona fide error by a solicitor, in circumstances where the client had done all that it reasonably could to file the appeal timeously. Leaving aside for the moment the question of whether Aramark did all that it reasonably could to ensure that the appeal was filed timeously, we are not persuaded that the legal proposition can be accepted as broadly as it was presented. The "surrogacy principle" (as it now seems to be known) is very well established in both Scots and English law. Purely by way of example, in *Donald v*

Rutherford 1984 SLT 70 the court had to decide whether it was equitable to allow an action for personal injury to proceed outwith the triennium. Lord Cameron observed at page 77:

“The exercise of this jurisdiction necessarily involves a balancing not only of all relevant circumstances of the particular case but also the interests of both or all parties concerned. In the present case it would appear clear enough that no personal blame can properly be laid on the shoulders of the respondent himself, but he is answerable for the acts of his agents...”

The court regarded it as “a factor of great importance” that the pursuer appeared to have an unanswerable claim for negligence against his agents, but there is no suggestion that the blamelessness of the client himself compelled the court to exercise the equitable jurisdiction in favour of the pursuer. In *Ideal Shopping Direct Ltd v Mastercard Inc* [2022] 1 WLR 1541, in which claims were not validly served due to a procedural error by the claimants’ solicitors, the court declined to make an order remedying the error despite there being no suggestion of fault on the part of the claimants themselves. One of the reasons for refusing relief given by Sir Julian Flaux C (at paragraph 155) was:

“...(W)here a claimant leaves the filing of claim forms until the last day for service, as Lord Sumption JSC said in [*Barton v Wright Hassall LLP* [2018] 1 WLR 1119], it courts disaster and has a limited claim on the indulgence of the court. This is all the more so where the failure to serve sealed amended claim forms was due to a mistake on the part of the claimants’ solicitors, as in this case...”

Similarly, in *R (Good Law Project Ltd) v Secretary of State for Health and Social Care* [2022] 1 WLR 2339, where the court refused to extend the time for serving an application for judicial review, Carr LJ stated (at paragraph 61) without elaboration that the claimant was “fixed with the acts and omissions of its solicitors”.

[36] The decision in *Graham v John Tullis & Son (Plastics) Ltd* is distinguishable from the present case in that different powers were being exercised. The power in rule 25(3) is restrictively framed: the Tribunal may not extend the time limit unless satisfied that there are exceptional circumstances justifying an appeal out of time. The court in *Graham* was

exercising a more general dispensing power which, notwithstanding the phraseology selected by the court, does not contain an exceptionality requirement (cf *Semple Cochrane plc v Hughes* 2001 SLT 1121, in which the Lord Ordinary (Carloway) noted at paragraph 10 that the rule was not qualified by words such as exceptional or extraordinary circumstances and was reluctant to read any such words in).

[37] The issue in the fourth of the *Pomiechowski* set of extradition cases (*Halligen*) was whether a discretion in exceptional cases to extend the time for filing and serving a notice of appeal had to be read into a statutory provision that contained no such discretion.

Rule 25(3) does of course already contain an “exceptional circumstances” provision. The circumstances regarded by the Supreme Court as exceptional were those described in paragraph 37 of Lord Mance JSC’s judgment:

“...It is clear that the statutory provisions regarding the permitted periods for appeals may in individual cases impair the very essence of the right of appeal. The previous judicial expressions of concern are eloquent about the potential and actual unfairness of the position in which prisoners find themselves in trying to meet the statutory requirements, with such aid as the prison legal services department or legal advisers can, under difficult conditions, provide. The problems of communication from prison with legal advisers in the short permitted periods of seven and 14 days are almost bound to lead to problems in individual cases. It is no satisfactory answer that a person wrongly extradited for want of an appeal as a result of failings of those assisting him might, perhaps, be able to obtain some monetary compensation at some later stage. Strict application of the surrogacy principle would be potentially unjust. I am not persuaded that the interests of finality and certainty outweigh the interests of ensuring proper access to justice by appeal in the limited number of extradition cases where this would otherwise be denied. There would not be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”

In the circumstances described, the Supreme Court held (paragraph 39) that:

“...the statutory provisions concerning appeals can and should all be read subject to the qualification that the court must have a discretion in exceptional circumstances to extend time for both filing and service, where such statutory provisions would otherwise operate to prevent an appeal in a manner conflicting with the right of access to an appeal process held to exist under article 6.1 in [*Tolstoy Miloslavsky v UK* (1995) 20 EHRR 442]. The High Court must have power in any individual case to

determine whether the operation of the time limits would have this effect. If and to the extent that it would do so, it must have power to permit and hear an out of time appeal which a litigant personally has done all he can to bring and notify timeously.”

