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Third party disclosure applications against parties outside of the jurisdiction

Gorbachev v Guriev and Fosters LLP v T.U. Reflections Limited and others (2022) EWCA Civ 1270

The principal issue on this appeal was whether an order for disclosure of documents could be made against a third party outside England and Wales pursuant to S34 of the Senior Courts Act 1981 ("the SCA") and CPR 31.17. Mr Justice Jacobs held in this case that such an order could be made. In so holding he disagreed with the view taken earlier this year by Mrs Justice Cockerill in *Nix v Emerdata Ltd*.

The issues on this appeal were as follows:

(1) Did the court have jurisdiction to make an order for disclosure of documents against a third party ('the Trustees') outside England and Wales?

(2) If such jurisdiction existed, was the judge wrong to exercise his discretion to permit service out of the jurisdiction?

(3) Was the judge wrong to permit alternative service on the Trustees (based in Cyprus)?

The Court of Appeal held that in the typical case where it was sought to obtain documents held abroad from a person abroad, the principle of territoriality had an important role in considering the scope of S34 of the

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The Court of Appeal allowed an application for third party disclosure where the non-party was outside of the jurisdiction but the documents were held by solicitors within the jurisdiction.

SCA. The cases had consistently held that apparently wide and general words enabling documents to be obtained should be interpreted subject to that principle. The existence of the letter of request procedure and the limitations to which it was subject would be circumvented if wide-ranging disclosure of documents held by third parties abroad could be too readily obtained by means of an application under S34 and CPR 31.17. That would infringe international comity in ways that would be objectionable to foreign states, just as the United Kingdom had objected when other states had sought to obtain documents here without using the letter of request procedure and, even then, had limited the documents which could be obtained through that procedure. Moreover, such orders could not readily be enforced unless the persons against whom they were made chose to come within the jurisdiction.

However, the critical fact in the present case was that the documents whose production was sought were located in England, even though the Trustees whose consent was required for their production were outside the jurisdiction. The documents in question were sent to Forsters in England, albeit by electronic means, so that Forsters could give advice to the Trustees concerning various transactions, some of which occurred here. It was not the result of chance that they were held within the jurisdiction.

In such circumstances the principle of territoriality had little or no application. To require the production of documents located within the jurisdiction did not involve any illegitimate interference with the sovereignty of the state where the owners of the documents, i.e., the Trustees, were located.

The cases had recognised that the strength of the principle of territoriality varied according to the circumstances. None of the cases concerned with the principle of territoriality had been concerned with documents located within the jurisdiction. That included *Nix v Emerdata Ltd*, which was the only case directly concerned with third party disclosure. In all of the cases in which it has been necessary to consider whether an order to produce documents could be made against a person abroad, the documents themselves had been abroad.

But where the documents were here, the position was very different. It was in accordance with the purpose of the legislation that documents held by third parties which were within the jurisdiction should be available to ensure a just outcome in litigation, including in particular personal injury litigation which was the original subject matter of these provisions, regardless of the location of the third parties themselves. An example canvassed in argument was the case of a doctor in private practice who retired abroad, but whose documents, including a claimant's medical records, remained here. It would defeat the purpose of the statute if those documents could not be obtained merely because the doctor had chosen to retire abroad.

Accordingly, the court held that S34 of the SCA allowed an application to be brought against a third party out of the jurisdiction for an order to produce documents which were located within England and Wales.

That conclusion made it unnecessary to decide whether the court would have jurisdiction to make such an order, and thus to permit service out of the jurisdiction, if the documents had been located elsewhere. There were two views as to the way in which the principle of territoriality would operate in such a case. One view was that S34 should be interpreted as limited to the production of documents located within the jurisdiction, giving effect to the principle of territoriality with a hard-edged rule. The alternative view was that the court had jurisdiction to make such an order against a

person located anywhere in the world, with the existence of judicial discretion providing a sufficient safeguard against any illegitimate interference with the sovereignty of other nations or inappropriate circumvention of the letter of request procedure; that would mean interpreting "a person" and "any documents" as referring to any person and any documents anywhere in the world.

There was something to be said for both of these views. The former view provided clarity and certainty, and avoided any possibility of an infringement of international comity. The latter view provided for the possibility of doing justice in an exceptional case, accepting the risk that cases might be argued to be exceptional, even if the argument was ultimately rejected. It was preferable to leave this question to be decided in a case where it made a difference. Such a case was likely to be rare.

The issue of discretion could be dealt with more briefly. The judge had exercised his discretion in way which could not be said to have been wrong.

CPR 6.15 enabled a court to make an order for alternative service where it appeared that there was "a good reason" to do so. It was common ground that where a respondent was domiciled in a state which was a party to the Hague Service Convention, it must be shown that there was a good reason for allowing alternative service instead of requiring service to be affected pursuant to that Convention.

The judge here considered that there was a good reason to allow alternative service in the present case without requiring service to be affected pursuant to The Hague Service Convention in view of the existing and outstanding application for third party disclosure against Forsters, which needed to be determined quickly in view of an imminent trial date.

There was no error in the judge's conclusion rendering it necessary for this court to interfere. It was true that he did not expressly mention the claimant's delay in making the application when he dealt with the issue of alternative service at the conclusion of his judgment, but the judge was entitled to conclude that, notwithstanding the delay, there was a good reason to permit alternative service.

The full judgment is available at: Gorbachev v Guriev [2022] EWCA Civ 1270 (30 September 2022) (bailii.org)