

SERVICE AND OVERHAUL

Service of process continues to provide fertile ground for litigation. In this article, Andrew Butler looks at some recent case-law which demonstrates the continuing difficulties being experienced with the workings of CPR Part 6.

Using e-mail to serve overseas, extending time for service, and the consequences of mis-stating the grounds for service out of the jurisdiction – all have been the subject of judicial determination in 2011 as the workings of CPR Part 6 (and CPR Part 7.6, dealing with extensions of time to serve) continue to mystify and confuse in equal measure.

In February, the Court of Appeal handed down judgment in **Bayat -v- Cecil** [2011] EWCA Civ 135, an appeal against a decision of Hamblen J who had declined to set aside orders extending the claimants' time for serving a claim form. The reason for the delay was that the claimants' resources had been exhausted by litigation against the same defendants in the US and funding arrangements needed to be made before they could proceed in the UK. The Court of Appeal held that this was not an adequate reason to extend time for service, deciding that the claimants could (and should) have served and then applied for a stay if funding was an issue. The case highlights the extreme difficulty which can be encountered in obtaining an extension of time for service when there are limitation issues, even where application is made during the period of validity of the Claim Form. See on this point also **Aktas -v- Adepta** [2011] 2 WLR 945, a decision of the Court of Appeal given in October 2010 in the context of personal injury claims.

The first of two important cases concerned with overseas service, **Bacon -v- Automatic Inc** [2011] EWHC 1072, was decided by Tugendhat J in June this year. The claimant's objective was to discover the identity of the author of defamatory blogs which were appearing on Wikipedia and elsewhere, and for this purpose he wished to serve Norwich Pharmacal proceedings on respondents in the US and Caribbean who hosted the offending websites. The matter was urgent because of the hosts' policy of retaining information about bloggers only for a limited period of time. The issues thrown up by the case were a) whether it was desirable to make an order for alternative service (in this case, by e-mail) and b) whether CPR Part 6 in fact permitted alternative service overseas at all. The reason for doubt on this latter point is that CPR Part 6.15, which contains the only express power to order alternative service, appears in Section 1 of the rule concerned with service of process within the jurisdiction.

Tugendhat J held that he did have power to order that service be effected overseas by an alternative method. He held that CPR Part 6.15 applied to Part 6 in its entirety, not just to the section in which it appeared. In reaching this conclusion, he followed obiter observations in **Bayat**, and consciously adopted a different route from that taken by other judges, albeit in reaching the same result (see e.g. Andrew Smith J's reliance on CPR Part 6.37 in **Brown -v- Innovatorone plc** [2009] EWHC 1376). Turning to the question of whether the order should be made, he emphasised that the mere desire for speed could not be a ground for permitting service by an alternative method. Where however there is something in the facts of the case which justifies the desire for speed (here, the limited period during which the details sought would be retained), service by an alternative method was justified, and he so ordered.

Finally, mention must be made of the decision in **NML -v- Argentina** [2011] UKSC 31, handed down by the Supreme Court in July. The effect of this was to sweep aside a procedural objection to service out of the jurisdiction. The problem was that a claimant had obtained permission to serve outside the jurisdiction, and indeed had served, on two grounds which were subsequently shown to be

unsustainable. In allowing an appeal from the Court of Appeal and restoring the order of Blair J (who had declined to set aside the order permitting service out), the Supreme Court emphasised that there was no reason why the rules relating to amendment should not apply to claims requiring service out as they should to other claims; and that, so long as there were grounds which did justify service out, there was no point in requiring a claimant who had effected service out on a different and erroneous ground to start all over again.

It seems that, notwithstanding the wholesale replacement of the entirety of CPR Part 6 which occurred in 2008, its capacity to generate satellite litigation remains unaltered. It is understood that a further rewrite of this part of the rules is now under active consideration. It is to be hoped that the Rules Committee can iron out, third time around, some of the many areas of difficulty which continue to exist.

ANDREW BUTLER

TANFIELD CHAMBERS



For further information or to instruct a barrister, please contact **David Wright**, Principal Commercial Clerk or **Kevin Moore**, Senior Clerk on +44 (0) 20 7421 5300 or clerks@tanfieldchambers.co.uk

BUSINESS & COMMERCIAL BARRISTERS

- Geraint Jones QC
- David Berkley QC
- Philip Rainey QC
- David Guy
- Stephen Monkcom
- Paul Staddon
- Richard Nowinski
- David Daly
- Charles Joseph
- Christopher Maynard
- Phillip Alier
- Nick Isaac
- Andrew Butler
- Michelle Marnham
- Tim Polli
- Marc Glover
- Ellodie Gibbons
- Adrian Carr
- Steven Walker
- Carl Fain
- Tom Carpenter-Leitch
- Tim Hammond
- Amanda Gourlay
- Andrew Sheftel
- Louise Mankau
- Paul Stevenson
- Gemma de Cordova
- Cecily Crampin
- Michael Walsh

Tanfield Chambers' dedicated conference facilities are readily accessible by the mobility-impaired. Please contact the clerks to agree fees in advance, whether on a fixed or hourly rate. Feedback on our service is welcomed and should be directed to the Senior Clerk, Kevin Moore. A copy of Chambers Complaints' Procedure is available on our website or on request.

