World service

Andrew Butler explores the circumstances under which alternative service overseas is permitted

Most litigators are familiar with – and will at some point have used – the provisions for alternative service in CPR part 6. These have become less restrictive since the rule was reformed in 2008, specifically empowering the courts to order alternative service with retrospective effect, something the old rules did not permit.

But what is the role of alternative service when attempting to serve overseas? After all, it might be thought that it is in this context that alternative service was most useful; in an era when large documents can be sent across the world instantaneously at the touch of a button, its potential benefits (as opposed to the cumbersome mechanisms of, say, the 1965 Hague Convention) are obvious. But despite this – or, perhaps, because of it – a number of recent cases have emphasised how restrictive the circumstances are in which an overseas defendant can be served by an alternative method.

For some time there was even uncertainty as to whether a party serving overseas could resort to alternative service at all. The reason for this uncertainty was that CPR part 6.15, which permits alternative service, appears in section I of the rule; this deals only with service of claim forms within the jurisdiction (or, in specified circumstances, the EEA). No corresponding provision appears in section IV, which is the set of provisions dealing with service out of the jurisdiction. In some cases – see *Cecil v Bayat* [2011] EWCA Civ 135, below – it was more or less assumed that such a power was available, without any real examination of this difficulty.

Instead it was left to Tugendhat J, in the later case of *Bacon v Automattic Inc* [2011] EWHC 1072, to explain the procedural route by which alternative service overseas is permissible. In *Bacon*, a claimant sought Norwich Pharmacal orders against companies in the US and Caribbean that hosted websites on which material allegedly defamatory to him had been published. There was genuine urgency in the case because (a) the defamatory material was likely to spread, and (b) at least one of the hosts would only retain material identifying its contributors for a limited time.

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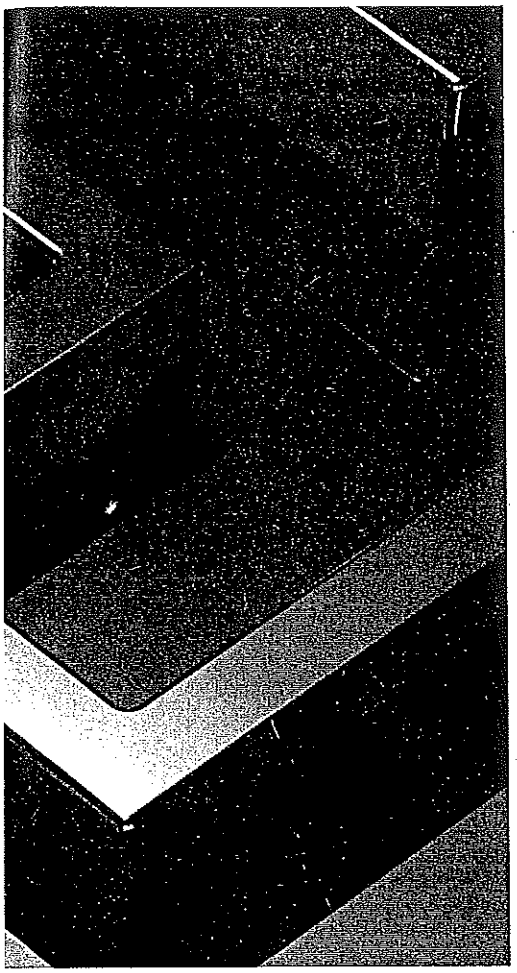
In ordering that service be effected by email, Tugendhat J reviewed three earlier authorities that gave competing procedural justifications for ordering alternative service overseas. In particular, he rejected the view, expressed by previous judges, that CPR part 6.37(5)(b)(i) (which enables a court, when permitting service overseas, to "give directions about the method of service") was wide enough to encompass alternative service. He held, simply, that, notwithstanding its place in the structure of CPR part 6, rule 6.15 applied to overseas service as well. In reaching this conclusion, he relied on the words "in this part" appearing in CPR part 6.15(1). He also relied on the established principle that the headings in the CPR, while an aid to interpretation, are not themselves part of the rules.

Interfering with sovereignty

The procedural route having been established, in what circumstances is alternative service overseas appropriate? *Cecil* laid down a clear marker in this respect. The claimants in *Cecil* were endeavouring to serve American businessmen who travelled extensively between New Jersey, Florida and Kabul. As well as having been permitted numerous extensions of time to serve, they had been given permission to serve by alternative means, namely email. The reason for this was that such service would bring the documents to the defendants' attention more quickly than service under the Hague Convention and/or under the law of Afghanistan.

