

THIRD PARTY DISCLOSURE ORDERS AGAINST FOREIGN RESPONDENTS IN AN ERA OF GLOBALISATION

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In the recent case of *Gorbachev v Guriev* [2022] EWCA Civ 1270, the Court of Appeal has confirmed that where documents are located in England or Wales they are subject to the jurisdiction of the English courts, meaning that said courts can order their disclosure.

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The appellants, who were located abroad, appealed against an order for third party disclosure of documents and service by alternative means on the basis that this contravened the presumption against extra-territoriality and that the correct process was the letter of request procedure. They argued that the judge was wrong to exercise his discretion in favour of the claimant where the claimant's own delay had meant those processes could no longer be completed before trial.

The Court of Appeal dismissed the appeal, having particular regard to the fact that the documents in this case were located in England, notwithstanding that the appellants were located in Cyprus. This meant both that the relevant legislation enabling the court to order third party disclosure was not being applied extra-territorially and that the order could be enforced.

FACTS AND BACKGROUND

The substantive claim is listed for trial in January 2023. One of the issues in the case involves two trusts based in Cyprus. From 2006, the trustees (who were not parties to the claim) were advised by a London-based Partner at Lawrence Graham LLP, who then joined Forsters LLP. The claimant issued an application against Forsters pursuant to Rule 31.17 of the Civil Procedure Rules ("CPR"), to obtain third party disclosure of documents that Forsters held electronically.

Forsters' position was that they were not the correct party against which the claimant should have issued an application, as they merely held the documents on behalf of the trustees. In response, the claimant applied orally and without notice for an order joining the trustees to the application and for permission to serve them out of the jurisdiction by alternative means.

The claimant obtained permission, pursuant to gateway (20) in CPR Practice Direction 6B (referring to claims made under an enactment), to serve the application for third party disclosure on the trustees in Cyprus. The enactment the claimant relied on was section 34(2) of the Senior Courts Act which enables the court to make orders for third party disclosure. Permission was also granted for the application to be served by alternative means pursuant to CPR 6.15, by delivery to Forsters' office within the jurisdiction and by email to two addresses specified in the order.

The trustees applied unsuccessfully to set aside the order and then appealed that decision.

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THE DECISION OF THE COURT OF APPEAL

Jurisdiction

The court has jurisdiction to make an order for disclosure of documents against the trustees in this case, under gateway (20).

The court considered the principle of territoriality at length, in the context of globalisation and having regard to the increasing normalcy of international disputes but refrained from concluding on how the principle ought to apply in a case where the documents were located abroad. The court clarified that the presumption against extra-territoriality would have less force where the relevant matter may be properly regarded as within their jurisdiction. The principle, as it applies to documents, is concerned with the location of the documents rather than the location of the person against whom an order for disclosure may be made.

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Discretion

The fact that the documents were in England and that some of the transactions advised on by the English lawyers had taken place within that jurisdiction was an important distinction from *Nix v Emerdata Ltd*¹, where the court had found that applications against overseas third parties should generally be made using the letter of request procedure. On the facts of this case, the court at first instance had been right to exercise its discretion to allow for service on the trustees.

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Alternative service

The judge at first instance was entitled to conclude that there was good reason to permit alternative service without requiring service to be effected pursuant to the Hague Service Convention in view of the existing application for third party disclosure against Forsters, which needed to be determined quickly ahead of the imminent trial date.

PRACTICAL IMPLICATIONS FOR INTERNATIONAL CLIENTS

This is a noteworthy case for both individuals and organisations conducting business internationally. In circumstances where documents relevant to legal proceedings in England and Wales are located within the jurisdiction, the courts have the jurisdiction to make an order for their production, even if the third party who owns or controls those documents is located abroad.

If, however, the documents themselves are abroad, careful consideration would need to be given to the principle of territoriality when interpreting the applicable legislation and it is likely that the letter of request system would need to be followed.

Individuals and organisations who are based abroad, will now wish to think carefully about whether to send documents to their legal representatives in England for the purposes of obtaining advice where those documents could subsequently be considered relevant to court proceedings in England and therefore subject to an order for third party disclosure.

It may be that, if there is an imminent risk of third party litigation in England, clients may wish to use technology such as document viewing platforms hosted in their own jurisdiction to allow advisors to view documents without those documents coming within the jurisdiction of the English courts. Clients may also wish to consider requiring prompt return of all documents following the close of a case (although this may need to be balanced against the need for legal advisors to retain copies for insurance purposes).

On the other hand, parties to litigation may now have a quicker and potentially more expansive route to request documents from foreign third parties, where the factual circumstances align with those in this case.

It should be noted that the issues of (a) the application for disclosure against Forsters and (b) the question of whether third party disclosure should actually be given in this case still await a decision.

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Trainee Laura Izquierdo also contributed to this article

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[1] Nix v Emerdata Ltd [2022] EWHC 718 (Comm)

[2] Nix v Emerdata Ltd [2022] EWHC 718 (Comm)

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