HAS THE ENGLISH COURT BROADENED ITS JURISDICTION?

This article explores recent extensions of the scope of gateways through which the English Court exercises jurisdiction over foreign parties and whether what has now resulted is a position where the Court's only meaningful fetter on jurisdiction is whether there is any other more appropriate forum for the claim.

Introduction

When the Lord Sumption in *Abela v Baadarani* [2013] UKSC 44 referred at [53] to litigation between residents of different states being a routine incident of modern commercial life, such that *"muscular presumptions against service out which are implicit in adjectives like 'exorbitant'"* are no longer necessary, it felt like there was a changing of judicial attitude towards assertion of the English Court's jurisdiction.

In *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, Lord Sumption clarified that in *Abela* he had *"protested against the importation of an artificial presumption against service out as being inherently 'exorbitant', into what ought to be a neutral question of construction or discretion. I had not proposed to substitute an alternative, and equally objectionable, presumption in favour of the widest possible interpretation of the gateways simply because jurisdiction thus conferred by law could be declined as a matter of discretion."*

However, what has followed in the neutral construction of one of those jurisdictional gateways has potentially been to broaden the jurisdiction of the English Court to one where discretion does become the critical limiting factor[1].

Gateway (20): claims under an enactment

The gateway in question, is the enactment gateway which is to be found in Practice Direction 6B to the Civil Procedure Rules at paragraph 3.1(20), which provides that the claimant may serve a claim form out of the jurisdiction with the permission of the court where:

"Claims under various enactments

(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."

In *Orexim Trading Ltd v Mahavir Port &Terminal Pte Ltd* [2018] EWCA Civ 1660, Lord Justice Lewison in the Court of Appeal referred at [33] to the change of judicial attitude to service out of the jurisdiction when analysing the scope of the enactment gateway, saying that *"it must be implicit … that the enactment in question must allow proceedings to be brought against persons not within England and Wales, otherwise it would be of extraordinary width. But it is not easy to see any other limitation from the words of the paragraph itself."*

He went on to conclude at [35] that: *"The key point, for present purposes, is that the question of construction is a 'neutral' one. Untrammelled by authority, it seems to me that the natural construction of "gateway" 3(20)(a) is that if, as a matter of construction, the enactment in question allows proceedings to be brought against persons not*

[1] For readers unfamiliar with the way in which the English Court exercises jurisdiction over foreign parties, the general method (where there is no applicable treaty/convention or other specific mechanism) is for the Court to grant permission to serve out of the jurisdiction if: (i) the claim raises a serious issue to be tried, i.e. a merits threshold; (ii) the claim falls within one or more of a limited set of jurisdictional gateways; and (iii) England is the appropriate forum to hear the claim, i.e. the discretionary requirement.

within England and Wales, then the court has power to allow those proceedings to be served abroad. Whether it should exercise that power is a different question."

The next in the sequence of relevant cases is the Court of Appeal judgment in *Gorbachev v Guriev* [2022] EWCA Civ 1270. One of the questions in that case was whether section 34 of the Senior Courts Act 1981, which enables the court to make orders for disclosure against third parties, allows proceedings to be brought against persons not within the jurisdiction. At first instance, Mr Justice Jacobs held that it did.

On appeal, Lord Justice Males started his analysis of the question with reference to the rules of statutory interpretation, and in particular the principle that legislation is generally not intended to have extra-territorial effect. He then considered a substantial number of cases in which the question had been considered of whether orders should be made under various enactments against persons outside of the jurisdiction in respect of information/documents, before noting the important feature of the *Gorbachev* case was that whilst the third party against whom disclosure was sought was overseas, the documents were within England. Males LJ concluded at [88] that s34 of the Senior Courts Act *"allows an application to be brought against a third party out of the jurisdiction for an order to produce documents which are located within England and Wales."* Males LJ left open the question of whether such an application could be brought against a third party out of the jurisdiction in respect of documents located outside of the jurisdiction.