[38] The sentence at the end of paragraph 39 must be read in context. We do not understand the Supreme Court to be creating or confirming a requirement that in any case in which a litigant personally has done all he can do to bring and notify an appeal timeously, the court is bound to permit and hear the appeal out of time. Had the Supreme Court intended to do so, we would have expected to see an acknowledgment that it was reformulating the surrogacy principle in such a way that it would henceforth apply only in those cases, perhaps a minority, where blame could be attached to the client as well as to the solicitor. We are confident that the Supreme Court intended no such thing. On the facts of the *Halligen* case, the appellant’s absence of personal blameworthiness in his solicitor’s failure to serve the appeal timeously on the Home Office and the Crown Prosecution Service was only one of the circumstances contributing to what would amount to a breach of his Article 6 right of access to an appeal process. The decision does not support the appellant’s broad proposition that relief must be granted in all circumstances in which an appellant has personally done all that he can reasonably do to enable timeous lodging of the appeal.

[39] In *Thillaiinayagam*, the appellant sought to appeal against a finding of misconduct by the Medical Practitioner’s Tribunal Service and the accompanying sanction of 1 month’s suspension from practice. The appeal documents were erroneously filed electronically with the Kings Bench Division of the High Court instead of the Administrative Court by a paralegal employed by the appellant’s solicitors. When the error was discovered, the appeal was 3 days out of time. Lang J noted (at paragraph 41) that Parliament had made provision for a 28-day period in which to lodge an appeal to the High Court without any provision for a discretionary extension of time. Having reviewed a number of authorities including

Pomiechowski, she concluded that although the time limit did not itself impair the very essence of the right of access to the court, the absence of any discretionary power to extend time in exceptional cases might give rise to a breach of the Article 6 right of access to the court. Having regard to the serious consequences of a relatively minor delay (the appellant would immediately lose his job), and the fact that the late filing was entirely the fault of the solicitors, he personally having done all he could to bring the appeal in time, Lang J considered this to be an exceptional case and granted an extension of time.

[40] Again we consider that it is going too far to view this case as supporting a proposition that wherever an appellant has personally done all he can to bring the appeal in time, an extension must be granted. The ratio of Lang J's judgment was the need to read a power to extend the time limit, in exceptional cases, into the statutory provision at issue in that case which made no provision for extension. Having held that such a power did require to be read in, the question whether to grant an extension was an exercise of the judge's discretion in all of the circumstances of the case, including the immediate loss of the appellant's employment. Lang J's conclusion was that application of the surrogacy principle in that case would have the effect of unjustly impairing the appellant's Article 6 right of access to the court. Whether or not such impairment is unjust in other cases will depend upon the facts and circumstances of those cases.

[41] In *Neilly v Nursing and Midwifery Council*, again the court was addressing whether it should allow non-compliance with an absolute and unqualified statutory time limit for an appeal. The answer was - not simply because of a mistake, oversight or otherwise excusable cause in terms of the dispensing power in RCS 2.1(1), but only if otherwise there would be an infringement of Article 6 rights: in practical terms, if there had been no realistic access to the court. It followed that if the unrepresented Ms Neilly could, if doing all reasonably

expected of her, have met the deadline, there was no infringement; in other words, no disproportionality between the restriction and the convention right. The case did not give rise to any questions as to the surrogacy principle. It serves merely to reinforce the weight to be attached to a statutory deadline.

[42] Turning, then, to the circumstances of the present case, the Tribunal addressed the surrogacy principle at paragraphs 111-115 of its decision, having invited parties to make submissions on it. The Tribunal acknowledged that the principle was not universal and, specifically, that it would not be applied where doing so would be incompatible with Article 6. The Tribunal observed, however, under reference to the decisions in *Good Law Project Ltd* and *Ideal Shopping Direct Ltd* (above), that if parties did not generally have to live with the consequences of errors made by their lawyers, procedural rules and time limits, including time limits for raising proceedings, would readily be undermined. The Tribunal considered that there were compelling considerations of legal policy for proceeding, as a general rule, on the footing that errors made by a solicitor would be imputed to the client. Merger proceedings were specialist proceedings that were invariably managed by external lawyers. In practice, it was the parties' lawyers who were responsible for ensuring that procedural requirements were complied with. If parties were permitted to distance themselves from errors by their lawyers, that would significantly compromise the Tribunal's ability to insist on compliance. The mere fact that it was inevitably the client who would bear the consequences of an error by its solicitor would not, generally speaking, be an exceptional circumstance justifying an extension of time under rule 25(3).