To contact us: T: +44 (0) 20 7421 5300, F: +44 (0) 20 7421 5333, DX: 46 London Chancery Lane, E: clerks@tanfieldchambers.co.uk
Address: Tanfield Chambers, 2-5 Warwick Court, London, WC1R 5DJ



BUSINESS & COMMERCIAL GROUP BULLETIN



We continue to forge ahead. Chambers sponsored the Legal Week Commercial Forum on 21st September at which both Andrew Butler and Philip Aliker were speakers. We are experiencing an upsurge in commercial litigation generally: perhaps businessmen who have been putting matters off since the financial crisis first struck now feel there is nothing to lose by going ahead. Litigation necessarily means that close attention must be paid to the Civil Procedure Rules. Unlike the old RSC, the CPR are in a constant state of change, and legal advisors have to keep up. Andrew Butler has put together some helpful notes about three cases decided so far this year in connection with issues relating to the service of proceedings, both in and outside the jurisdiction (CPR Part 6); and Chris Maynard has written a thoughtful and insightful piece about the continuing problems arising from the operation of CPR Part 36 (making offers to settle a dispute). Even this short article demonstrates the scope for unfortunate and expensive satellite litigation if Part 36 is not fully understood and followed to the letter. You have been warned.

CHARLES JOSEPH

ISSUE NO 6: AUTUMN 2011

QUESTIONS OF LANGUAGE AND CULTURE

Chris Maynard considers developments under Part 36 of the CPR

INTRODUCTION

Effective resolution of commercial disputes requires clear-eyed pragmatism on the part of the parties and their advisers. Pragmatism frequently involves compromise. Where the compromise should be struck is a matter of judgment, taking into account that pursuing a dispute to its ultimate conclusion may, even for the victor, carry an unacceptable cost in time, money and lost opportunities to pursue more profitable goals.

Part 36 of the Civil Procedure Rules 1998 introduced a new, formal machinery for the settlement of disputes, which sits alongside the common law of compromise. It prescribes certain automatic consequences in the incidence of costs in the event of particular outcomes. The first version of Part 36 was not thought to be satisfactory and it was replaced by the present version on 6th April 2007. Whilst one might expect that to have introduced some certainty, it has nevertheless proved to be a fertile source of satellite litigation. In **Marcus v Medway PCT** [2011] EWCA 750 at [29] Jackson LJ observed,

"The morass of case law which has developed concerning the effects of Part 36 offers and the effects of offers outside Part 36 reveals an unwelcome and unnecessary degree of uncertainty. This is an area of law where all parties need to know where they stand and understand the costs consequences of their actions."

CARVER V BAA PLC [2008] EWCA CIV 412 REVERSED BY NEW SUB-RULE

PART 36 HAS A COERCIVE PURPOSE

CONTINUED OVERLEAF



CHARLES JOSEPH

Charles Joseph is a member of the Business and Commercial Group. His wide experience includes partnership disputes, share disputes, directors' disqualification proceedings, unfair prejudice petitions and all forms of contractual and commercial disputes. He is also a member of the Property Group and his practice includes commercial landlord and tenant, real property issues of every description, and construction matters. He has considerable arbitration experience and is a Chartered Arbitrator and a Fellow of the Chartered Institute of Arbitrators. He is presently working on an application concerning the enforcement in London against a foreign government of an overseas arbitral award worth about three hundred million pounds.



Advising clients how to navigate that morass to their best advantage requires considerable care and expertise.

WHAT CONSTITUTES AN ADVANTAGEOUS RESULT

One element of uncertainty has been removed by the very recent amendment of Part 36 by the introduction of CPR 36.14(1A), which makes clear that where a money offer is beaten at trial, by however small a margin, the costs sanctions applicable under Part 36 will apply (but only in respect of offers made after 1st October 2011)¹. This reverses the effect of the decision in **Carver v BAA Plc** [2008] EWCA Civ 412², in which the Court considered the expression "more advantageous" as used in CPR 36.14 permitted a wide-ranging review of all the facts and circumstances of the case in deciding whether the judgment, which was the fruit of all the litigation, was worth the fight and that money was not the sole criterion. The consequent uncertainty about what how that should be applied in practice led to the Court in **Gibbon v Manchester City Council; LG Blower Specialist Bricklayer Ltd v Reeves** [2010] EWCA Civ 726³ saying that in most cases, success in financial terms would be the governing consideration.

