The extra-territoriality of non-party disclosure: obtaining documents from parties abroad

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A closer look at Gorbachev v Guriev [2022] EWCA Civ 1270

Background

1. In litigation relating to the ownership of PJSC PhosAgro, a fertiliser business based in Russia, a relevant issue was how and why the Defendant had been financially supported by two Cyprus-based Trusts.

2. The Trustees (based in Cyprus) were not parties to the claim, and the Claimant brought an application for non-party disclosure of relevant financial documents of the Trustees. The documents were in electronic form and had been sent by the Trustees to be held by their English solicitors, Forsters LLP ("**the Solicitors**"), for the purposes of advising on transactions taking place in this jurisdiction.

3. As a procedural shortcut that would avoid the need for argument on that point (*i.e*. whether the Trustees were the correct, or necessary, parties to the application).

4. The Commercial Court Judge granted permission to join the Trustees, and to serve the non-party disclosure application on them outside of the jurisdiction. In doing so the Judge relied on service "gateway" 20 in paragraph 3.1 of Practice Direction 6B: *"a claim is made… under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to in [paragraph 3.1 of the Practice Direction]"*.

5. The application, and the appeal to the Court of Appeal (Males L.J., with whom Lewis LJ and Nicola Davies LJ agreed), consequently raised the question of whether an order for disclosure of documents can be made against a third party outside England and Wales, in respect of documents held by their agents within the jurisdiction.

The Key Question for the Court of Appeal

6. The key question for the Court of Appeal to address was whether CPR 31.17 and section 34 of the Senior Courts Act 1981 ("SCA") enabled the court to make an order requiring a third party based outside of the jurisdiction to disclose documents.

7. In addressing this question, the following key issues were explored:

   i) Does the court have jurisdiction to make an order for disclosure of documents against a third party outside England and Wales?

   ii) If such jurisdiction exists, was the Commercial Court Judge wrong to exercise his discretion to permit service out of the jurisdiction?

   iii) Was the Commercial Court Judge wrong to permit alternative service on the Trustees?

The Relevant Legal Framework

8. Under CPR 31.17 (3), the court may order a third party to disclose documents if:

   (a) the documents of which disclosure is sought are likely to support the case of the applicant, or adversely affect the case of one of the other parties to the proceedings; and

   (b) disclosure is necessary in order to dispose fairly of the claim or to save costs.

9. That provision derives from section 34(2) of the Senior Courts Act 1981 which enables the court "…[to] *order* [disclosure from] *a person who is not a party to the proceedings and who appears to the court to be likely to have in his possession, custody or power any documents which are relevant to an issue arising out of the said claim"*.

10. Where the third party is located out of the jurisdiction, the applicant must also obtain permission to serve the application out of the jurisdiction, by satisfying the usual criteria under CPR 6. Adapted for the purposes of third-party disclosure, the three-stage test used by the Commercial Court [para 19] was:

    i) Is there a good arguable case that the application against the foreign respondent falls within one or more of the "gateways" set out in paragraph 3.1 of Practice Direction 6B?

ii) Is there a serious issue to be tried, on the merits of the claim for third party disclosure?

iii) In all the circumstances:

(a) is England clearly or distinctly the appropriate forum for the trial of the application?

(b) ought the court exercise its jurisdiction to permit service of the application out of the jurisdiction?

11. The Claimant relied on gateway 20 (set out above). The question of whether it was satisfied depended on whether, properly construed, s.34(2) of the SCA allows proceedings to be brought against persons not within the jurisdiction.

The Court's approach to Statutory Interpretation

12. The Court of Appeal noted the modern approach to statutory interpretation, by which the court seeks to give effect to the purpose of the legislation, by deriving its meaning from its language and context. One important principle is that legislation is generally not intended to have extra-territorial effect (*i.e.* the principle or presumption of territoriality); however *"the strength of the presumption varies depending on the context in which it falls for consideration"* [para 24].

What is the meaning of "Claim" and "Proceedings"?

13. The Trustees had argued at first instance that the word "claim", in paragraph 3.1 of Practice Direction 6B, refers to a claim to enforce a substantive (as distinct from a procedural) right; and that "proceedings", in gateway 20, refers to *"claims or similar matters which are essentially freestanding"*, as distinct from applications (such as an application for third party disclosure) within such proceedings.

