3 HARE COURT

BRIEFING NOTE

Introduction

1. In recent months there have been two significant developments in England concerning disclosure from third parties located outside the jurisdiction. The first was the introduction of a new gateway for service out in paragraph 3.1(25) of Practice Direction 6B of the CPR. The second was the decision of the Court of Appeal in Gorbachev v Guriev[1]. This note summarises these developments and considers their potential impact on parties in Jersey, particularly trustees.

PD 6B.3.1(25)

2. The new gateway permits service out of an information order against a non-party where:
   "A claim or application is made for disclosure in order to obtain information –
   (a) regarding:
   (i) the true identity of a defendant or a potential defendant; and/or
   (ii) what has become of the property of a claimant or applicant; and
   (b) the claim or application is made for the purpose of proceedings already commenced or which, subject to the content of the information received, are intended to be commenced either by service in England and Wales or pursuant to CPR rule 6.32, 6.33 or 6.36."

3. Information orders falling within this purview will include Norwich Pharmacal ("NPO") and Bankers Trust ("BTO") applications. As per paragraph (b), the gateway is limited to applications in support of proceedings already on foot, or intended to be commenced, in England and Wales.

[1] [2022] EWCA Civ 1270

4. A successful claimant will have to satisfy the applicable test for the order sought (e.g. NPO or BTO) and the broader test for service out, namely that there is (a) a good arguable case that the claim falls within one of the gateways in PD 6B.3.1, (b) a serious issue to be tried on the merits of the substantive claim, and (c) that England is clearly the appropriate forum for the trial of the action.

5. The new gateway was introduced to address difficulties encountered in fraud claims, often involving cryptoassets, where claimants struggled to fit their disclosure application within the existing gateways. It follows that, in theory, it has become easier to obtain an information order against a third party in Jersey. In reality there is unlikely to be a marked increase in such orders. This is because, in the overwhelming majority of cases, it will be more straightforward to seek freestanding relief in Jersey.

6. The Royal Court has frequently stated its readiness to provide assistance when the Island's financial services have been caught up in wrongdoing[2]. It is extremely familiar with NPO/BTO applications and will sit at short notice if necessary. It also has a separate, broader, power to order post judgment disclosure from both the judgment debtor and third parties[3].

7. The jurisdiction to grant NPO/BTO relief in support of foreign proceedings is wider than PD6B.3.1(25), although the scope remains limited, particularly where foreign proceedings are already on foot. The Royal Court has not followed the English decision in Ramilos Trading Ltd v Buyanovsky[4] (albeit it has not been directly considered), however in Sakab Saudi Holding Company v Al Jabri[5] the Royal Court referred, with apparent approval, to the more flexible approach taken by the Cayman Islands Court of Appeal in Essar Global Fund Limited v Arcelormittal USA LLC[6] and held, without identifying a clear dividing line, that certain categories of material constituted evidence in support of foreign proceedings and were therefore outwith the NPO jurisdiction. In that situation, and assuming the Jersey party was not prepared to submit to the foreign jurisdiction, the claimant would need to obtain a letter of request and bring an application under the Service of Process and Taking of Evidence (Jersey) Law 1960.

[2] Macdoel Investments Ltd and Others v Federal Republic of Brazil and Others 2007 JLR 201
[3] Jomair Leasing v Hourigan [2011] JRC 042
[4] [2016] EWHC 3175 (Comm)
[5] [2021] JRC187
[6] CICA (Civil) Appeal No 15 of 2019

8. If a party obtains NPO/BTO relief and subsequently wishes to deploy the material as evidence in foreign proceedings, the Royal Court has a customary law power akin to that available under CPR 31.22 to permit collateral use[7]. A potential pitfall for office holders appointed by foreign courts (e.g. administrators, liquidators, trustees in bankruptcy) is that the Royal Court will require recognition of their appointment before any substantive relief is granted, although flexibility may be available where the application is urgent, but only with an undertaking to seek recognition forthwith[8].