The Court of Appeal was quick to



emphasise that this was not a justification for allowing alternative service. Citing the judge's observation that service is "a means of bringing proceedings to the attention of the defendants", Stanley Burnton LJ stated that it was "more than that. It is an exercise of the power of the court. In a case involving service out of the jurisdiction, it is an exercise of sovereignty within a foreign state." He went on: "Because service out of the jurisdiction without the consent of the state in which service is to be effected is an interference with the sovereignty of that state, service on a party to the Hague Convention by an alternative method under CPR part 6.15 should be regarded as exceptional, to be permitted in special circumstances only."

Finally, he emphasised (echoing previous authorities such as *Knauf v British Gypsum* [2001] EWCA Civ 1570) that, although the accelerated receipt of a document was a relevant consideration when making an order under CPR part 6.15, it was not on its own a sufficient reason to order such service – even where limitation was at stake. But, as Rix LJ added, "some flexibility should be shown" in dealing with cases where there is no bilateral treaty and service can take very long periods, to the potential prejudice of the underlying litigation.

Alternative service: key facts

- The alternative service provisions in CPR part 6.15 apply to service overseas, as well as service within the jurisdiction.
- Even so, service overseas constitutes an interference with sovereignty, and alternative service will only be permitted in exceptional circumstances.
- The desire for speed, or to circumvent a limitation period, is not enough, but if service by conventional methods may prejudice the litigation that may suffice.
- If the method of service proposed is in fact permissible in the country in question, no order for alternative service is required (CPR part 6.40(3)(c)).

Confusing decisions

Last in this line of decisions, and in keeping with the strictures of *Cecil*, is *Abela v Baadarani* [2011] EWCA Civ 1571. In *Abela*, an English claimant sought to serve proceedings on defendants domiciled in Lebanon. On 14 September 2009, Morgan J made an order permitting service in Lebanon by an alternative method (namely, by personal service of an untranslated copy). Service in that way could not be effected before the claim form expired, although on 22 October 2009 the defendant's Lebanese lawyer, who held a power of attorney, received the documents. It was argued that this constituted valid service under Lebanese law and on 28 January 2011 Sir Edward Evans Lombe ordered that the receipt by Mr Baadarani's lawyer should be treated retrospectively as good service.

The Court of Appeal allowed Mr Baadarani's appeal. The grounds for doing so were largely that the method of service did not in fact constitute good service in Lebanese law, and there was no good reason for ordering alternative service which would have enabled it to be treated as such. Longmore LJ observed, consistently with the observations in *Cecil*, that it would be "unusual (to say the least) for a judge to validate a form of service which was not valid by local law".

This is, however, a confusing decision. The Court of Appeal assumed that Sir Edward Evans Lombe had treated the method of service as valid under local law. But it also assumed that he was making an order for alternative service. It is difficult to reconcile these two assumptions; had the method of service been valid in Lebanon, it would ipso facto have been valid under English law too (CPR part 6.40(3)), and no order for alternative service would have been required. It is respectfully suggested that Sir Edward Evans Lombe must actually be taken to have decided that the method of service used was not valid under Lebanese law, but could be retrospectively validated as an act of alternative service. On any view, the Court of Appeal disagreed with that conclusion, on the basis that there was no good reason for it to be so treated.

In another confusing (and somewhat unfortunate) footnote to *Abela*, the Court of Appeal expressly approved the decision of Tugendhat J in *Bacon*, but then proceeded to misstate its effect, holding that the power emanates from CPR part 6.37, and not (as Tugendhat J decided) from CPR part 6.15. It is understood that the claimant in *Abela* has petitioned the Supreme Court.

Closing off the escape route

Finally, in the context of service on overseas defendants, mention should be made of *SSL International plc v TTK LIG Ltd* [2011] EWCA Civ 1170. In this case, an English company wished to bring proceedings against an Indian company in relation to a dispute about the supply of condoms. There was a high degree of urgency. In an attempt to circumvent the difficulties of serving overseas, the claimant sought to invoke CPR part 6.5(3)(b), which permits a claim form to be served personally on a company "by leaving it with a person holding a senior position within the company". The claimant had a nominee director on the board of the defendant, and sought to effect service simply by leaving the claim form with him.

Mann J held that this was not valid service, and the Court of Appeal dismissed the claimant's appeal. The ratio of the decision is that CPR part 6.5(3)(b) must, like its predecessors under the RSC, be interpreted as applying only to companies carrying on business within the jurisdiction – thus closing off what would, in many cases, have been a neat escape route from the labyrinthine requirements of service overseas.

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