Court Has Power to Serve Disclosure Application on Third Party Outside the Jurisdiction

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INTRODUCTION

In *Gorbachev v Guriev & Ors* [2022] EWHC 1907 (Comm), the High Court held that it had jurisdiction to permit service of a third-party disclosure application outside the jurisdiction of England and Wales, and that in appropriate cases (such as the present where the documents were actually in England and held by English solicitors), the Court will be inclined to exercise its discretion to grant such permission. Nonetheless, the Court noted that the default route for obtaining disclosure from overseas third parties remains the letter of request regime.[1]

Notably, this decision is at odds with the recent judgment in *Nix v Emerdata Ltd & Anor* [2022] EWHC 718 (Comm) ("*Nix*") (considered here), where the Court held that it did not have the power to grant permission to serve a third-party disclosure application outside the jurisdiction.

BACKGROUND

This application arises out of a dispute between Alexander Gorbachev (the "Claimant") and Andrey Guriev (the "Defendant"), in respect of their interests in a valuable Russian fertiliser business, PJSC PhosAgro. One of the key issues in dispute is how, and why, the Claimant was financially supported by two Cyprus trusts of which T.U. Reflections Limited and First Link Management Services Limited (the "Trustees") are the trustees.

In furtherance of the primary dispute, the Claimant sought to obtain, pursuant to Civil Procedure Rule ("CPR") 31.17 and section 34 of the Senior Courts Act 1981 ("SCA"), an

[1] A party to proceedings in England may apply to the English courts to issue a 'letter of request' to a foreign court requesting that they order the taking of evidence and send that evidence to the English court for use in the proceedings.

order for third-party disclosure of certain documents held by Forsters LLP ("Forsters") the English law firm advising the Trustees (the "Original Application").

Forsters alleged that the documents were held on behalf of the Trustees, that the Trustees were the only proper parties to the Original Application, and that it would therefore be inappropriate to require Forsters to give disclosure. Accordingly, the Claimant applied for, and was granted, an order joining the Trustees to the Original Application (the "Amended Application", and together with the Original Application, the "TPD Applications"), and for permission to serve the TPD Applications on the Trustees out of the jurisdiction in Cyprus.

THE LEGAL FRAMEWORK

The Court noted that it was common ground that if a party wished to apply under CPR 31.17 (*Orders for disclosure against a person not party*), the application must be made by an application notice, which would also need to be served on the non-party. Additionally, the Court found that CPR 6.39 (*Service of application notice on a non-party to the proceedings*)[2] implicitly applies the ordinary rules for service out of the jurisdiction to cases where an application notice is to be served on a non-party outside the jurisdiction.

Accordingly, the Court held that the Claimant's application for permission to serve the TPD Applications out of the jurisdiction must satisfy the following three requirements:

- there is a **good arguable case** that the TPD Applications fall within one of the 'jurisdictional gateways' under PD 6B paragraph 3.1 (e.g. Gateway 20(a));
- in relation to the Trustees, there is a **serious issue to be tried**; and
- in all the circumstances, England is clearly or distinctly the **appropriate forum** and the Court **ought to exercise its discretion** to permit service out of the jurisdiction.

Notably, Gateway 20(a) provides that the claimant may serve a claim form outside the jurisdiction with the court's permission where:

[2] CPR 6.39(1) states that "*where an application notice is to be served out of the jurisdiction on a person who is not a party to the proceedings, rules 6.35 and 6.37(5)(a)(i), (ii) and (iii) do not apply*".

"**(20)** a claim is made—

(a) under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to in this paragraph" (emphasis added)

Further, in *Orexim Trading Ltd v Mahavir Port and Terminal Private Ltd* ("*Orexim*"), Lewison LJ held that the only limitation on the scope of Gateway 20(a) is that the relevant enactment must allow proceedings to be brought against overseas persons. Otherwise, Lewison LJ found that Gateway 20(a) should be given a "neutral" construction, as with the increasing globalisation and digitisation of commerce, the Court is "*less cautious than before in contemplating service out of England and* Wales".[3]

THE JUDGMENT

The principal issue to be determined was whether an application under s. 34 SCA (*Power of High Court to order disclosure of documents*) and CPR 31.17 falls within Gateway 20(a) (i.e. if the Court has the power to permit service of third-party disclosure applications outside the jurisdiction). If Gateway 20(a) was available, then the Court would need to decide if this was an appropriate case to exercise its discretion to serve out of the jurisdiction.

