CIVIL PROCEDURE NEWS

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In Brief

Cases

■ **DUNBAR ASSETS PLC v BCP PREMIER LTD** [2015] EWHC 10 (Ch), January 12, 2015, unrep. (John Baldwin Q.C.)

Service of claim form by alternative method–whether good reason to authorise

CPR r.6.15. On December 18, 2013, banking institution (C) issuing claim form seeking damages for breach of contract etc against construction management company (D). Cause of action based on events occurring during 2006 to 2008. Before final date for completion of the service "step" required by r.7.5 (i.e. April 17, 2014), (1) on March 3, for information purposes, C sending D by fax a copy of the sealed claim form, and (2) on April 1, parties entering into an arrangement (embodied in a consent order) under which (a) they agreed a time-table for engaging in the relevant pre-action protocol process and (b) C undertook to serve the claim form by April 3. On that date, C e-mailing a copy of the claim form to D (and also placing copy of it in DX for delivery next day to D). On April 25, having conceded that that service was not good service, C applying for extension of time for serving the claim form under r.7.6(3) and/or relief from sanction, but also relying on r.6.15. Deputy Master (1) finding that there was no explanation as to why C did not serve the actual claim form properly by April 3, 2014, (2) holding that the service by e-mail was good service by an alternative method within r.6.15, and (3) granting D permission to appeal. **Held**, allowing D's appeal, (1) an application for an order under r.6.15 permitting service by an alternative method or at an alternative place will only succeed if (a) it appears to the court that there is "good reason" to authorise such alternative service, and (b) the court decides to exercise its discretion in favour of permitting such alternative service, (2) the court should adopt a rigorous approach to such an application and should examine with some care why it has come about that it is being asked to make an order, (3) in the instant case, C (a) under the terms of the consent order, had agreed to serve the claim form properly in accordance with the rules, (b) had plenty of time in which to do so, and (c) had provided no explanation whatsoever for not doing so, (4) in the circumstances there was no "good reason" to permit as alternative service the "steps already taken" by C to bring the claim form to the attention of D. (***Brown v Innovatrone plc*** [2009] EWHC 1376 (Comm), [2010] C.P. Rep. 2, ***Power v Meloy Whittle Robinson Solicitors*** [2014] EWCA Civ 898, July 2, 2014, CA, unrep., ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2014*** Vol. 1 paras 6.15.3 & 6.15.5.)

■ **F (A CHILD) (RETURN ORDER: POWER TO REVOKE), IN RE** [2014] EWHC 1780 (Fam), [2014] 1 W.L.R. 4375 (Mostyn J.)

Power to vary or revoke order–application to final orders

CPR r.3.1(7), FPR r.4.1(6), Hague Convention on the Civil Aspects of International Child Abduction 1980. On November 29, 2013, judge of Family Division of the High Court granting application made by father (C) for order requiring mother (D) to return their child to Italy. On March 13, 2014, Court of Appeal dismissing D's appeal. D then making application to another judge of the Family Division on grounds of supervening change of circumstances (principally a serious deterioration of her mental health) for order revoking the order of November 29, 2013. In resisting this application C submitting that there is no jurisdiction in the High Court to vary or set aside a substantive order made by another High Court judge. **Held**, rejecting that submission, granting the application and setting aside the order, (1) FPR r.4.1(6), which is in identical terms to CPR r.3.1(7), provides that a judge may vary or revoke an order made by a judge of equivalent jurisdiction, (2) that power is not confined to procedural or case management orders, (3) it may be exercised in civil proceedings or in family proceedings, and even where an appeal against the order challenged has been dismissed, provided non-disclosure or a significant change of circumstances is demonstrated, (4) in family proceedings it may be exercised to vary or revoke final orders, whether made in children proceedings or in financial remedy proceedings. ***Roult v North West Strategic Health Authority*** [2009] EWCA Civ 444, [2010] 1 W.L.R. 487, CA, ***Tibbles v SIG Plc*** [2012] EWCA Civ 518, [2012] 1 W.L.R. 2591, CA, ***Musa v Karim*** [2012] EWCA Civ 1332, [2013] Fam. Law 16, CA, ***In re L (Children) (Preliminary Finding: Power to Reverse)*** [2013] UKSC 8, [2013] 1 W.L.R. 634, SC, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras 3.1.9, 3.1.9.2 & 40.9.3.)

■ **JUSTICE FOR FAMILIES LTD v SECRETARY OF STATE FOR JUSTICE** [2014] EWCA Civ 1477, November 14, 2014, CA, unrep. (Sir James Munby P., Sharp & Vos L.J.J.)

Company as third party applicant for issue of writ of habeas corpus–standing and representation

CPR r.39.6 & r.81.28, Sch.1 RSC Ord. 52, r.1, Practice Direction 39A para.5.2, F.P.R. r.29.12. On November 1, 2013, company (C) formed for the purpose (amongst others) of monitoring family justice procedures and

