AN UPDATE ON THE NEW JURISDICTIONAL GATEWAY

WHERE ARE WE NOW?

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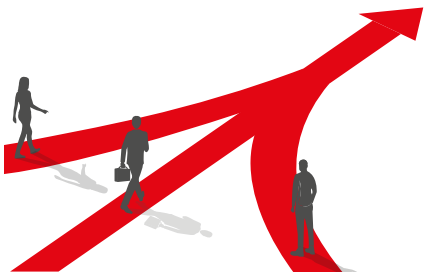
Introduction

In October 2022, an update to CPR Practice Direction 6B extended the 21 "jurisdictional gateways" through which the English Court could give permission for a claim to be served outside of the jurisdiction.

Under the new gateway 25[1] (the "Gateway"), parties can make an application for disclosure to obtain information needed to identify a defendant or to establish what has become of the property of the claimant so long as the application is made for the purposes of proceedings in England and Wales.

This article looks at how the English courts have approached the Gateway and whether victims of cross-border fraud can rely on using the Gateway in the hope of recovering their assets.



Disclosure Orders

Norwich Pharmacal orders (NPOs) and Bankers Trust orders are two powerful weapons in a civil fraud litigator's armoury to obtain information which might assist their client's case in tracing and recovering assets dissipated as a result of fraud. The information obtained from innocent parties who have been mixed up in the "wrongdoing" pursuant to such orders can reveal the identity of a fraudster or assist in tracing the stolen assets. Financial institutions such as banks and cryptocurrency exchanges are often the respondents to disclosure orders. These types of orders are often the steppingstone for claimants to bring their claim against the fraudster and maximise their chances of recovering the stolen assets.

The introduction of the Gateway for disclosure orders was driven by a willingness to assist victims of complex and cross-border fraud, such as cryptocurrency fraud, where the defendants or assets of the defendants are often located outside of the jurisdiction of the victim. The Gateway has the potential to fast-track parties being able to obtain information from foreign non-parties overseas without the need to go through the lengthy process of making a Hague request to obtain evidence.

LMN v Bitflyer Holdings Inc & Ors [2022] EWHC 2954 (Comm)

In November 2022, Mr Justice Butcher handed down the first judgment to be released concerning the Gateway granting Bankers Trust relief against a handful of overseas cryptocurrency exchanges for service out of the jurisdiction. LMN, a cryptocurrency exchange operating in England was the victim of a hack in 2020, whereby millions of dollars of stolen cryptocurrency were transferred to exchange addresses around the world. Butcher J found that the test to bring the claim within the remit of the new disclosure gateway was satisfied and that LMN had a good claim to Bankers Trust relief.[2]

The Judge did, however, address the argument made by Binance (the second Defendant), registered in the Cayman Islands. Binance argued that making a Bankers Trust order against a foreign defendant is an infringement of the sovereignty of a foreign jurisdiction and should only be made in "exceptional circumstances" on the basis of the reasoning in Mackinnon v Donaldson, Lufkin & Jenrette Corp[3]. On balance the Judge found Mackinnon to be

1 CPR PD6B, para 3.1(25)

2 The requirements for an order permitting service out of the jurisdiction is summarised in Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2011] UKPC 7

3 Where the respondent to an application is a foreign bank, additional special considerations apply (Hoffman J in Mackinnon v Donaldson, Lufkin & Jenrette Corp [1986] Ch 482) [1986] Ch 482)

inapplicable as it would be impractical and contrary to the interests of justice for the victim to have to make "speculative applications" in multiple jurisdictions to locate the relevant exchange. It would then have had to seek disclosure in aid of foreign proceedings back in England. Butcher J cited the importance of "no further avoidable delay" to the pursuit.

While the orders in Bitflyer were ultimately granted, the judgment issued a word of warning.

Where a party serves disclosure orders outside of the jurisdiction in reliance of the gateway, much will turn on whether the overseas financial institutions consider that English court orders override their own local laws and specifically the duties of confidentiality owed to their customers.

Scenna & Anor v Persons Unknown [2023 EWHC 799 (Ch)

In the latest decision of the High Court on the Gateway, the threat of foreign law obligations prevailed.

In this case, a Canadian resident and his company were the victims of a fraud. The alleged fraudsters persuaded the victims to make payments of US$2.9 million to accounts at banks in Hong Kong and Australia. The Claimant sought Bankers Trust relief against two Australian banks but at a second hearing in January 2023, James Pickering KC discharged those orders for the following reasons:

1. **Compliance with Australian law:** The banks argued that compliance with the disclosure orders would put the banks in breach of Australian law (i) under the implied contractual duty of confidentiality[4] and (ii) by way of a beach of the Privacy Act 1988.[5]
2. **Availability of an alternative procedure:** The Judge reasoned that the Australian courts have powers to grant similar disclosure orders as in England and the Banks had confirmed that if the Claimants were to make an application for such an order to the Australian courts, they would comply.
3. **Hot pursuit:** The case was not a "hot pursuit"[6] but at best a "luke warm" pursuit therefore infringing local laws could not be excused.

On balance, the High Court found no exceptional circumstances to justify the orders originally made. The appropriate course of action was to obtain a disclosure order from the Australian courts.

Will applicants get what they ask for?

The Gateway was a welcome invention that turned the heads of civil fraud practitioners working on multi-jurisdictional fraud cases. However, Scenna v Persons unknown demonstrates that English disclosure orders sought for the purpose of aiding victims of cross-border fraud will not necessarily override the duties that foreign banks owe to their customers under local laws.

What to consider when relying on the gateway

1. **Local laws:** Is it likely that the foreign non-party will be able to comply with an order without breaching its own local laws? It may be worth including a caveat in the order that the respondent will not be required to do anything contrary to local laws to bolster the applicant's position. The applicant may also consider obtaining local foreign law advice before the application is made.
2. **Hot or not?** Is the pursuit of information in the foreign jurisdiction time-sensitive? The Court will be more willing to grant relief if the applicant can show there was no delay between the fraud, the discovery of the fraud and issuing the application. Applicants should demonstrate the need to act quickly to avoid the train of enquiry going cold. "Hot pursuits" will be considered in the overall balancing exercise to show why, exceptionally, an order should be made against a foreign bank.
3. **Equivalent orders in the overseas jurisdiction**: Is it possible to get a similar order for Norwich Pharmacal or Bankers' Trust relief in support of foreign proceedings in the overseas jurisdiction? If the answer is yes, the Court may be in favour of the applicant pursuing relief directly in the overseas jurisdiction to secure the order, particularly if it is known that the information is located in the jurisdiction in question. On the other hand, if the answer is no, will the Court be willing to step into the shoes of the foreign lawmaker and make a disclosure order where local law does not permit one? Unlikely.

So where does this leave us? While the gateway may provide a shortcut to obtaining evidence abroad in exceptional circumstances for the hottest pursuits, the challenges of foreign laws cannot be ignored. When the English courts are next called upon to balance the interests of victims of fraud and foreign law obligations, we can expect the gateway to be further tested.

4 Tournier v National Provincial and Union Bank of England [1924] 1 KB 461

5 The Privacy Act 1988 is an Australian statute which requires certain entities (including banks) not to act or engage in a practice that breaches an "Australian Privacy Principle".

6 The wording "hot pursuit" derives from Hoffman J's dicta in Mackinnon v Donaldson, Lufkin & Jenrette Corp [1986] Ch 482) [1986] Ch 482