First, Jacobs J held that an application under CPR 31.17 and s. 34 SCA is a "claim". Jacobs J relied on (a) the broad definition of a "claim" under CPR 6.2(c)[4], which includes applications made before action, (b) the decision in *ED&F Man Capital Markets LLP v Obex Securities LLC* ("*Obex*") whereby an application for pre-action disclosure under s. 33 SCA and CPR 31.16 was treated as a "claim"[5], and (c) CPR Part 6 and CPR 6.39, which contemplate that "claims" which are of a procedural character are still within its scope.

Secondly, Jacobs J found that an application under CPR 31.17 and s. 34 SCA does "allow proceedings to be brought". Jacobs J reasoned that as between an applicant and the non-party respondent, the application notice is the originating process which commences proceedings. Jacobs J also relied on *Obex*, which had found that an application for pre-action disclosure constitutes "proceedings" for the purposes of Gateway 20(a). Notably,

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3 [2018] EWCA Civ 1660 at [33]–[47].

4 CPR 6.2(c): "'*claim' includes petition and any application made before action or to commence proceedings and 'claim form', 'claimant' and 'defendant' are to be construed accordingly*".

5 [2017] EWHC 2965 (Ch) per Catherine Newman QC sitting as a Deputy High Court Judge at [13].

Jacobs J also expressly rejected *Hollander's* criticism of *Obex*, which described the decision as "clearly wrong".[6]

Thirdly, Jacobs J considered that it was clear from *Orexim* that, for the purposes of Gateway 20(a), it was not necessary for the relevant enactment to expressly authorise the bringing of proceedings against overseas persons. Jacobs J held that the question is whether the statute, on its true construction, does so, and, on the facts, he found that s. 34 SCA neither expressly nor impliedly provides that applications can only be brought against persons in England.

Accordingly, Jacobs J found that Gateway 20(a) gives the Court jurisdiction to order service out in respect of a s. 34 SCA/CPR 31.17 application. Jacobs J considered that as Cockerill J had held in *Nix*, disclosure applications against overseas third parties should generally be made using the letter of request regime.[7] However, in the present case, there were good reasons not to use that procedure, as (i) the relevant documents were held pursuant to English transactions by English solicitors (Forsters) in England, which meant the Trustees would not be required to do anything in Cyprus, and (ii) there would be a significant delay in carrying out the letter of request process in Cyprus (i.e. 12 months), which would be well after the trial had concluded. Thus, Jacobs J held that this was an appropriate case for the Court to exercise its discretion in favour of permitting service out.

Lastly, Jacobs J noted that, insofar as jurisdiction was concerned, his conclusion was not impacted by the decision of *Nix*. This was on the basis that (a) the arguments presented to Cockerill J in *Nix* were very different from those advanced in the present case, (b) Cockerill J had not been referred to *Orexim*, and (c) Cockerill J had accepted *Hollander's* criticisms of *Obex*.

COMMENTARY

The Court has found that it has the power to permit service of non-party disclosure applications (under CPR 31.17 and section 34 SCA) outside the jurisdiction, but will only utilise its discretion to do so where the letter of request regime is unsuitable on the facts.

While the decision in *Gorbachev v Guriev* includes a more thorough analysis of CPR Part 6 and Gateway (20) than was the case in *Nix*, it is a novel decision based on particular

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6 Hollander, Documentary Evidence (13th ed., 2018) at [1–10].

7 Jacobs J agreed with Cockerill J's comments in *Nix* at [27]; "*the letter of request regime is the proper, courteous, respectful method of obtaining evidence within a foreign jurisdiction from a foreign party*".

facts. It is likely that the Court of Appeal will be needed to provide authoritative guidance in due course.

Importantly, this decision highlights the English Court's increasing willingness to permit service out of England and Wales in a progressively more interconnected global economy.

Notably, from 1 October 2022, PD 6B para. 3.1 will include a new Gateway (25) providing for service out of the jurisdiction of claims or applications seeking the disclosure of information from non-parties. However, Gateway (25) will only be useful for claims seeking the disclosure of (i) the identity of the defendant or potential defendant, or (ii) what has become of the property of the claimant. Thus, it is likely Gateway (20) will remain useful for service outside the jurisdiction of claims seeking broader third-party disclosure of documents.

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Please do not hesitate to contact us with any questions.

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