promoting reforms thereof, applying to High Court judge for writ of habeas corpus. C represented by a director (H). C apparently motivated by press reports of the committal to prison of woman for contempt of court by breach of court order. In witness statement, H asserting that it had not been possible to identify the name of the contemnor or the circumstances of her committal, but revealing at hearing that, on October 11, 2013, she had been committed to prison for 28 days by a Family Division judge, that the committal hearing had been held in open court and that the woman was legally aided and represented at the hearing. Judge dismissing application and C appealing to Court of Appeal. On the appeal (made as of right), C identifying the contemnor and the proceedings in which she had been committed (see [2013] EWHC 3493 (Fam)), describing her as a "secret prisoner" who had been released (on October 21), and submitting that, because the committal proceedings had been unlawful in certain respects, permission to issue the writ should have been granted. **Held**, dismissing the appeal, (1) although the court must be flexible, the circumstances in which an application by a third party for the issue if a writ of habeas corpus may be entertained are confined to those where either the prisoner is incommunicado or the impediment restraining the prisoner from acting is ignorance or disability, neither of which applied in the instant case, (2) habeas corpus does not lie to challenge a sentence of imprisonment of a court of competent jurisdiction as the proper remedy is appeal, (3) since the only issue on an application for habeas corpus is to determine the legality of detention, the writ will not lie where (as here) the detention has already been brought to an end. Court explaining that habeas corpus applications are usually required to be made by counsel or advocates with higher court rights, and that as there had not been compliance with r.39.6 and para.5.2, H was not entitled to represent C. Court also stressing importance (revealed by the instant proceedings) of compliance by courts with directions in *Practice Direction (Committal Proceedings: Open Court)* [2103] 1 W.L.R. 1316, and related sources concerning the publication of committal orders and judgments. ***Ex p. Child*** 139 E.R. 413, ref'd to. (See ***Civil Procedure 2014*** Vol.1 paras 39.6.1, 81.1.2, sc54.1.2 & sc54.1.9)

■ **ONTULMUS v COLLETT** [2014] EWHC 4117 (QB), December 5, 2014, unrep. (Warby J.)

Acceptance of defendant's offer to settle–claimant's liability for indemnity costs–set off

CPR rr.36.10, 36.11, 44.2, 44.3 & 44.12, Senior Courts Act 1981 s.51. Three claimants (a businessman (C1) and two companies (C2 & C3)), with benefit of CFAs and ATE insurance, bringing libel action against three defendants (two individuals and a company). Each claimant advancing a substantial claim for special damage (amounting to £110m approx in total). On November 13, 2013, one of the individual defendants (D) making Part 36 offers of £75,000 and £25,000 to, respectively, C1 & C3, and a non-Part 36 offer of £500 to C2. Offers not accepted within the relevant period. In February 2014, on order of court, C2 and C3 providing security for D's costs by guarantee from an insurer. In pleading justification D making allegations against C1 and C3 of fraud and improper manipulation and in amended defence alleging that the special damage claims were false and fraudulent. On October 9, 2014, claimants accepting D's offers and discontinuing claims against the other defendants. At CMC held (as previously fixed) on October 15, 2014, at which (of the parties) only D appeared and was represented (the claimants' solicitors having ceased to act on October 13), D making applications for final orders in respect of damages and costs. **Held**, entering judgment for the claimants for the sums accepted, staying the claimants' proceedings, and granting D a temporary stay of enforcement of the judgment, (1) D should pay C1 and C3's costs on the standard basis up to December 3, 2013, (2) as £500 did not represent substantial damages for the libel complained of by C2, but amounted to no more than nominal damages, and was success of such a very limited kind, the right order was that on their claim there should be no order for costs up to December 3, 2013, (3) the claimants were liable for D's costs from December 4, 2013, to October 9, 2014, (4) during that period the claimants pursued their claims for special damage, but their acceptance of D's offers was a complete abandonment of those claims and, in effect, they accepted less than 1% of their combined claims, (5) their conduct in that respect was highly unreasonable and justified awarding D his costs on the indemnity basis, (6) it was just to direct that the claimants should be jointly and severally liable for those costs, other than any incurred as a result of a separate claim by any one of them, which should be the sole and several responsibility of that claimant, (7) the court has power, to be exercised in accordance with equitable principles, to order that a party may set off, against a damages award against him, a costs order in his favour, and, when making an order as to costs, the court has a discretionary power to order that an order for costs against one party should be set off against a costs order against another, but in the circumstances of the instant case it would be premature to make an order of either variety. ***Bairstow v Queens Moat Houses Plc*** [2001] C.P. Rep. 59, CA, ***Brawley v Marczynski*** [2002] EWCA Civ 756, [2003] 1 W.L.R. 813, CA, ***R. (Burkett) v London Borough of Hammersmith & Fulham*** [2004] EWCA Civ 1342, [2005] 1 Costs L.R. 104, CA, ***Esure Services v Quarcoo*** [2009] EWCA Civ 595, April 28, 2009, CA, unrep., ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2014*** Vol.1 paras 44.4.1, 44.12.1, 44x.3.5, 44x.4.3 & 44x.3.17.)

■ **R. (BOTLEY PARISH ACTION GROUP) v EASTLEIGH BOROUGH COUNCIL** [2014] EWHC 4388 (Admin), November 28, 2014, unrep. (Collins J.)

Aarhus Convention claim–limit on costs recoverable from several unsuccessful claimants

CPR r.45.43, Practice Direction 45 para.5.1. Borough council authority (D), acting on report of one of its committees, granting planning permission for substantial suburban development adjacent to a parish. Local action group (an unincorporated association "represented" by several named individuals) (C1) commencing judicial review claim challenging the decision on ground that it hade been made by a flawed process. After refusal of permission to continue at first instance and on appeal, claim renewed on amended grounds (in particular, whether proper regard had been given to an alternative site). C1 then granted permission to continue and protective costs order made in favour of C1 in sum of £5,000. Parish Council (C2) joined as co-claimants. Judge dismissing claim and ordering claimants to pay D's costs. D's schedule of costs exceeding £15,000 not challenged by claimants. D submitting that C1 ought to be ordered to pay costs in the amount of £5,000, and C2 in the amount of £10,000, making total costs order of £15,000. **Held**, acceding to D's submission, (1) where a claimant is ordered to pay costs in an Aarhus Convention claim, the amount ordered (a) must not exceed £5,000 where the claimant claimed only as an individual (para.5.1(a)), and (b) otherwise must not exceed £10,000, e.g. where the claimant claimed as or on behalf of a business or other legal person (para.5.1(b)), (2) in the instant case, C1 fell into the first category of claimant and C2 into the second, (3) it was appropriate to consider the costs liability of C1 and C2 separately and to award costs against each up to the maximum of the respective costs caps. Observations on question whether, where there are several individual claimants, a costs cap under para.5.1(a) may be imposed on each of them separately rather than (as in this case) collectively. (See ***Civil Procedure 2014*** Vol. 1 para.45.41.1.)