14. Mr Justice Jacobs took a different view, which was upheld by the Court of Appeal. He determined, first, that an application for third party disclosure is a "claim" for the purpose of gateway 20 because (amongst other reasons):

i) CPR 6.2 gives the word "claim" a broad and non-exhaustive definition, and there was no good reason to artificially restrict its meaning.

ii) A “claim” includes an application made before an action, for example an application for pre-action disclosure. There is no reason why such an application would constitute a claim, but the present application should not.

15. Secondly, a similarly broad definition should be adopted in relation to “proceedings” in gateway 20, for the following reasons:

i) When considered in the context of gateway (20), “proceedings” must be given a neutral construction, consistent with the approach taken in *Orexim Trading Ltd v Mahavir Port &Terminal Pte Ltd* [2018] EWCA Civ 1660.

ii) Put simply, “*the application notice is the originating process which commences proceedings. Once it is served, the third party must respond to the application. In so doing the third party is engaged in court proceedings to determine whether disclosure should be ordered. It is not concerned with the claimant’s substantive claim against the defendant*.” [para 35]

iii) A number of the authorities cited by the Trustees were unhelpful or inapplicable, having been decided in different contexts that were not properly comparable.

Was SCA s.34 intended to operate internationally?

16. Jacobs J. had held that the court did have jurisdiction to make the order, because s.34 of the SCA could apply to persons outside of the jurisdiction. His Lordship reasoned that:

i) Whilst recognising the domestic, interpretative presumption of territoriality, the question was ultimately who is “within the legislative grasp, or intendment” of the relevant statutory provision.

ii) There is nothing in section 34 of the SCA which expressly or impliedly provides that an application under that section can only be brought against persons in England and Wales.

iii) It was significant that the section operates in conjunction with court rules, for three reasons:

(a) Any such application requires the court to exercise its discretion, both when determining the initial application to serve out, and also in the context of any application to set aside the order for service out.

(b) The power to make such rules (as derived from section 2 of the Civil Procedure Act 1997) is very broad and extends to the making of rules applicable to persons outside the jurisdiction.

(c) *Masri v Consolidated Contractors International (UK) Ltd* (No. 4) [2008] UKHL 43 provided authority to support the conclusion that s.34 of the SCA could apply to persons outside the jurisdiction.

17. The Trustees challenged that approach, on three main grounds:

i) First, it had reversed the presumption against extra-territoriality. In construing the statute, the important factor ought to have been that there was no express provision which enabled s.34 of the SCA to apply extraterritorially, as opposed to focusing on the fact that the legislation did not expressly limit its applicability to persons within the jurisdiction.

ii) Secondly, the fact that any jurisdiction (if it existed) could and would be limited by judicial discretion, did not justify a different approach. Relying on judicial discretion to constrain the practical reach of the statute still required persons out of the jurisdiction to submit to the English court's procedures and process, and there was nothing to suggest that this was an intended consequence of the statute.

iii) The extra-territorial effect of rulemaking powers (under the Civil Procedure Act 1997) did not support the extra-territorial scope of s.34 of the SCA, particularly in circumstances where there was nothing in the legislation itself, or CPR 31.17, to suggest any intention to make these rules extra-territorial.

18. The Trustees therefore argued that, absent express wording in section 34 indicating an intention to apply to persons outside of the jurisdiction, such an intention should not be readily implied. On the contrary, such an interpretation would be an encroachment on foreign processes, and contrary to the principle of comity. Further, there was already a well-established procedure, now governed by the Hague Evidence Convention, for obtaining evidence and documents from persons outside the jurisdiction; under which any request for disclosure should be made.