[43] The Tribunal's reasoning is clear and cogent. In contrast to the cases relied upon by Aramark, this case concerns a corporate entity whose interests are essentially economic and commercial. The Tribunal was not convinced that a professional negligence action against

Aramark's solicitors would be an inadequate remedy for the loss of the opportunity to challenge the merger decision. Its conclusion that in all the circumstances it would not be unjust to fix Aramark with the consequences of its solicitor's error, nor incompatible with Aramark's Article 6 rights to apply the statutory provision in accordance with its terms and to hold that the circumstances of this case were not exceptional, is in accordance with the principles enunciated by the Supreme Court in *Pomiechowski* and applied, in different circumstances, in *Thillaiinayagam*. The Tribunal did not err in law in reaching that conclusion. We would add that it would be a somewhat curious situation if a party litigant who personally made an error in good faith as to a filing deadline could not obtain an extension of time whereas a client whose solicitor made such an error would invariably be entitled to an extension of time merely because he had relied upon the solicitor to meet the deadline.

Did the Tribunal otherwise err in law?

[44] Looking at the matter more broadly, the Tribunal noted that the statutory time limit promoted legal certainty and finality and that there was a public interest in any challenge to a decision of the CMA being brought promptly. The importance of meeting the time limit had repeatedly been emphasised in previous cases. At paragraph 73 the Tribunal cited several statements to this effect, including the following observation by the President, Sir Christopher Bellamy QC, in *Hasbro UK Ltd v Director General of Fair Trading* [2003] CAT 1 at page 5:

"In my judgment, the general intention behind the Tribunal's rules is that the initial time limit for lodging an appeal is intended to be strict. Cases that do not involve *force majeure* in the strict sense will, in my judgment, only rarely give rise to 'exceptional circumstances'.

As far as the Tribunal is concerned, respect for the deadline in commencing proceedings is, in many ways, the keystone of the whole procedure. In my judgment, therefore, derogations can be granted only exceptionally...”

The reference to *force majeure* is a reminder of the genesis of the rule in the procedural rules of (what was then) the Court of First Instance. It would clearly be inconsistent with that approach to characterise lawyer error as “exceptional circumstances” in every case in which the client has done all he reasonably can do to lodge the appeal timeously.

[45] The Tribunal gave careful consideration to the circumstances which, according to Aramark’s argument, justified characterisation as “exceptional”. The fact that the solicitor’s error was made in good faith did not distinguish the case from others where a mistake, which would almost always be a good faith mistake, had been made. The Tribunal’s view, with which we agree, was that there was no room for reasonable doubt as to the effect of rule 112(3) in the present case, namely that the deadline for lodging the appeal was Thursday 12 February, being the same day of the week as the day on which the CMA’s decision was published. Although there was no dispute that the error had been an honest one, it was not contended before us that it had been a reasonable one to make. Nor was there anything exceptional about Aramark’s swift response to discovery of the error: as the Tribunal observed, such a response was intrinsic to the nature of the error and there was nothing exceptional about the fact that immediate steps were taken to seek an extension of time.

[46] The next of the circumstances relied on by Aramark was absence of prejudice to the CMA. The Tribunal accepted that the CMA knew that an appeal was likely to be forthcoming, and that the short extension sought, if granted, would be very unlikely to have a practical impact on the progress of proceedings. That was not, however, to say that no prejudice would be caused by an extension of time. The CMA was entitled to take a time

bar point that would secure finality and certainty for it and for others. The respective prejudice to each of the parties in extending or refusing to extend the time limit was intrinsic to the decision that had to be made and did not materially advance the question of whether the circumstances were exceptional. That question was not to be determined simply by balancing the relative prejudice to the parties.