Because the new rule applies only in respect of offers made after 1 October 2011, the previous law will remain important for some years to come. Practitioners already need to be alert to whether Part 36 offers were made before or after rule changes brought in effect from 6 April 2007, when the Part was replaced with a re-drawn version⁴. Now there is a new date to conjure with.

A NEW LANGUAGE OF OFFER AND ACCEPTANCE

A common source of confusion is that, although Part 36 uses a seemingly familiar vocabulary of offer and acceptance, in reality it is a procedural code with nothing contractual about it⁵, or at least very little. It must to be read and understood according to its terms without importing rules derived from the general law, save where that was clearly intended⁶. For the unwary, this can lead to some unexpected results which may seem bizarre to a legal adviser and possibly to the lay client.

For example, Part 36 allows a party to have multiple concurrent offers, in different terms⁷, any one of which may be accepted by the opposing party even if that party has, at some earlier stage, explicitly rejected the offer it later chooses to accept⁸.

The procedural effect of acceptance of a Part 36 offer is to

impose an automatic stay under rule 36.11(1). It is *possible* that it may also create a binding contract⁹ but that is only a collateral outcome and contract lawyers need to be aware that it is far from inevitable. That is because the Court retains jurisdiction in an appropriate case to permit withdrawal of a Part 36 offer even after such an offer had been accepted¹⁰.

CHANGING THE CULTURE

It is important to understand the public policy purpose of the machinery under Part 36 of the CPR. It is more than merely to facilitate compromise; it is to "*motivate parties to make, and to accept, appropriate offers of settlement*"¹¹. Parties, particularly defendants, who do not avail themselves of the opportunities it provides, will attract no sympathy when it comes to costs orders¹².

But, because the essence of Part 36 is compromise, the offer must contain some genuine element of concession on the part of the offeror to which a significant value can be attached in the context of the litigation¹³. It must represent at the very least a genuine and realistic attempt by the offeror to resolve the dispute by agreement as opposed to a merely tactical step designed to secure the benefit of the incentives¹⁴.

In other words Part 36 is not a passive rule - it has a coercive purpose. It is designed to affect litigation conduct by inducing parties to compromise rather than to litigate. Litigators need to understand and respond to it in that light. That is not simply a case of learning a new language; it requires us as advisors, and our clients as commercially minded men of business, to use the rules laid out in Part 36 in order best to take advantage of the opportunities presented by the rules and to secure such benefits as can be achieved. This is of the essence of commercial decisions in the business world.

PRE-ACTION OFFERS

An area which has given rise to particular difficulty is where a Part 36 offer is made and accepted before the commencement of proceedings¹⁵. Rule 36.10 gives an automatic entitlement only to the "*costs of the proceedings*". Generally, costs incurred before issue may be recoverable as costs in the proceedings¹⁶, but if a Part 36 offer is accepted without any proceedings having been issued at all, it is arguable there are no costs "*of the proceedings*" and hence no automatic entitlement. That approach has found favour in the Senior Courts Costs Office¹⁷ but the opposite was held recently in **Thompson v Bruce** [2011] EWHC 2228 (QB)¹⁸,



CHRIS MAYNARD

Chris Maynard practises principally in the field of property and commercial litigation. He has over 20 years of experience providing advice and advocacy in civil disputes arising in common law, chancery and administrative law. His clients include

business entities, charities, local authorities and trustees. He recognises the strategic needs of clients and regularly advises upon practice and procedure, including emergency remedies, as well as on the substantive law. He gives clear advice and is a determined advocate with experience of advocacy in courts and tribunals at all levels. He also has experience of representation of clients in mediations and other forms of alternative dispute resolution.



ANDREW BUTLER

Andrew Butler is Head of the Business & Commercial Group and specialises in property-related commercial litigation including insurance and construction disputes, professional negligence and dilapidations claims. He has a particular

interest in the niche area of service having been involved in two leading cases under the old CPR Part 6 (*Marshall v Maggs* reported as *Collier v Williams* [2006] 1 WLR 1945 and *Hart v Fidler* [2007] BLR 30). When time permits he is a keen sportsman, enjoying cricket and golf; and his ability still to get through the occasional 90 minutes on the football pitch defies all conventional medical wisdom.

where the word “proceedings” in rule 36.10 was held to include steps taken prior to the issue of proceedings. Although, arguably, that produces a more just result, the reasoning in **Thompson** is not entirely satisfactory. As the Deputy Judge himself observed in that case, his construction means that “proceedings” in CPR 36.10 has a different meaning to that which it has in CPR 36.3 where clearly it means post-issue proceedings.

