

Court of Appeal Confirms Narrow Jurisdiction to Serve Third Party Disclosure Applications Abroad

5 December 2022

Introduction. The Court of Appeal in *Gorbachev v Guriev & Ors* [2022] EWCA Civ 1270 has narrowly affirmed Jacobs J's decision in *Gorbachev v Guriev & Ors* [2022] EWHC 1907 (Comm) (considered [here](#)), which disagreed with the view taken earlier this year by Cockerill J in *Nix v Emerdata Ltd* [2022] EWHC 718 (Comm) (considered [here](#)).

Jacobs J in the High Court had held that: (i) the court has jurisdiction to permit service of a third-party disclosure application abroad pursuant to gateway (20)(a) of Practice Direction 6B;¹ and (ii) in appropriate cases (such as the present where the documents were located in England but the relevant respondents were not), the Court will be inclined to exercise its discretion to grant such permission.

The Judgment. The principal issue addressed by the Court of Appeal was whether section 34 of the Senior Courts Act 1981² is an enactment which allows proceedings to be brought against persons not within the jurisdiction. This was a key issue because it must be answered affirmatively for a third-party disclosure application to be served outside the jurisdiction under gateway 20(a).

Males LJ (with whom the other members of the Court of Appeal agreed) considered that the answer to this question turned on the application of the principle of territoriality. The principle (or presumption) of territoriality (or the presumption against extra-territoriality) provides that UK legislation is generally not intended to have extra-territorial effect.

Males LJ found that where a party seeks to obtain documents held abroad from a person abroad, the principle of territoriality *will* have an important role to play in considering the scope of s. 34 SCA 1981. Further, Males LJ considered that if wide-ranging disclosure of documents held by third parties abroad could be too readily obtained by means of an

¹ Gateway 20(a) provides that a claimant may serve a claim from outside the jurisdiction with the court's permission where: "(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 [PD 6B para 3.1]".

² s. 34 SCA 1981—alongside the rules of the court contained in Civil Procedure Rule 31.17 (*Orders for disclosure against a person not party*)—enables the court to make orders for third-party disclosure.

application under s. 34 SCA 1981 and CPR 31.17 then: (i) international comity might be infringed; and (ii) the letter of request procedure³ would be circumvented.

However, Males LJ considered that legislation which affects foreign nationals who have done something to render themselves subject to the jurisdiction of the UK does not, or at least may not, infringe the principle of territoriality.

Thus, the Court of Appeal held that the principle of territoriality had little or no application in circumstances where the documents whose production was sought were located in England, even though the relevant respondents to the application were located outside the jurisdiction. By sending the documents to England, the Court found that the respondents had made the documents subject to the jurisdiction of the English courts, and that to require the production of such documents would not involve any illegitimate interference with the sovereignty of the state where the owners of the documents were located. Additionally, the Court of Appeal considered that it was not clear whether documents located within the jurisdiction could even be obtained via the letter of request procedure, as foreign courts may take the view that production of such documents was a matter for English courts.

Accordingly, Males LJ held that s. 34 SCA allows for an application to be brought against a third party outside the jurisdiction for an order to produce documents which are located within England; and, as a result, that the court has the jurisdiction to make such an order and to serve the same outside the jurisdiction.

Commentary. The Court of Appeal has confirmed that the courts have the power to permit service of a third-party disclosure application outside the jurisdiction for an order to produce documents that are located within England.

However, the Court of Appeal has left undecided the issue of whether the court would have jurisdiction to make such an order, and thus permit service out of the jurisdiction, where documents are located abroad. Nonetheless, the Court of Appeal noted that in such a case the availability of jurisdiction (if it exists) would likely be curtailed by the availability of the letter of request procedure.

The present decision illustrates that any presumption against extra-territoriality has less force where the matter with which the court is concerned can be regarded as within the jurisdiction, even if the relevant persons are outside the jurisdiction. It also demonstrates just how narrow the scope of permitted service out of third-party

³ A party to proceedings may apply to the English courts to issue a 'letter of request' to a foreign court requesting that they order the taking of evidence abroad and send that evidence to the English court for use in the proceedings.

disclosure applications may be, for now confining it to a situation where the applicant satisfies the court that the documents themselves (whether electronic or hard copy) are within jurisdiction even if the respondent is not. Applicants must consider the evidence available to them in order to satisfy that evidentiary hurdle.

It is also worth noting that since 1 October 2022, Practice Direction 6B para. 3.1 (i.e. the ‘jurisdictional gateways’) includes 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 (similar to applications for *Norwich Pharmacal* and *Bankers Trust* orders). Thus, it is likely gateway (20) will remain useful for service outside the jurisdiction of applications seeking broader third-party disclosure of documents—at least where those documents sought are located within England and Wales.



Christopher Boyne
Partner, London
+44 20 7786 9194
cboyne@debevoise.com



Patrick Swain
Partner, London
+44 20 7786 9157
pswain@debevoise.com



Julia Caldwell
Associate, London
+ 44 20 7786 9098
jcaldwel@debevoise.com



Luke Duggan
Associate, London
+ 44 20 7786 9169
lduggan@debevoise.com



Callum Murphy
Trainee Associate, London
+ 44 20 7786 9054
cmurphy@debevoise.com