

# Amendments to the Jurisdictional Service Gateways

**8 September 2022**

Following approval by the Civil Procedure Rules Committee in May this year, amendments to the jurisdictional gateways for permission to serve out of the jurisdiction of England and Wales in Practice Direction 6B (“PD 6B”) have now been published. The amendments are due to come into force in October 2022.

As a reminder, when seeking permission to serve out of the jurisdiction, a claimant must satisfy three conditions:

- first, there must be a good arguable case that the claim falls within one or more of the gateways in PD 6B, enabling the court to exercise jurisdiction over the foreign person or entity;
- second, there must be a serious issue to be tried in respect of the underlying claim in the sense that the claimant must satisfy the court that the claim has reasonable prospects of success; and
- third, England and Wales must be the appropriate jurisdiction in which the claim is to be tried.

The amendments to PD 6B have expanded the jurisdictional gateways available to claimants. Whilst this is helpful to claimants and may provide additional ways in which to invite the English courts to assume jurisdiction, the amendments are unlikely to open the floodgates to litigation in England and Wales because claimants must continue to satisfy the second and third conditions identified above.

Below, we set out some of the key amendments:

### **Information Orders against Non-Parties**

Helpfully, PD 6B has been clarified to provide a new gateway for service out of the jurisdiction of claims seeking disclosure of information. Such claims may be made where:

- the claimant seeks disclosure of
  - the identity of the defendant or potential defendant; or
  - what has become of the property of the claimant, and
- where the claim and application are made for the purposes of existing proceedings or proceedings which are intended to be commenced subject to receipt of the information sought.

This new gateway significantly clarifies the position with respect to service out against third parties when disclosure of information as opposed to substantive relief is sought. To date, there has been mixed judicial guidance on the ability to serve out of the jurisdiction in such circumstances, so the clarification is welcome. The new gateway will be especially relevant for claims for Norwich Pharmacal orders and Bankers Trust orders.

### **New Domicile Test**

Ordinarily, a claimant may serve a claim form on a person present in the jurisdiction of the court. Sometimes, a person will be domiciled in the jurisdiction but not physically present. Under PD 6B paragraph 3.1(1), a claimant may serve a claim form out of the jurisdiction on a person domiciled in England and Wales. To determine whether a person, company or association is domiciled within the jurisdiction, the court will now look to the test set out in ss. 41 and 42 of the Civil Jurisdictions and Judgments Act 1982 instead of the common law position. In summary terms, this new test focuses on the place of residence and substantial connection test. A person will be domiciled within the jurisdiction if resident in, and with a substantial connection to, the jurisdiction. There is a rebuttable presumption of domicile if a person is resident within the jurisdiction for three months or longer. For a company, the focus of the inquiry is on the location of its seat, being the place of incorporation or the location of its central management or the place from where control over the company is exercised. If the company has its seat within England and Wales, then the company will be domiciled within the jurisdiction.

## Branch, Agency or Other Establishment

There is a new gateway similar to the former Brussels regulation gateway where there is a dispute arising out of the operations of a branch, agency or other establishment of a person within the jurisdiction. Under the new gateway, a claim may be made against a person outside the jurisdiction in relation to such claims where the branch, agency or other establishment cannot be served. For example, if a person domiciled abroad sets up a branch, agency or other establishment in England and Wales, then a claim may be served on that person out of the jurisdiction if the branch, agency or other establishment in England and Wales cannot be served (say perhaps because it is no longer operating in the jurisdiction).

## Claims Arising Out of Closely Connected Facts

Gateway 4A has been broadened to include further circumstances where claims arising out of closely connected facts can be made against a defendant served pursuant to other gateways or provisions of the CPR. For example, the new gateway allows service out of a new claim arising out of the same or closely connected facts as an existing claim where the defendant was served with the existing claim within the jurisdiction without the need for an agreement to accept service or where service out without the need for permission was allowed.

## The Contractual Gateways Are Extended

In addition to a case where a contract is made within the jurisdiction, now a claim may be brought where a contract is “*concluded by the acceptance of an offer, which offer was received within the jurisdiction*”. Similarly, a claim can now be made where a breach of contract is *likely* to be committed in the jurisdiction. This goes beyond the old rule that applied only where the breach occurred within the jurisdiction. Further, claims for unlawfully causing or assisting in breach of applicable contracts may now be brought, which is a further extension of the jurisdictional gateways for contract claims.

## The Tort Gateways Are Broadened

The tort gateway now applies to claims governed by the laws of England and Wales, thereby going beyond circumstances where any damage was suffered or will be suffered within the jurisdiction or where tortious acts are committed in England and Wales. Although on its face this looks to be a significant extension of the gateway, the governing law of tortious claim is ordinarily identified by reference to the jurisdiction in which loss is suffered, so it may not be overly significant in terms of the volume of cases now falling within the gateway.

## **New Breach of Trust and Fiduciary Duty Gateways**

The amendments introduce new gateways for breaches of trust where the trust is subject to the laws of England and Wales or where breaches of trust have occurred or are likely to occur within the jurisdiction. The rules also extend to constructive and resulting trusts and accessorial liability claims (e.g. claims for assisting in a breach of trust). Parallel amendments have been incorporated for breaches of fiduciary duty and (somewhat paradoxically) where declarations are sought that either no trust or fiduciary duty has arisen in circumstances where the laws of England and Wales would apply if they had so arisen. For example, a claimant can request service out of a claim seeking a declaration that there is no trust in circumstances where the trust (if it existed) would have been governed by English law.

## **Breaches of Confidence and Privacy Claims**

Amendments corresponding with the tortious, fiduciary and trust gateways have been incorporated with respect to claims for breach of confidence and privacy, including accessorial liability claims. It is therefore easier for claims to be served out of the jurisdiction in respect of breach of confidence or breach of privacy, and for claims against those who assist in such breaches.

## **Declarations of Non-Liability**

Where an equivalent claim would have fallen within the terms of the Practice Direction (subject to some exclusions), a claim may now be brought for a negative declaration as to liability. Put another way, one can seek service out in respect of a claim for a declaration that one is not liable in respect of a matter that otherwise would have been subject to PD 6B. This seems slightly circuitous, but is designed to address a lacuna where service could be sought with respect to a substantive claim, but not for a pre-emptive declaration of non-liability.

## **Contempt Applications**

There is a new gateway specifically for contempt applications.

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## **Takeaways**

These reforms are welcome and, in many cases, provide helpful clarification or expansion to the rules. Taken together with recent dicta from the Supreme Court and the Court of Appeal to the effect that the jurisdictional gateways are not to be interpreted in a narrow fashion but rather in a neutral manner, one might expect there to be a marked increase in claims in England and Wales. However, we do not expect this

to be the case because the courts will still have to be satisfied that there is a reasonable prospect of success and that England and Wales is the appropriate jurisdiction in which to try the matter after a claim is shown to fit within one or more of the gateways in PD 6B. The clarification with respect to information orders had the increase in crypto claims very much in mind, and it will be interesting to see how this gateway in particular is utilised given the steady number of crypto-related claims brought in the English courts.

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Please do not hesitate to contact us with any questions.

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