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HARE COURT

Commercial and Insolvency Update December 2017

ED&F Man Capital Markets LLP v (1) Obex Securities LLC (2) Randall Katzenstein
[2017] EWHC 2965 (Ch)

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The High Court has ruled that the court has jurisdiction to permit the service out of the jurisdiction of pre-action disclosure applications, in the first authoritative decision on this controversial point.

Background

ED&F Man, a financial services company, took on clients introduced by Obex Securities ("Obex"), acting through Mr Katzenstein, under the terms of a written Introducing Broker Agreement ("the IBA") dated 25 November 2016. The IBA included a jurisdiction clause for proceedings to be brought in the courts of England and Wales.

ED&F brokered a number of CDF trades for a client, Platinum Partners Value Arbitrage Fund LP ("Platinum"), introduced by Obex. Platinum failed to meet a margin call in August 2016 and was insolvent, leaving ED&F with losses.

The company asserts that Obex knew that Platinum was insolvent at the time of the introduction, and falsely represented its solvency and worth. ED&F suspect that these representations were fraudulent, and the court was informed that the CEO of Platinum is under investigation in the USA for fraud.

ED&F were granted leave to serve an application for pre-action disclosure ("PAD") out of the jurisdiction in New York by order of Master Teverson on 3 February 2017. Obex applied to set aside that Order.

Legal Framework

The rules for serving out of the jurisdiction are to be found at CPR Part 6. CPR r 6.36 provides for the service of the claim form where the court's permission is required:

> *"**6.36** In any proceedings to which rule 6.32 or 6.33 does not apply, the claimant may serve a claim form out of the jurisdiction with the permission of the court if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply."*

The grounds referred to in Practice Direction 6B set out that:

> *"**3.1** The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 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 this paragraph …".*

Section 33(2) of the Senior Courts Act 1981 ("the SCA 1981") allows proceedings to be brought for PAD in accordance with CPR r 31.16:

> "*On the application, in accordance with rules of court, of a person who appears to the High Court to be likely to be a party to subsequent proceedings in that court, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who appears to the court to be likely to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that claim—*
>
> > *(a) to disclose whether those documents are in his possession, custody or power; and*
> >
> > *(b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order—*
> >
> > > *(i)to the applicant's legal advisers; or*
> > >
> > > *(ii)to the applicant's legal advisers and any medical or other professional adviser of the applicant; or*
> > >
> > > *(iii)if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.*"

The interpretation provisions at CPR r 6.2 define "*claim*" as follows:

> "*(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*"

The test to be applied on an application to serve outside the jurisdiction is contained at the notes to CPR 6.37.15 of the White Book:

> "*i) A serious issue to be tried on the merits of the claim against a foreign defendant;*
>
> *ii) A good arguable case that the claim falls within one or more of the gateways provided under paragraph 3.1 of PD6B and*
>
> *iii) England and Wales is clearly and distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service out of the jurisdiction.*"

In the context of PAD, it was accepted by all parties that the serious issue to be tried on the merits and the good arguable case apply to the PAD application itself and not to the substantive underlying claim.

Court's jurisdiction to serve outside of the jurisdiction

Catherine Newman QC, sitting as Deputy Judge in the Chancery Division, held that the court did have jurisdiction for permitting service out of a PAD under the gateway found in PD6B para.3.1(20)(a). The enactment allowing proceedings to be brought is that contained in s.33(2) of the SCA 1981, which allows pre-action proceedings brought under CPR r 31.16 to constitute "proceedings" for the purposes of the gateway.

Obex argued that that an application for PAD did not constitute proceedings, and that the rules only provided for service out where substantive proceedings had been commenced by issue of the claim form. They sought to rely *inter alia* upon AES Ust-Kamenogorsk Hyrpopower Plant LLP v Urst-Kamenogorsk Hyrdopower Plant JSC [2011] EWCA Civ 647, in which the Court of Appeal

commented obiter that it was open to argument whether section 37 of the SCA 1987 fell within para.3.1(20)(a) of PD6B. Hollander on Documentary Evidence (12th ed.) was also quoted in support of the proposition that there is no power for serving a PAD claim out of the jurisdiction.

The Court rejected these submissions, finding that nothing cited bound her to find that a PAD claim is not a "proceeding", within the meaning of PD6B para.3.1(20)(a) or at all. S.33(2) permitted such proceedings where the conditions set out in that section and the rules are satisfied [23]. As such, a PAD application was a freestanding set of proceedings for purposes of the court's service out jurisdiction [25].

The instigation of further proceedings was not as a matter of general practice required when the court made an order for PAD, the granting of which may avert the need for substantive proceedings in itself [20].

If it were otherwise, the Judge reasoned, this would result in an unexplained "*lacuna*" that would disadvantage litigants in dispute with certain foreign defendants due to an unnecessarily restricted application of language [24].

Material non-disclosure

The court was further asked by Obex to consider whether permission for service in New York ought to have been refused on the basis that ED&F had not informed Master Teverson that similar proceedings had been brought against Platinum in the US.

The Court held that such arguments formed part of the discretionary exercise tasked to the court. While disclosure of this parallel application would have been preferable in this dispute, the documents sought in the course of both proceedings were not identical and would not fully dispose of the application in this jurisdiction.

Significance

On the facts of this case, the Judge accepted that there was a serious issue to be tried on the merits and a good arguable case for PAD. As such, the threshold test at CPR 6.37.15 was met and Master Teverson's Order was upheld.

But the ruling has wider significance in that it is the first time the court has determined whether there is jurisdiction to allow service out of a PAD application brought under CPR r 31.16. This runs against the grain of the *dicta* of Blair J in Clermont Energy Partners LLP v SDP Services Limited [2016] EHWC 1328 (Comm), who doubted the possibility of service out for a PAD application in a case where he was not required to rule on this point.

This ruling is unlikely to be the final word on the issue, however, and the PAD application has been stayed pending an application for permission to appeal to the Court of Appeal on the jurisdiction point.