

# Guidance on Serving an Overseas Corporation Through Its Representative in This Jurisdiction

21 July 2022

## INTRODUCTION

In *BW Legal Services Limited v Glassdoor Inc* [2022] EWHC 979 (QB) the High Court considered whether the requirements for valid service had been met when the Claimant served a company—whose headquarters were in San Francisco—care of a London company, GGL, within the same group. Mr. Justice Jay concluded that the service rendered was not valid because GGL was not the Claimant’s representative in the UK. He also found that even if service had been effective, the English court lacked jurisdiction to order the relief the Claimant sought (a *Norwich Pharmacal* order) due to an exclusive jurisdiction clause in the Defendant’s Terms of Use under which California was the jurisdiction proper to the dispute.

The Court applied the Court of Appeal’s test from *Adams v Cape Industries* [1990] 1 Ch 443 regarding what was required before a corporation incorporated in one country could be regarded as present in another country, so as to be validly served there.

## THE FACTS

The Claimant is a law firm specialising in debt recovery. The Defendant is a company incorporated in Delaware, registered in Los Angeles and headquartered in San Francisco; it owns and operates a platform on a website where employees post reviews of their present or former employers. The Claimant sought from the Defendant the identity of the authors of anonymous reviews published to the Defendant’s website (the URL of which included a “co.uk” suffix). The Claimant alleged that the reviews were defamatory and possibly in breach of contractual terms of employment.

The Claimant issued a Part 8 Claim Form against the Defendant seeking *Norwich Pharmacal* relief (seeking pre-action disclosure from a third party). The Claim Form gave an address for service for the Defendant as being “c/o Glassdoor Limited” at a

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London address, the registered address of a UK incorporated company (“GGL”) in the same group of companies.

In November 2021, Master Eastman granted the *Norwich Pharmacal* Order and granted the Claimant permission to serve the Defendant at GGL’s address, based on the provisions of CPR r.6.9 rather than the rules governing service outside the jurisdiction.

The Defendant issued an application notice seeking orders including: 1) a declaration that the court has no jurisdiction to try the claim for *Norwich Pharmacal* relief because no valid service has been effected, or alternatively that, even if permission had been sought to serve the Claim Form out of the jurisdiction, permission to serve out could not be granted for the relief sought; or, alternatively, 2) for a declaration that, if valid service has been effective, the court should not exercise its discretion to try this claim because of (a) the existence of an exclusive jurisdiction clause in the Defendant’s Terms of Use (under which California was the proper jurisdiction for the Claimant’s claim); or (b) the Claimant obtained the Order of Master Eastman unfairly or improperly.

## THE JUDGMENT

### Validity of Service

The Claimant sought to serve the Defendant under CPR r 6.9, which provides that “any other corporation” may be served at “any place within the jurisdiction where the corporation carries on its activities; or **any place of business of the company within the jurisdiction**” (emphasis added).

The Court of Appeal’s decision in *Adams v Cape Industries* [1990] 1 Ch 443 establishes that an overseas corporation would be likely to be treated as present in another jurisdiction only where:

- It had established and maintained at its own expense (whether as owner or lessee) a fixed place of business of its own in the other country, and for more than a minimal period of time had carried on its own business at or from such premises by its servants or agents (a branch office case); or
- A representative had been carrying on the overseas corporation’s business in the other country at or from some fixed place of business (a representative case).

In considering the question of whether a representative has been carrying on the overseas corporation’s business, the Court asked the essential question whether GGL’s business should properly be regarded as its own business or as the business of the

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Defendant. That question “necessitates an investigation of the activities of GGL and of the relationship between it and the Defendant.” The Court also considered that (i) if GGL lacked authority to enter binding contracts on behalf of the Defendant this would be a strong factor against the Defendant having a place of business in this jurisdiction; (ii) if GGL was a branch office it would be likely that the court would find the Defendant had a place of business here; (iii) the Court would consider the circumstances and business of the entities in the round; and (iv) the “single commercial unit” analysis, considering whether or not GGL’s economic activities were wholly related to advancing the Defendant’s business interests, would be relevant.

Mr. Justice Jay considered the incorporation documents of GGL, noting the U.S. nationality of the initial directors. He also considered the acquisition of the Defendant by RGF OHR USA Inc, a subsidiary of a limited company listed on the Tokyo Stock Exchange, which became the ultimate parent company of the Defendant in 2018. GGL and the Defendant were within the same group, but GGL was not a subsidiary of the Defendant. He considered the most recent financial statements of GGL, and the principal business activity of GGL to provide marketing services of the Defendant in the UK. It was relevant that advertising contracts were made with the Defendant and not with GGL. The Court was also provided with evidence from the Defendant that GGL has no control over user content posted to the GlassDoor website, the lease agreements for GGL’s offices are in GGL’s name and not the Defendant’s, GGL’s letterhead does not refer to the Defendant, and GGL and the Defendant share no directors.

The Court found that GGL lacked authority to enter contracts on behalf of the Defendant and did not do so. “Notwithstanding the commercial nexus between GGL’s marketing activity and the contracts formally entered into by the Defendant, those contracts are the Defendant’s business (in all senses of the term) and GGL’s business is legally separate.” GGL’s letterhead also made clear that it was not the Defendant’s representative in the UK. Applying *Adams v Cape Industries*, the Court considered that since GGL lacked authority to enter binding contracts on behalf of the Defendant this would be a strong factor against the Defendant having a place of business in this jurisdiction. It was not a branch office. The answer to the crucial question posed in the authorities is that the Defendant’s business is not carried on from GGL’s offices in the City of London.

The Court rejected arguments based on the “wider economic reality” of this being a sole commercial unit. Similar points were raised briefly in *Tamiz v Google Inc and Google UK Ltd* [2012] EWHC 449 (QB) and *ABC v Google Inc* [2018] EWHC 137 (QB) where the Court accepted that Google (UK) Limited carried on a sales support and marketing business in the jurisdiction and was not the right defendant for libel actions in respect of a blog on blogger.com (where the proper defendant should be Google LLC).

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**Court's Lack of Jurisdiction, or Refusal to Exercise Jurisdiction**

Under CPR r 11.11 a defendant may apply to the court for an order that it lacks jurisdiction or that it should not exercise any jurisdiction it may have, in relation to a claim. The Court considered the construction of two clauses of the Defendant's Terms of Use, noting the general principle that exclusive jurisdiction clauses are construed liberally and on the premise that all disputes are covered by them unless their clear language otherwise dictates (*Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40).

The Court found that the claim was caught by the exclusive jurisdiction clause and that such claims are governed by California law and must be brought in the relevant California court. It also found that the effect of the Defendant's Terms of Use was that the Claimant had waived its right to sue in California for "pre-suit discovery."

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Please do not hesitate to contact us with any questions.

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