■ **R. (BUGYO) v SLOVAKIA** [2014] EWHC 4230 (Admin), November 21, 2014, unrep. (Blake J.)

Extradition proceedings–time limit for service of appeal notice on respondent

CPR rr.3.1(2)(a) & 52.4, Practice Direction 52D para.21.1, CrimPR 2014 rr.17.17(6) & 17.19, Extradition Act 2003 s.26, Human Rights Act 1998 Sch.1 Pt. I arts 6 & 14. On September 18, 2014, magistrates' court judge ordering extradition of an individual (D) (a non-British EU national) to Slovakia on a conviction warrant. On September 23, D issuing notice of appeal to the Administrative Court, but notice not served, either by D or by his then legal representatives, upon the requesting state within seven days as required by s.26(4) and para.21.1. **Held**, dismissing appeal, (1) D's failure to serve the notice within the requisite period deprived the court of jurisdiction, (2) where a statutory provision imposes a service time limit, that provision predominates over any flexibility which may exist in a court's procedural rules to extend time limits. Court explaining (a) that where a British national resists extradition to another country strict service time limits may be read down to include exceptional circumstances for non-compliance in order to accommodate submissions to the effect that extradition would interfere with the individual's right to reside in his own country under art.6, and (b) that differential treatment between British nationals and EU nationals in this respect does not constitute discrimination prohibited by art.14. ***Agardi v Hungary*** [2014] EWHC 3433 (Admin), ref'd to. [Ed.: With effect from October 6, 2014, and subject to transitional provisions, rules of court for appeals to the High Court in extradition proceedings are found in Section 3 of Pt. 17 in the Criminal Procedure Rules 2014 (SI 2014/1610).] (See ***Civil Procedure 2014*** Vol. 1 paras 3.1.2, 52.1.1.1 & 52.4.1.1.)

■ **RICHARDSON v GLENCORE ENERGY UK LTD** [2014] EWHC 3990 (Comm), November 7, 2014, unrep. (Walker J.)

Case management conference–request for "on paper" hearing

CPR rr.29.3 & 58.13, Practice Direction 29 para.5, Practice Direction 58 para.10, Admiralty and Commercial Courts Guide Section D8.3(e). In claim proceeding in Commercial Court, first case management conference scheduled for Friday, November 7, 2014. On afternoon of previous day, parties e-mailing to court letter (1) informing court that the parties had reached agreement on the list of issues, on the case memorandum, and on a draft order as to the pre-trial timetable (all of which were enclosed), and (2) requesting the court to confirm whether, in the circumstances, their attendance at the CMC will be required. At oral hearing of CMC, **held**, (1) the general rule is that there must be an oral hearing for a CMC, (2) a request for an on paper CMC should only be made where the legal representatives for the parties are satisfied (a) that the issues are straightforward and (b) that the costs of an oral hearing cannot be justified, (3) in making such a request the parties must comply with the provisions in para. D8.3 as to notice and the filing of documents, (4) where there is non-compliance in this respect parties run the risk of costs sanctions, (5) ordinarily, where there is a failure to file requisite documents for a CMC on time there will be an oral hearing. Provisions for attendance of parties at CMCs and justifications for them explained. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2014*** Vol. 1 paras 29.3.1 & 29PD.5, and Vol. 2 paras 2A-18.1, 2A-31 & 2A-68.)

In Detail

ON PAPER HEARINGS FOR CASE MANAGEMENT CONFERENCES

The rules in CPR Part 29 (The Multi-Track) set out the procedure to be followed from the allocation of a claim to the multi-track to the trial of the claim. The terms of those rules and of the directions which supplement them follow quite closely the innovative case management recommendations made by Lord Woolf in Ch.5 of the Access to Justice–Final Report (July 1996). A key event in the procedure is the case management conference (CMC). Lord Woolf envisaged that it would be a meaningful event, attended by representatives of parties equipped with sufficient authority to deal with any issues likely to arise, an occasion on which the court would be able to determine, not only issues on which the parties required directions, but matters raised by the court of its own initiative, and an occasion on which, perhaps, orders may be made disposing of particular matters. The full flavour of what Lord Woolf had in mind (indeed, prescribed) as the aims and objectives of the CMC is illustrated by the directions stated in para.5 of Practice Direction 29 (directions which have hardly changed since first made in 1999). All this was designed for the purpose of ensuring that the CMC did not go the way of the old hearing of the summons for directions (which, though introduced with the best of intentions, degenerated into a mere perfunctory box-ticking exercise, contributing nothing to the more efficient and effective handling of cases pre-trial).

All proceedings in the commercial list are treated as allocated to the multi-track, but Part 29 does not apply to such proceedings. Rule 58.13(3) states that, as soon as practicable, the Commercial Court will hold a CMC at which "the court may give such directions for the management of the case as it considers appropriate" (r.58.13(4)). Paragraph 10 of Practice Direction 58 contains directions as to case management and applies to commercial list proceedings selectively some only of the directions set out in para.5 of Practice Direction 29. However, elaborate guidance concerning CMCs in commercial list claims is set out in Section D8 of The Admiralty and Commercial Courts Guide (White Book Vol. 2 para.2A-68 et seq). In this guidance, the terms of relevant rules and directions are recapitulated, but there is much else besides of which practitioners should be aware and take note (see further below).