9. In addition to the same (or broader) relief being available, the claimant will side-step a number of difficulties caused by reliance on an English order – not least that the recipient may just ignore it. This problem would be particularly acute in respect of a Jersey trustee. The English order would engage the firewall provisions in Article 9 of the Trusts (Jersey) law 1984 ("TJL") and it is almost inevitable that a trustee would not comply immediately.

10. In the face of reputational damage, and potentially contempt proceedings, a trustee could seek directions from the Royal Court as to whether it should provide the disclosure. In that context, the Royal Court would be sitting in its supervisory jurisdiction. Its primary focus would be the interests of the beneficiaries, rather than assessing the overall merit of the English disclosure application. Absent compelling reasons, and in circumstances where disclosure could have been sought in Jersey, the Royal Court may not be inclined to direct or approve disclosure, particularly if it involved submission to the jurisdiction of the English Court.

11. It follows that a claimant seeking third party disclosure from Jersey should, in most circumstances, bring their application locally. It would also be unsurprising if, having been apprised of the relevant provisions of Jersey law and the potential difficulties in procuring compliance, the English Court considered, as part of its discretion, that the circumstances militated against the exercise of its extra territorial jurisdiction.

[7] Satfinance Investments Limited v Valla Limited [2020] JRC027
[8] Smith v Nedbank [2018] JRC156

Gorbachev v Guriev

12. In Gorbachev the Court of Appeal upheld the decision of the High Court[9] to order disclosure of documents against a third party outside England under s.34 of the Senior Courts Act 1981 and CPR 31.17. The claimant had commenced proceedings in London pertaining to the ownership of a Russian business. In those proceedings the defendant is alleged to have been financially supported by two Cypriot trusts. The claimant sought to obtain non-party disclosure of certain documents held by the trustees' English Solicitors, Forsters. The trustees were subsequently joined to the application and permission was granted to serve the application in Cyprus and, by alternative means, on Forsters. In doing so the Court departed from the established position that applications for overseas third parties to provide evidence should be made via the letter of request regime[10].

13. The Court of Appeal considered whether (a) the High Court had jurisdiction to order service out and, if so, (b) the discretion had been wrongly exercised, and (c) alternative service had been appropriate. The Court held that (a) the High Court was correct to conclude that the jurisdiction existed, (b) the exercise of its discretion could not be said to be wrong, and (c) there were good reasons, namely the outstanding application for disclosure against Fosters directly, as well as the imminent trial date, for ordering alternative service instead of awaiting service via the Hague Service Convention.

14. The case turned on its facts. Most importantly, the documents in question were already in the jurisdiction. This underpinned the Court's conclusion that the principle of territoriality had little or no application and the letter of request procedure had not been circumvented. Importantly, the Court acknowledged that if disclosure against foreign parties became readily available under CPR31.17 (as opposed to the letter of request regime) this *"would infringe international comity in ways that would be objectionable to foreign states… and such orders could not readily be enforced unless the persons against whom they were made chose to come within the jurisdiction."*[11]

[9][2022] EWHC 1907 (Comm)
[10]Nix v Emerdata [2022] EWHC 718 (Comm)
[11][2022] EWCA Civ 1270 at para 82

Conclusion

15. The impact of the above developments in Jersey is likely to be limited. The majority of disclosure orders will continue to come from the Royal Court, however careful consideration should be given to how much documentation institutions allow to be held in England and Wales. Even if it is, the availability of comparable relief, the firewall provisions in Art 9 TJL (where applicable), potential enforcement difficulties and the demands of comity could all impact the willingness of the English Court to make orders against parties in Jersey.

16. The appropriate response will depend on the wider circumstances of the case. A prudent trustee will seek directions from the Royal Court before taking any steps in foreign proceedings, particularly where there is no domestic authority on the points in issue. The question may arise whether disclosure can be provided without the trustee submitting to the jurisdiction[12]. As submission can occur in a number of different ways, and without an intentional decision to do so, trustees served with English proceedings are likely to proceed with the utmost caution.

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February 2023

[12] BJ v MJ (Financial Remedy Overseas Trusts) [2011] EWHC 2708