Court of Appeal Analysis

19. The Court of Appeal recognised, first, that *"legislation does not generally apply to persons and matters outside the jurisdiction. But Parliament may and sometimes does provide in express terms that legislation is to apply to persons anywhere in the world.*

Equally, it may appear by necessary implication from the language, or from the object or subject matter or history of the enactment, that it is intended to have such application." [at paragraph 49]

20. Secondly, it acknowledged that there were, in practice, established alternative means of compelling a third party out of the jurisdiction to assist with domestic proceedings. *"The long standing practice of states has been to deal with the problem of evidence and documents outside their jurisdiction by means of letters of request whereby a court in which proceedings are taking place will request a court in the jurisdiction where a witness is located to require the witness to answer questions or to produce documents. That was described by Mrs Justice Cockerill in Nix v Emerdata Ltd at [27] as "the proper, courteous, respectful method of obtaining evidence within a foreign jurisdiction from a foreign party [which] is a very sensitive topic in many jurisdictions". The procedure is now governed by the Hague Evidence Convention and, for incoming requests, by the Evidence (Proceedings in Other Jurisdictions) Act 1975"*.

21. Despite these points, in the present case there was a critical factual point: the documents which were the subject of the dispute were located in England. They had been sent, electronically, to the Trustees' Solicitors, in order for them to advise in this jurisdiction. Having resolved the meaning of "claim" and "proceedings" in the applicable provisions, that key fact had the consequence that the principle of territoriality had little or no application: requiring the Trustees to produce documents located within the jurisdiction did not involve any illegitimate interference with the sovereignty of the state where the owners of the documents are located.

22. The Court of Appeal found that, by sending the documents to England, the Trustees had made the documents subject to the jurisdiction of the English court and could be regarded as having accepted the risk that those documents, like any other in the jurisdiction, might be subject to disclosure and production in the English courts.

23. By way of analogy, the Court of Appeal used the example of a retired doctor who had emigrated abroad having left his patients' records in England: *"…It would defeat the purpose of the statute if those documents could not be obtained merely because the doctor had chosen to retire abroad. To order the production of documents which are here involves no infringement of the sovereignty of any other state and no breach of comity. Moreover, even if the third parties are abroad, if the documents are here there will be no difficulty in enforcing any order for their production."* [para 86]

24. The Court of Appeal further noted that, despite the existence of the alternative 'letter of request' process, the authorities were not clear on whether it could apply (or, indeed, that its exercise was desirable) where the documents in question were held within the jurisdiction of the requesting court.

Court of Appeal Conclusions

25. The Court of Appeal's decision, by a slightly different route, produced the same effect as that of the High Court. S.34 of the SCA allows an application to be brought against a third party out of the jurisdiction for disclosure of documents which are located in England.

26. Therefore, the court did not have to address whether jurisdiction would have existed, or would have been appropriately exercised, because this would only be relevant if the documents had been located elsewhere. It did, however, offer some insight into what the relevant factors for such an analysis might be [at paragraphs 89-91].

27. The final issue, as to the permission for service by alternative means, raised no point of principle. The discretion had been properly exercised in a manner with which the Court of Appeal would not interfere.

Key Takeaways

28. First, some commentators may see this case as an example of the presumption against extra-territoriality being weakened. In particular, the High Court's analysis of whether s.34(2) of the SCA can be said to apply to persons outside of the jurisdiction, and the Court of Appeal's agreement with this analysis, is significant. However, whilst some of the Court of Appeal's reasoning and analysis on the principle of extra-territoriality may be interpreted in this way, the actual decision somewhat sidestepped this issue by recognising that extra-territoriality is not so relevant a consideration where the documents being requested are located in England.

29. Secondly, a further takeaway is the court's approach towards clarifying and bringing consistency to the meaning of "claim" and "proceedings". As discussed in the Court of Appeal's judgment, there were previously some authorities which potentially muddied the water. However, the analysis undertaken in the High Court and the endorsement of that analysis by the Court of Appeal bring consistency and clarity to these definitions.

30. Finally, this judgment reinforces the position that third parties, who are located abroad but (even if merely for the purposes of seeking professional advice, and in electronic form) send documentation to England, assume the risk that those documents may become the subject of English proceedings and therefore may be subject to an order by the court requiring them to be produced. Litigants will need to give careful thought to the custody of their documents, and to the extent to which transfers of custody will render them subject to disclosure obligations.

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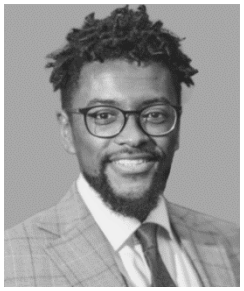

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