In some other courts, apart from the Commercial Court, the provisions in Part 29 and in Practice Direction 29 relating to CMCs are varied by bespoke rules and directions applicable to proceedings in those courts. For example, in relation to intellectual property claims to which Part 63 applies, r.63.8 and para.5 of Practice Direction 63 play a role similar to that played by r.58.13 and para.10 of PD 58 in commercial list claims. Further, the guidance given in the court guides for those other courts differs quite significantly, not only in the level of detail, but also in substance. (See Chancery Guide paras 3.5 to 3.11 (White Book Vol 2 para.1A-12); Queen's Bench Guide para.7.2 (ibid para.1B-42); Technology and Construction Court Guide Section 5 (ibid para.2C-65); Patents Court Guide Section 7 (ibid para.2F-133); Mercantile Court Guide Section 6 (para.2B-23).)

The importance of practitioners being well-informed about the rules and directions applicable to CMC procedure in whichever court they have business, and of the guidance given in any relevant court guide, is well-illustrated by the recent case of *Richardson v Glencore Energy UK Ltd*, [2014] EWHC 3990 (Comm), November 7, 2014, unrep. (Walker J.) (for summary, see "In Brief" section of this issue of CP News). This was a sizeable action proceeding in the Commercial Court. The claimant sought to enforce employment rights. Necessarily, several defendants were joined (including trustees). Much was in dispute. On the afternoon of the day before the day fixed for the first CMC, a letter, said to have been written on behalf of all of the parties in the action, was e-mailed to the court listing officer. It informed the court that agreement had been reached by the parties on the list of issues, on the case memorandum, and on a draft order as to the pre-trial timetable, all of which were enclosed. It concluded by inquiring whether, in light of the agreement reached between the parties as to directions for disposal of the case, the court "could please confirm whether our attendance tomorrow will be required". Having seen the request, the judge put aside other urgent work, reviewed the case management bundle and the material which had been e-mailed to the court, and arranged for the parties' legal advisers to be informed that their attendance would be required.

In giving judgment subsequently, Walker J. stated that the letter to the court demonstrated "a failure on the part of all concerned to appreciate the role and importance of the case management conference" and also demonstrated a failure to comply with the special provisions made for case management in the Commercial Court by r.58.13, Practice Direction 58, and by The Admiralty and Commercial Courts Guide ("the Guide"). His lordship expressed his concern about the increase in the incidence of cases where legal advisers have not given proper consideration to the relevant rules, directions and guidance. In particular his lordship referred to cases where legal advisers, at a late stage, "have reached a hurried agreement" as to the orders to be made at a CMC and have followed that with an out of time request to the court to vacate the scheduled hearing (para.09). His lordship explained, at some considerable length, why such an approach is misguided and why it may result in procedural sanctions being imposed.

Walker J. noted (paras 05 & 06) that the Guide recognises that there are cases which are out of the ordinary where it may be possible to dispense with an oral hearing, if the issues are straightforward and the costs of an oral hearing cannot be justified. But such cases will be rare and exceptional. In such cases it may be appropriate to make a request that the case management conference be dealt with on paper. Such a request should only be made where the legal teams for the parties have carefully considered the matters set out in the Guide and are satisfied that the case is one which falls within that rare and exceptional category. The legal teams must be satisfied (1) that the issues are straightforward and (2) that the costs of an oral hearing cannot be justified. Both of these conditions must be met.

Further, in a case where it is appropriate for the parties to ask the court to consider holding the CMC on paper, the parties should comply with the guidance given in para.D8.1(d) and (e) of the Guide. Amongst other things, that guidance stipulates that, if the parties wish to ask the court to consider holding the CMC on paper, they must lodge all the appropriate documents "by no later than 12 noon on the Tuesday of the week in which the CMC is fixed for the Friday". In the instant case, manifestly that had not been done (a point which, at the hearing, the parties conceded and which meant that their request for an on paper hearing should not have been made). Walker J. emphasised (para.13) that if parties in commercial list cases make a late request for a paper CMC then they must recognise the degree to which they are imposing on the court. In particular they must recognise that, unless there is good reason for a late request, they run the risk of sanctions for failure to comply with the requirements in the Guide; for example, an order to the effect that each side should bear their own costs of the CMC. (It may be noted, in passing, that of the other court guides, only one contains a specific reference to requests to the court for on an paper CMC and the vacating of the hearing date; that is para.6.24 of the Mercantile Court Guide (see White Book Vol 2 para.2B-23).)

In concluding his judgment, Walker J. stated (para.22) that the moral for any party contemplating making a request for an on paper CMC is that if the parties have not been able to agree upon and prepare the requisite documents within time, then the case is likely to be one in which an oral case management conference will be of particular benefit. His lordship added (in terms with which Lord Woolf would surely agree):

"An oral case management conference is not something to be feared, nor is it something so unimportant as to be no more than a nuisance. It is a valuable opportunity in which the parties have the benefit of a judge giving the case a constructive look, working through the practicalities of what the parties have in mind, and seeking to ensure that the case is on track to proceed in a way which will be efficient, which will be fair to both sides, and will accord with the interests of justice. Save in the most exceptional circumstances, the appropriate course for anyone who is thinking that costs might be saved by an out of time request for a paper case management conference is to think again. The best working assumption is that the benefits of an oral case management conference will more than justify the costs involved."