Before turning to the final case in the sequence, it is appropriate to note from the Privy Council judgment in *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24 that the power of the court to grant injunctions is embodied in section 37 of the Senior Courts Act; that s37(3) specifically provides that the power to grant a freezing order in respect of assets located within that jurisdiction *"shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction"*; and that the power extends to freezing of assets outside of the jurisdiction: see paragraphs 18, 20 and 40.

The final authority in the run of post-CPR cases on the scope of gateway (20) was the Judgment of Mr Justice Foxton in *Commercial Bank of Dubai PSC and others v Al Sari and others* [2024] EWHC 3304 (Comm). The Judge referred to a talk on freezing injunctions that he had given (*"The Big Freeze: The Rise and Rise of the Mareva Injunction"*, a talk given to the Manchester Business & Property Courts Forum on 30 October 2024) in which he had floated the idea that there is under gateway (20) a basis for serving a freestanding application for freezing order relief out of the jurisdiction.

Indeed, it would appear that the ability for service using the enactment gateway of an application for an injunction under s37 of the Senior Courts Act is not limited to freezing order relief, but extends to an action for a mandatory or prohibitory injunction.

The potentially wide application of the gateway (20) to any application for an injunction is in contrast with gateway (2), which provides that the claimant may serve a claim form out of the jurisdiction with the permission of the court where (emphasis added):

"(2) A claim is made for an injunction ordering the defendant to do or refrain from doing an act ***within the jurisdiction.****"*

What is the point of an express gateway that provides for a more limited form of claim for an injunction than that which gateway (20) permits, applying the line of post-CPR authorities referred to above? That might be seen as a reason not to permit claims for injunctions under s37 to be

served out under gateway (20). However, the line of authorities referred to above seem to compel that outcome.

In relation to the predecessor of the enactment gateway, RSC Order 11, r1(2)(b), the Court of Appeal in *Re Harrods (Buenos Aries) Ltd* [1992] Ch 72 at 116 was concerned that a wide application of that that gateway would result in claims for injunctions being brought against anyone outside the jurisdiction under s37 of the Senior Courts Act. In *Orexim* this concern was said to be that a claim falling within rule 1(2)(b) could be brought without the leave of the court, and it would plainly have been wrong to interpret rule 1(2)(b) as allowing a wider class of claim to be brought *without* the leave of the court (an injunction not limited to acts and omissions in England and Wales) than the class of claim permitted to be brought *with* the leave of the court (an injunction limited to acts and omissions in England and Wales).

Implicit in this reasoning in *Orexim* is that the Court of Appeal did not consider it objectionable for gateway (20) to include claims for injunctions under s37 of the Senior Courts Act for relief in respect of acts outside of the jurisdiction (even though there exists gateway (2) in respect of acts within the jurisdiction).

Gateway 4(a): claims arising on similar facts

When the Rules Committee made changes to the jurisdictional gateways in 2022, it did not in light of *Orexim* seek to curtail the scope of gateway (20). In fact, what it did was to bring gateway (20) within the ambit of gateway (4A)(c), which provides that the claimant may serve a claim form out of the jurisdiction with the permission of the court where:

"(4A) A claim is made against the defendant which—

…

(c) falls within one or more of paragraphs (1A), (2), (6) to (16A) or (19) to (23),

and a further claim is made against the same defendant which arises out of the same or closely connected facts."

Previously gateway (20) was not one of those listed in sub-paragraph (c).

The consequence of this change is that if a claim for an injunction could be made under gateway (20), a claim for damages in respect of the underlying cause of action that justifies the injunction could potentially also be pursued under gateway (4A). In other words, if the conduct of a party outside of the jurisdiction, in respect of acts that occurred outside of the jurisdiction, could justify injunctive relief, the English Court could potentially exercise jurisdiction over the claim even if it has no connection with England.

Limits on the jurisdiction

So what then might be the limits on this seemingly very wide jurisdiction?