[47] Aramark founded also upon the consequences for it of being deprived of the right of appeal. Divestment was the most onerous remedy available to the CMA. If the order was unlawful, it interfered with Aramark's rights under ECHR Article 1, Protocol 1. The Tribunal acknowledged the very significant prejudice to Aramark of losing the opportunity to challenge the CMA's decision on the merger but was not convinced that a damages action against its solicitors would be an inadequate remedy. Aramark's interest was essentially commercial or economic, and the courts routinely assessed complex damages claims including claims for the loss of a chance.

[48] We find no error of law in the Tribunal's decision that the foregoing circumstances, whether viewed individually or collectively, did not justify the characterisation of exceptional so as to engage the power in rule 25(3) to grant an extension of time. This was, in essence, an exercise in evaluative judgment by a specialist tribunal where the importance of compliance with deadlines had been repeatedly emphasised. The onus lay upon Aramark to satisfy the Tribunal that the circumstances were exceptional and the Tribunal, for the reasons it gave and which we have narrated above, was entitled to hold that Aramark had failed to do so and that, accordingly, the power in rule 25(3) was not engaged.

Personal responsibility of Aramark

[49] Thus far we have proceeded on the basis that Aramark had, as was submitted on its behalf, done all that it personally could reasonably do to secure the timeous submission of the appeal. A major plank of Aramark's criticism of the Tribunal's decision was that it erred in finding that Aramark itself bore responsibility along with its solicitors for the missed deadline. In fact, the Tribunal's finding in relation to Aramark's responsibility was expressed in a negative manner: at paragraph 92 the Tribunal stated that in the circumstances it could not hold that Aramark itself had no responsibility for the fact that the notice was filed on 13 February rather than on 12 February.

[50] We consider that that was a reasonable position for the Tribunal to adopt in the light of the evidence placed before it. That evidence did not include an affidavit from anyone who had participated in giving advice as to the deadline for filing the notice. The Tribunal was instead presented with an oral submission by senior counsel which partly explained the error but did not detail how the erroneous advice had been arrived at (beyond the unspecific assertion that "minds were applied" to the provisions of the rules), nor how it was conveyed to Aramark, nor how it was received by decision-makers within Aramark. Mr Miah's affidavit referred to an internal administrative plan agreed between Aramark and its legal advisors to file the notice on 12 February. The reasons why that plan was not adhered to were unclear. Mr Miah stated that as late as 2.00pm on 12 February, Aramark was discussing with its legal advisors whether any additional comments from its management team based in the United States might be incorporated into the notice. As the Tribunal observed, Mr Miah's statement does not explain why the internal plan was being departed from, when any comments were received, or whether any consideration was given to possible risks attendant on departing from the agreed plan. In the face of those uncertainties

it was in our view entirely reasonable for the Tribunal to decline to hold that Aramark did all that it personally could to ensure that the notice was filed in time.

[51] Senior counsel submitted that because Aramark had sought, obtained and proceeded on the basis of advice from specialist lawyers as to the deadline for filing the notice, it followed that Aramark had done all that it reasonably could to ensure timeous filing, regardless of the reasons for not adhering to the plan to file on 12 February. We agree with the conclusion of the Tribunal that the evidence presented to it falls short of supporting such a positive finding. Given that the notice was still being worked on during the afternoon of the correct filing date, contrary to the internal plan, the Tribunal was justified in declining to hold that Aramark bore no responsibility for the fact that the notice was not filed by close of business on 12 February. On any view, we consider that Aramark bore some responsibility for the fact that filing was intended to take place at the last minute. Having been advised (incorrectly, as it turned out) as to the deadline for filing, there was nothing, so far as the evidence demonstrates, that obliged Aramark to wait until the very last day or the day before to file the notice. We consider that the reference by Flaux C in *Ideal Shopping Direct Ltd* to “courting disaster” (see paragraph 35 above) applies as much to a sophisticated business client such as Aramark as it does to its external lawyers. In the present case the decision to leave filing until the last possible day did contribute to the failure to meet the deadline, and it is less easy than in the *Pomiechowski* cases to assert that the client personally did all that he could reasonably do to secure the timeous filing of the notice. Again we find no error of law in the manner in which the Tribunal dealt with Aramark’s personal responsibility.

Conclusion

[52] In all of these circumstances we hold that the Tribunal did not err in law in deciding that there were no exceptional circumstances which justified an extension to the statutory time limit, and that it therefore had no power to grant an extension of time under rule 25(3). We answer the three questions posed by Aramark (see paragraph 24 above) in the negative and refuse the appeal. Questions of expenses are reserved.