COSTS IN THE CASE

In para.4.1 of Practice Direction 44 (General Rules About Costs) it is noted that the court may make an order for costs "at any stage in the case". In para.4.2 it is noted that there are certain costs orders which the court will commonly make in proceedings before trial and the table following that provision lists such orders and for each states its "general effect" (see White Book 2014 Vol. 1 para.44PD.4). Included in the list is the order termed "costs in the case" or "costs in the application". The general effect of this order is described as follows:

"The party in whose favour the court makes an order for costs at the end of the proceedings is entitled to that party's costs of the part of the proceedings to which the order relates"

That description proceeds on the assumption that, at the end of the proceedings, there will be one party "in whose favour the court makes an order for costs". It does not, in terms, countenance the not unusual circumstance where, at the end of the proceedings, the court will make a costs order in favour of the claimant and another costs order in favour of the defendant. In this circumstance the "general effect" provides no guidance.

In *Ontulmus v Collett* [2014] EWHC 4117 (QB), December 5, 2014, unrep. (Warby J.), the claimants in a libel action on October 9, 2014, accepted the defendant's Part 36 offer made on November 13, 2013. In exercise of his powers under r.44.2 the judge ordered that the defendant should pay the claimants' costs on the standard basis up to December 3, 2013, and that the claimants should pay the defendant's costs thereafter on the indemnity basis. (For summary of this case, see the "In Brief" section of this issue of CP News.)

Early on in the proceedings the defendant had made an application to strike out the claim on the ground that the court lacked jurisdiction to try it. The defendant's submission in that respect was met by the claimants' amendment of their claim to add additional defendants, with the result that, on April 30, 2013, upon the application being withdrawn, the court ordered that the costs of the application should be "costs in the case".

After the settlement of the proceedings, the defendant submitted to the judge that, in reality, he was the successful party and that, as such, was entitled to the costs of the strike out application. Warby J. rejected this submission. His lordship noted that in many cases the answer to the question who has won and who has lost is not straight-forward. There had to be a better starting point for determining where "costs in the case" should be allocated where several costs orders are made. In his lordship's opinion, in these circumstances the court should have regard "to when in the proceedings the relevant costs were incurred and which party has obtained an order for costs in relation to that phase of the proceedings". His lordship explained (para.91):

"As a starting point I would suggest that acceptance of a Part 36 offer, which will ordinarily lead to an order for the costs up to the relevant date, should also carry with it any costs incurred within that period which are the subject of an order for costs in the case. Equally, if an offer is accepted 'out of time' and an order is made, in the ordinary way, for the offeree to pay costs since the expiry of the relevant period that order should carry with it any costs incurred in that period which are the subject of an order for costs in the case."

SERVICE OF CLAIM FORM BY AN ALTERNATIVE METHOD

CPR r.6.15(1) states that, where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service "by an alternative method or at an alternative place". Paragraph (2) of the rule states that, on an application under this rule, the court may order that "steps already taken" to bring a claim form to the attention of the defendant by an alternative method or at an alternative place is good service.

As is explained in the White Book commentary on this provision (White Book 2014 Vol. 1 para.6.15.1), rules of court permitting substituted service were first introduced when virtually the only prescribed method for service of originating process on an individual was personal service and were designed to assist claimants where defendants were deliberately evading service. The introduction of methods of service other than personal service (especially service by post) reduced the need for reliance on these rules. The expression "service by an alternative method" in this rule reflects the use in r.6.3 (Methods of service) of the expression "methods of service" to describe the various ways in which service of originating service may be effected validly. The rule provides for service, not only "by an alternative method", but also "at an alternative place". This reflects the fact that some particular methods of service permit of a choice of places at which service may be effected.

In the recent case of *Dunbar Assets Plc v BCP Premier Ltd*, [2014] EWHC 10 (Ch), January 12, 2015, unrep., the claimant issued a claim form in the Chancery Division but failed to effect valid service on the defendant within the relevant time limits. The claimant sought to rely on r.6.15 to retrieve its position. A Deputy Master held that the defective method of service (being "steps already taken" to bring the claim form to the attention of the defendant) was an alternative method of service that should in the circumstances be permitted, but granted the defendant permission to appeal. A Deputy Judge allowed the defendant's appeal, principally on the ground that there was no "good reason" for permitting the alternative service. (For summary of this case, see the "In Brief" section of this issue of CP News.)

The case serves as a reminder of the point that the purpose of the rules relating to service of originating process is not merely to ensure that the defendant has notice of the fact that such process has been issued and to inform him of the nature of the claim. As the Deputy Judge noted, in *Hoddinott v Persimmon Homes (Wessex) Ltd*, [2007] EWCA Civ 1203, [2008] 1 W.L.R. 806, CA, the Court of Appeal explained that other purposes include that of enabling the defendant to participate in the formal litigation process, and of enabling the court to control that process. In the Deputy Judge's opinion, another purpose of proper service is the certainty that it gives to the parties with respect to any CPR provisions with which they have to comply or, for example, any limitation defences which might be available to them (para.30).

CPR Update

OFFERS TO SETTLE

By the Civil Procedure (Amendment No.8) Rules 2014 (SI 2014/3299), with effect from April 6, 2015, the existing text of CPR Part 36 (Offers to Settle) is substituted by new text. The new text, together with commentary, will be included in the 2015 edition of the White Book (to be published in March 2015).

Re-enactment of Part 36–background

Part 36 is divided into two Sections. That division was made by the Civil Procedure (Amendment) Rules 2010 (SI 2010/621) which inserted in Part 36 rules dedicated to offers to settle made by parties under the RTA Pre-Action Protocol. The rules enacted by that statutory instrument were included in Section II and, thereafter, the existing rules dealing with offers to settle in civil proceedings generally stood in Section I. Amendments made by the Civil Procedure (Amendment No.6) Rules 2013 (SI 2013/1695) extended the operation of Section II to the EL/PL Pre-Action Protocol. By the Civil Procedure (Amendment) Rules 2013 (SI 2013/262), with effect from April 1, 2013, some amendments to Part 36 were among the series of amendments to the CPR made to implement the Jackson reforms.