First, it may be argued that this route to establishing jurisdiction should only apply to a claim for final injunctive relief as opposed to interim relief, because the decision as to whether interim relief should be granted does not require a trial of the facts (with disclosure and cross-examination) that would normally be required to determine the claim for damages: see *Eli Lilly and Co v Genentech Inc* [2018] 1 WLR 1755 at [33], although it might be said that this would be to add a gloss to the natural meaning of the wording of gateway (4A) rather than the neutral construction that *Orexim* says should apply.

Second, the claimant will still need to satisfy the court that there is a serious issue to be tried in respect of that injunctive relief, and where there is no connection with England it might be argued that such injunctive relief would lack any 'teeth' and therefore would never as a matter of discretion be granted.

But individual defendants and individual directors of corporate defendants may well be concerned to avoid the consequences of contempt by breaching an injunction, and indeed the court will often sentence people to imprisonment for contempt even if there is limited prospect of the contemnor coming to England to serve a prison sentence. Moreover, in *Renaissance Securities v Chlodwig Enterprises Ltd and others* [2023] EWHC 3160 (Comm) at [28] and [29], Mr Justice Butcher declined to include a *Babanaft* proviso in an anti-suit injunction (an explanation as to which third parties outside of the jurisdiction are bound by the injunction) reasoning that it was not appropriate given that a third party, even if not, in law, susceptible to a committal application, might be unwilling to help or permit the breach of an English Court order; and also finding it at least arguable that there can be committal proceedings in respect of third parties who aid or abet, abroad, the breach by a corporate defendant of an anti-suit injunction.

Thus, at the jurisdictional stage, it may be premature to say there is no prospect of an injunction being granted as a matter of discretion.

Third, the claimant will also need to satisfy the court that England is the appropriate forum for the claim. It is unlikely to be the natural forum if the defendant is outside of the jurisdiction and the conduct in question all took place outside of the jurisdiction.

However, it might nevertheless be the case that there are in the jurisdiction relevant documents, witnesses and assets against which enforcement of an injunction by fines/sequestration may take place, such that England is the appropriate forum. Although in a case where there are assets in the jurisdiction, an alternative route might be said to be available, being a claim for freezing order relief using gateway (2)[2] and then relying on gateway (4A) for the hearing of the substantive claim.

Or, it may be the case that the claimant can establish by cogent evidence that there is a real risk that it will not be able to obtain substantial justice in the appropriate foreign jurisdiction: see for example *Catarina Oliveira da Silva v Brazil Iron Ltd* [2025] EWHC 606 (KB), where such a risk was established because the claimants would not be able to fund sufficient legal representation.

There is also the commercial question for the client as to whether any injunction and/or judgment for damages eventually obtained will be enforceable, but that is an issue that arises in many multi-jurisdictional cases.

So, for example, in a case where a company associated with the ruler of a foreign country, where the rule of law may be somewhat questionable, is involved in seizing assets of a claimant, that claimant might have a claim against the company for an injunction to stop further misappropriation and for an injunction to restore seized assets. They may also have a claim for damages. Those claims might not be barred by sovereign immunity or the act of state doctrine. In that case, the claimant may well be able to argue that there is a real risk that they cannot obtain substantial justice in the foreign country and that there is no other available forum other than

[2] This gives rise to another issue, as to whether gateway (2) applies to a claim for interim relief. Its predecessor in the RSC did not, as held by the House of Lords in *Siskina (Cargo Owners) v. Distos Compania Naviera S.A.* [1979] A.C. 210, but the wording has materially changed in the CPR, such that it is submitted that it does apply to claims for interim relief. For a fuller analysis as to this argument see *The Chabra injunction: service out of the jurisdiction* I.C.C.L.R. 2025, 36(5), 263-273.

England using the route of gateways (20) and (4A). The claimant may also see merit in obtaining a judgment from the English Court if it can be enforced against assets of the defendant company, particularly if it does business in England or in other jurisdictions where an English judgment might be enforced.

Conclusion

Thus, whilst there remain significant hurdles, and any application for permission to serve out using this route is likely to be met with considerable judicial scrutiny, it does appear that for the right case there is a potential route to establishing jurisdiction of the English Court against foreign defendants for acts committed overseas with no apparent connection to England.

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