Until there is guidance from the Court of Appeal, the offeree in such a case would be well-advised, before acceptance, to seek clarification that if the offer is accepted before commencement of proceedings the costs regime under CPR 36.10 will apply as if a claim form had been issued. The incorporation of the Part 36 consequences will determine where the burden of costs falls. Thereafter, if the amount of costs cannot be agreed, recourse may be had to costs only proceedings under CPR 44.12A, which provides a special procedure for obtaining a detailed assessment of costs in circumstances where parties have reached a written agreement on all other issues without a Claim Form having been issued.

FOOTNOTES

¹Rule 4 of the Civil Procedure (Amendment No. 2) Rules 2011 provides for the following to be inserted after rule 36.14(1), “(1A) For the purposes of paragraph (1), in relation to any money claim or money element of a claim, “more advantageous” means better in money terms by any amount, however small, and “at least as advantageous” shall be construed accordingly.” Although it is not clear on the face of the new rule itself, rule 1(4) of the amending instrument provides that it only applies to Part 36 offers made on or after 1 October 2011.

²[2009] 1 WLR 113 at [31]

³[2010] 1 WLR at [40], [51].

⁴The headline change was that the need for a payment into court was dropped, but it became an essential feature of the Part 36 regime and its consequences that the Part 36 offer was identified as such (rule 36.2(2)), was not time limited, could only be withdrawn formally (rule 36.9(2)), and, if withdrawn, would not carry with it the costs

⁵See *Flynn v Scougall* [2004] EWCA Civ 873; [2004] 1 WLR 3069; per May LJ at [26] quoting Goddard LJ in *Cumper v Potheary* [1941] 2 KB 58 at 67 on payments into court.

⁶*Gibbon v Manchester City Council* (above); per Moore-Bick LJ at [6]

⁷*Gibbon v Manchester City Council* (above); per Moore-Bick LJ at [32]

⁸*Sampla v Rushmoor BC* [2008] EWHC 2616 (TCC)

⁹The editors of *Foskett on Compromise* [2010] suggest that the effect of acceptance is that a contract of compromise is concluded (see fn 49 at p.236). That was also the conclusion of Mr Peter Prescott QC sitting as a deputy High Court Judge in *Orton v Collins* [2007] EWHC 803 (Ch) [2007] 1 WLR 2953 who said “it seems to me that the acceptance of a Part 36 offer may well create a contract and probably does so in the vast majority of cases.” That was *obiter* to his decision as to whether acceptance of a Part 36 offer was unenforceable because it did not comply with the formalities of s.2 of the Law of Property (Miscellaneous Provisions) Act 1989. In the view of this writer that does not take sufficient account of the nature of Part 36 as a self-contained code. Furthermore it is inconsistent with decisions which hold



that the offeror can renege even after acceptance. On the other hand, the facts of a particular case may disclose a mutual intention to create a contract notwithstanding reference to Part 36.

¹⁰See *Flynn v Scougall* (above) and *Erghani SA v Saufion Pharmaceuticals Ltd* (2010)(unrep).

¹¹*Walsh v Singh* [2011] EWCA Civ 80; [2011] Fam Law 344; per Arden LJ at [6].

¹²See e.g. the dissenting judgment of Jackson LJ in *Marcus v Medway PCT* [2011] EWCA 750 at [40]: “... it seems to me quite wrong that defendants, who do not avail themselves of the Part 36 machinery and who press on in the hope of escaping liability altogether, should nevertheless escape the ordinary costs consequences because the claimant has only recovered a small sum in damages.” A week later, in *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790, the same Judge, this time with the agreement of Moore-Bick and Ward LJ in a differently constituted court, emphasised the point again where he said at [63] “If the defendant fails to make a sufficient Part 36 offer at the first opportunity, it cannot expect to secure costs protection.”

¹³*AB v CD* [2011] EWHC 602 (Ch); [2011] All ER (D) 25 (Apr)

¹⁴*Huck v Robson* [2002] EWCA Civ 398; [2003] 1 WLR 1340

¹⁵One of the changes introduced in April 2007 was that a Part 36 offer may be made at any time, including before the commencement of proceedings. Before then a Part 36 offer could only be made after proceedings had started.

¹⁶*In re Gibson's Settlement Trusts* [1981] Ch 179; *Roach v Home Office* [2009] EWHC 312 (QB); [2010] QB 256

¹⁷*Udogaranya v Nwagw* [2010] EWHC 90186 (Costs). See also *Solomon v Cromwell Group Plc* (unrep, Manchester CC, appeal pending).

¹⁸[2011] All ER (D) 213 (Jun).

CHRIS MAYNARD