The rules particularly affected by the reforms now effected by the Civil Procedure (Amendment No.8) Rules 2014 (SI 2014/3299) are those in Section I concerning (1) the withdrawing or changing the terms of a Part 36 offer, (2) the acceptance of an offer (especially where there is a split trial), and (3) the placing of restrictions on the disclosure of offers. (These are outlined under separate headings below.) Amendments made to other rules largely clarify existing provisions, sometimes by bringing rules into line with relevant case law. Although these amendments touch upon only a few of the rules in Part 36, albeit key provisions in Section I, they involve an increase of the number of rules in that Section from 17 to 22. In the circumstances the Rule Committee has thought it wise to re-number the rules throughout both Section I and Section II and to re-enact Part 36 in its entirety. By CPR Update 78, a new version of Practice Direction 36A is made. (This is the second time, since the original enactment of the CPR, that Part 36 has been subject to complete re-enactment, the other being that effected by the Civil Procedure (Amendment No.3) Rules 2006 (SI 2006/3435), which followed an earlier detailed review by the Rule Committee.)

Transitional provisions

The implementation of the new Part 36 is subject to the transitional provisions set out in r.18 of SI 2014/3299. In particular that rule states (1) that the rules in Part 36 apply only in relation to Part 36 offers made on or after the April 6, 2015 (the commencement date), and (2) that r.36.3 (Definitions), r.36.11 (Acceptance of a Part 36 offer), r.36.12 (Acceptance of a Part 36 offer in a split trial case) and r.36.16 (Restriction on disclosure of a Part 36 offer), apply also in relation to any Part 36 offer where (a) the offer is made before the commencement date, but (b) a trial of any part of the claim or of any issue arising in it starts on or after the commencement date. Amendments made by SI 2014/3299 to rules in other Parts of the CPR, consequential upon the re-enactment of Part 36, came into effect on the commencement date.

WITHDRAWAL OR CHANGING TERMS OF PART 36 OFFER

When first brought into effect in 1999, Part 36 contained no provision about the withdrawal or variation of a Part 36 offer, but provisions within the Part bore the clear inference that such an offer could be withdrawn. As to Part 36 payments (formerly known as payments into court) it was provided, simply, that such a payment could be withdrawn, but only with the permission of the court (following the terms of former RSC Ord. 22, r.1(3), a provision which had attracted a certain amount of case law). As part of the substantial revisions of Part 36 introduced by the Civil Procedure (Amendment No.3) Rules 2006 (SI 2006/3435) which came into effect on April 6, 2007, payment into court as a means of costs protection was abolished and for the first time express provisions dealing with the withdrawal of, or changing the terms of, a Part 36 offer, were enacted (as paras (5) to (7) of r.36.3). Those provisions stated that a Part 36 offer could be withdrawn, or its terms changed to be less advantageous to the offeree, without the permission of the court if this were done (by service of written notice on the offeree by the offeror) after the expiry of "the relevant period", but only with the permission of the court (to be sought by application) if before the expiry of that period.

Withdrawal etc before and after expiry of relevant period

By the Civil Procedure (Amendment No.8) Rules 2014 (SI 2014/3299), with effect from April 6, 2015, much more detailed rules as to the withdrawal and changing the terms of a Part 36 offer are introduced. Rule 36.9 deals with

the withdrawal and changing of terms generally, and r.36.10 with the withdrawal and changing of terms before the expiry of the relevant period (for texts of these rules, see below). These new rules seek to clarify areas of uncertainty that had emerged. They are not mutually exclusive; they have to be read together as the latter builds on the former. (Rule 36.10 is supplemented by para.2 of Practice Direction 36A.)

The scheme set out in r.36.9 and 36.10 proceeds on the basis that offers may be withdrawn or varied but only on written notice to the offeree or with the court's permission (granted on application of which the offeree had notice).

After the expiry of the relevant period an offeror may withdraw or change the terms of an unaccepted Part 36 offer by giving written notice (which takes effect when it is served on the offeree) (r.36.9(2) & (4)). Where in such written notice the offeror changes the terms of the offer to make it more advantageous to the offeree, such improved offer shall be treated, not as the withdrawal of the original offer, but as the making of a new offer on the improved terms specifying a new "relevant period" (r.36.9(5)(a)). Where in such written notice the offeror changes the terms of the offer to make it less advantageous to the offeree there is no new "relevant period".

It should be noted that, under r.36.10, an offeror may withdraw or vary an offer simply by giving the written notice (referred to in r.36.9(2)) if the offeree has not served notice of acceptance of the original offer by the expiry of the relevant period (r.36.10(2)(a)). If the offeree has served such notice then para.(2)(b) of r.36.10 comes into play. The offeror has a choice, either to let the acceptance have effect or to apply to the court for permission to or vary or withdraw the offer within the timetable stated.

Paragraph 2.2(1) of Practice Direction 36A (see para.36APD.2 below) states that, unless the parties otherwise agree, an application by the offeror for the court's permission under r.36.10(2)(b) must be sought by making an application under Part 23 and, for the purpose of ensuring that the offer is not improperly disclosed, must be dealt with by a judge other than the trial judge (as defined in r.36.3(f)). Permission may be sought at a trial or other hearing provided the judge is not the trial judge (ibid para.2.2(2)).

A significant feature of r.37.10 is that it states (in para.(3)), albeit in general terms, the approach that the court should adopt in determining whether permission to withdraw or vary an offer should be granted as provided by that rule. That provision reflects the guidance given in decided cases (e.g. *Flynn v Scougall* [2004] EWCA Civ 873, [2004] 1 W.L.R. 3069, CA; *Evans v Royal Wolverhampton Hospitals NHS Foundation Trust* [2014] EWHC 3185 (QB), October 8, 2014, unrep. (Leggatt J.)).

Automatic withdrawal of offer–time-limited offers (r.36.9(4)(b))

Generally, where a Part 36 offer is accepted by a claimant within "the relevant period" the claimant will be entitled to the costs of the proceedings up to the date on which notice of acceptance was served on the offeror (r.36.13(1)). In the case of an offer made not less than 21 days before a trial, the relevant period is a period of not less than 21 days (r.36.3(g)(i)), and such a period must be specified in the Part 36 offer (r.36.5(1)(c)). After the period specified (whether of the minimum of 21 days or something more), and provided the offeree has not previously served notice of acceptance, the offeror may withdraw the offer or change its terms to be less advantageous to the offeree without the permission of the court (r.36.9(4)(a)). The offeror withdraws the offer or changes its terms by serving written notice of the withdrawal or change of terms on the offerree (r.36.9(2)). The significance of the specification in a Part 36 offer of the relevant period is that it indicates a period within which the offer cannot be withdrawn or varied without the permission of the court. On its own, such specification does not have the effect of causing the offer to lapse or to be automatically withdrawn once the period has ended. Rule 36.9(4)(b) states that after the expiry of the relevant period, and provided the offeree has not previously served notice of acceptance, "the offer may be automatically withdrawn in accordance with its terms". This provision had no counterpart in the previous rules (whereas all of the other provisions mentioned immediately above did). Its purpose is to make it possible for an offeror to state in the offer that it will automatically lapse after the expiry of the relevant period (or, presumably, some longer period). Previously, a term to that effect exposed the offeror to the argument that the offer was not a Part 36 offer (because, by definition, without express withdrawal made in accordance with the rules, such an offer could not lapse) (see *C. v D.* [2011] EWCA Civ 646, [2012] 1 W.L.R. 1962, CA, *Epsom College v Pierce Contracting Southern Ltd* [2011] EWCA Civ 1449, [2012] 3 Costs L.R. 451, CA, where the validity of offers said to be "open for 21 days" or "open for acceptance for 21 days" was challenged). The advantage of the new provision is that it enables an offeror who wishes to make a time-limited offer to give notice of that in the Part 36 offer rather than to require him to give it separately (and subsequently) by notice under r.36.9(2).

Texts of r.39.9 and r.39.10

Rule 36.9 (Withdrawing or changing the terms of a Part 36 offer generally) states as follows. (There are references within this rule to r.36.17(7), r.36.5(2) and r.36.2(2)(c); as Part 36 presently stands, those provisions are, respectively, r.36.14(6), r.36.2(3) and r.36.2(2)(c).)

"36.9.—(1) A Part 36 offer can only be withdrawn, or its terms changed, if the offeree has not previously served notice of acceptance.

(2) The offeror withdraws the offer or changes its terms by serving written notice of the withdrawal or change of terms on the offeree.

(Rule 36.17(7) deals with the costs consequences following judgment of an offer which is withdrawn.)

(3) Subject to rule 36.10, such notice of withdrawal or change of terms takes effect when it is served on the offeree.

(Rule 36.10 makes provision about when permission is required to withdraw or change the terms of an offer before the expiry of the relevant period.)

(4) Subject to paragraph (1), after expiry of the relevant period—

(a) the offeror may withdraw the offer or change its terms without the permission of the court; or

(b) the offer may be automatically withdrawn in accordance with its terms.

(5) Where the offeror changes the terms of a Part 36 offer to make it more advantageous to the offeree—

(a) such improved offer shall be treated, not as the withdrawal of the original offer; but as the making of a new Part 36 offer on the improved terms; and

(b) subject to rule 36.5(2), the period specified under rule 36.5(1)(c) shall be 21 days or such longer period (if any) identified in the written notice referred to in paragraph (2)."

Rule 36.10 (Withdrawing or changing the terms of a Part 36 offer before the expiry of the relevant period) states as follows:

"36.10.—(1) Subject to rule 36.9(1), this rule applies where the offeror serves notice before expiry of the relevant period of withdrawal of the offer or change of its terms to be less advantageous to the offeree.

(2) Where this rule applies—

(a) if the offeree has not served notice of acceptance of the original offer by the expiry of the relevant period, the offeror's notice has effect on the expiry of that period; and

(b) if the offeree serves notice of acceptance of the original offer before the expiry of the relevant period, that acceptance has effect unless the offeror applies to the court for permission to withdraw the offer or to change its terms—

(i) within 7 days of the offeree's notice of acceptance; or

(ii) if earlier, before the first day of trial.

(3) On an application under paragraph (2)(b), the court may give permission for the original offer to be withdrawn or its terms changed if satisfied that there has been a change of circumstances since the making of the original offer and that it is in the interests of justice to give permission."

ACCEPTANCE OF A PART 36 OFFER–GENERALLY AND IN A SPLIT-TRIAL CASE

In Part 36 as substituted with effect from April 6, 2015, r. 36.11 (Acceptance of Part 36 offer) replaces former r. 36.9, but r. 36.12 (Acceptance of Part 36 offer in a split-trial case) is a new provision.

Effects of r. 36.11 and r. 36.12

In Part 36 as it stood before the amendments taking effect on April 6, 2015, provisions as to the acceptance of Part 36 offers were contained in r.36.9 (see White Book 2014 Vol. 1 para.36.9, p 1200). In the "new" Part 36, r.36.11 is in the same terms subject to modifications to take account of new rules as to the withdrawal of offers elsewhere in Part 36. Further, whereas para.(3)(d) of r.36.11 states that the court's permission is required to accept a Part 36 offer where "a trial is in progress", the former comparable provision said where "the trial has started". (Rule 36.11 is supplemented by the directions in Practice Direction 36A paras 3.1 to 3.3.)

Where there is a split trial, the provisions as to acceptance in r. 36.12 apply. This is a new rule. It applies in any case where there has been a trial but the case has not been "decided". This rule complements r.36.11 and is designed to deal with practical problems that had emerged concerning the acceptance of a Part 36 offers in a split-trial case created largely by the fact that the rules as to acceptance countenanced a straight forward case where all contested issues are disposed of at one trial.

For purposes of clarification, definitions for "trial" and "in progress" and "decided" in the context of r.36.11 and r.36.12 are stated in r.36.3. Thus, a "trial" means any trial in a case, whether it is a trial of all issues or a trial of liability, quantum or some other issue in the case (r.36.3(c)), a trial is "in progress" from the time when it starts until the time when judgment is given or handed down (r.36.3(d)), and a case is "decided" when all issue in the case have been decided, whether at one or more trials (r.36.3(e)).

Texts of r.39.11 and r.39.12

Rule 36.11 (Acceptance of a Part 36 offer) states as follows. (There are references within this rule to r.36.13, r.36.15(4), and r.36.22(3)(b); as Part 36 presently stands, those provisions are, respectively, r.36.10, r.36.12(4) and r.36.15(3)(b).)

"36.11.—(1) A Part 36 offer is accepted by serving written notice of acceptance on the offeror.

(2) Subject to paragraphs (3) and (4) and to rule 36.12, a Part 36 offer may be accepted at any time (whether or not the offeree has subsequently made a different offer), unless it has already been withdrawn.

(Rule 21.10 deals with compromise, etc. by or on behalf of a child or protected party.)

(Rules 36.9 and 36.10 deal with withdrawal of Part 36 offers.)

(3) The court's permission is required to accept a Part 36 offer where—

(a) rule 36.15(4) applies;

(b) rule 36.22(3)(b) applies, the relevant period has expired and further deductible amounts have been paid to the claimant since the date of the offer;

(c) an apportionment is required under rule 41.3A; or

(d) a trial is in progress.

(Rule 36.15 deals with offers by some but not all of multiple defendants.)

(Rule 36.22 defines "deductible amounts".)

(Rule 41.3A requires an apportionment in proceedings under the Fatal Accidents Act

1976 and Law Reform (Miscellaneous Provisions) Act 1934.)

(4) Where the court gives permission under paragraph (3), unless all the parties have agreed costs, the court must make an order dealing with costs, and may order that the costs consequences set out in rule 36.13 apply."

Rule 36.12 (Acceptance of a Part 36 offer in a split-trial case) states as follows:

"36.12.—(1) This rule applies in any case where there has been a trial but the case has not been decided within the meaning of rule 36.3.

(2) Any Part 36 offer which relates only to parts of the claim or issues that have already been decided can no longer be accepted.

(3) Subject to paragraph (2) and unless the parties agree, any other Part 36 offer cannot be accepted earlier than 7 clear days after judgment is given or handed down in such trial."

RESTRICTION ON DISCLOSURE OF A PART 36 OFFER

Rule 36.16, replaces former r.36.13 (see White Book 2014 Vol. 1 para.36.13, p 1206). The new rule is rather more elaborate than the former rule.

Effect of r.36.16

The general rule is that the fact that a Part 36 offer has been made and the terms of such offer must not be communicated to "the trial judge" until the case has been "decided" (r.36.16(2)). A "trial judge" includes the judge (if any) allocated in advance to conduct the trial (r.36.3(g)). A case is "decided" when all issues in the case have been determined, whether at one or more trials (r.36.3(e)). The general rule does not apply in the four circumstances stated in para.(3) of the rule. Three of those circumstances appeared in the former rule (i.e. in sub-paras (a) to (c) of r.36.13(3)). The fourth, stated in sub-para.(d) of r.36.16(3) and amplified in r.36.16(4), is a new provision designed to deal with practical problems that have emerged. It countenances the possibility that a judge may be told of the existence of Part 36 offers, but not their terms. Rule 36.16 is supplemented by para.2 of Practice Direction 36A. Restrictions on disclosure of Part 36 offers to appeal judges remains as provided by r.52.12 (which is not in substance amended by SI 2014/3299).

Text of r.36.16

Rule 36.16 (Restriction on disclosure of a Part 36 offer) states as follows. (As Part 36 presently, r.36.14 (referred to in this rule) is r.36.11.)

"36.16.—(1) A Part 36 offer will be treated as 'without prejudice except as to costs'.

(2) The fact that a Part 36 offer has been made and the terms of such offer must not be communicated to the trial judge until the case has been decided.

(3) Paragraph (2) does not apply—

(a) where the defence of tender before claim has been raised;

(b) where the proceedings have been stayed under rule 36.14 following acceptance of a Part 36 offer;

(c) where the offeror and the offeree agree in writing that it should not apply; or

(d) where, although the case has not been decided—

(i) any part of, or issue in, the case has been decided; and

(ii) the Part 36 offer relates only to parts or issues that have been decided.

(4) In a case to which paragraph (3)(d)(i) applies, the trial judge—

(a) may be told whether or not there are Part 36 offers other than those referred to in paragraph (3)(d)(ii); but

(b) must not be told the terms of any such other offers unless any of paragraphs (3)(a) to (c) applies."

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