DISCLOSURE ORDERS AGAINST THIRD PARTIES OVERSEAS

Zoe O’Sullivan KC

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Consider the purpose of the information and documents sought

Is the claimant seeking:

- Information as to the identity of a wrongdoer?
- Information needed to bring a claim ("the missing piece of the puzzle")?
- Information as to the location of assets?
- Evidence for use at trial in English proceedings?

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The principle of territoriality

Hoffman J in **Mackinnon v Donaldson, Lufkin & Jenrette** Corp [1986] Ch 482 at 493

“In principle and on authority it seems to me that the court should not, save in exceptional circumstances, impose such a requirement upon a foreigner, and, in particular, upon a foreign bank. The principle is that a state should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction…

“The need to exercise the court's jurisdiction with due regard to the sovereignty of others is particularly important in the case of banks. Banks are in a special position because their documents are concerned not only with their own business but with that of their customers. They will owe their customers a duty of confidence regulated by the law of the country where the account is kept…

Applied in a crypto fraud case where R was a foreign bank: **Scenna v Persons Unknown** [2023] EWHC 799 (Ch)

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Is there a different approach in crypto cases?

- **LMN v Bitflyer** [2022] EWHC 2954 (Comm) per Butcher J at [37]:

- "In my judgment the approach indicated in Mackinnon is inapplicable in the present case. Here, it is not known where the relevant documents are located. While there is clearly a possibility that the documents are in another or other jurisdictions, they may be in this one. Furthermore, it may well be that the location of the documents (which may be electronic) is of little significance. The court is faced with the novel challenges of fraud in relation to cryptocurrency transactions, and an approach adopted in relation to banks in 1985 does not seem to me to be apposite. In any event, Hoffmann J himself recognised in Mackinnon that such orders might be made in exceptional circumstances, and that exceptional circumstances had been found where crime and fraud were involved (see at 498 by reference to London and County Securities Ltd v Caplan (Unreported) 26 May 1978). …."

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Confidentiality concerns

The confidentiality of the documents sought is a factor in the court's discretion, but will not outweigh considerations of relevance: see **Bugsby Property LLC v LGIM Commercial Lending Ltd** [2021] EWHC 1054 (Comm) at [24] to [26]

Confidentiality clubs can provide pre-trial protection: see the TCC Guide and **Bugsby** at [79]

At trial, considerations of open and fair justice dictate that parties must be able to see the documents relied upon.

Nonetheless the judge can impose restrictions on the use of the documents, including requiring undertakings: **Aeroflot v Berezovskaya** [2014] EWHC 70

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Norwich Pharmacal orders

Three conditions: see Mitsui v Nexen Petroleum [2005] EWHC 625 (Ch) at [21].

An “exceptional” jurisdiction with a narrow scope: **Ashworth Hospital Authority v MGN Ltd** [2002] 1 WLR 2033 at [57]

The applicant must show a good arguable case that a wrong has been committed.

The wrong may include a crime, tort, breach of equitable obligation or contempt of court, but does not include a breach of financial regulations:**Burford Capital v London Stock Exchange** [2020] EWHC 1183 (Comm).

As to discretion, see the factors identified in **Rugby Football Union v Consolidated Information Services** [2012] UKSC 5 at [17]

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Limitations on Norwich Pharmacal relief

- NP relief is not available to obtain documents for use in foreign proceedings: **Ramilos Trading v Buyanovsky** [2016] EWHC 3175 (Comm). In such a case the claimant can only make an application to the English court by a letter of request under the Evidence (Proceedings in Other Jurisdictions) Act 1975.
- NP relief is available even against the wrongdoer, but it will weigh against the exercise of discretion if there is another route to obtaining the information such as pre-action disclosure under CPR 31.16: **The Kingdom Bank v Morwand** [2023] EWHC 3069 (Comm) at [49].

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Bankers' Trust orders

Available to enable a claimant to trace and recover assets over which it asserts a proprietary claim.

For the five governing principles, see **Kyriakou v Christie Manson & Woods Ltd** [2017] EWHC 487 (QB) at [14] to [16].

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Application for non-party disclosure under CPR 31.17 and SCA 1981 s.34

CPR 31.17(3):

The court may make an order under this rule only where-

(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.

See **Bugsby Property LLC v LGIM Commercial Lending** [2021] EWHC 1054 (Comm)

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CPR 31.17 contd.

Potentially wider than Norwich Pharmacal or Bankers Trust relief

Still said to be “exceptional” and “intrusive”: **Frankson v Home Office** [2003] EWCA Civ 655

The court may have to consider Art 8 ECHR privacy rights.

CPR 31.17 can be invoked against a foreign respondent where the documents are held in England. But where the documents are outside England, a letter of request is the only route to obtaining production: **Gorbachev v Guriev** [2022] EWHC 1907 (Comm)

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Practicalities: service out of the jurisdiction

The usual threefold test applies:

- Good arguable case that the application against the foreign respondent falls within one or more of the gateways in PD6B, para 3.1
- Serious issue to be tried on the merits of the claim for third party disclosure
- In all the circumstances England is clearly the appropriate forum for the trial of the disclosure application.

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New Gateway 25 of PD 6B para 3.1

A claim or application is made for disclosure in order to obtain information regarding:(i) the true identity of a defendant or a potential defendant; and/or (ii) what has become of the property of a claimant or applicant; **and**

The claim or application is made for the purpose of proceedings already commenced or which, subject to the content of the information received, are intended to be commenced either by service in England and Wales or pursuant to CPR rule 6.32, 6.33 or 6.36.

See **LMN v Bitflyer** [2022] EWHC 2954 (Comm)

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Do you need an order for service by alternative means under CPR 6.15?

- Default position: service must be effected in accordance with the Hague Service Convention 1965.
- There has to be a "good reason" to order alternative service. The length of time required for service under the Hague Convention is not a good reason in itself. The evidence must make out a case of urgency or other good reason. See **Osbourne v Persons Unknown** [2022] EWHC 1021 (Comm) (HHJ Pelling at [31]).
- The courts have been innovative as to the means of service: eg service by NFT airdropped into crypto wallets identified as having received the crypto assets: **D'Aloia v Binance** [2022] EWHC 1723

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Consider the timing of the application against the third party

- If the defendant has not yet been served, include a short term "gagging order" preventing the third party alerting the defendant to the existence of the order.
- Consider whether the application against the third party should be made on notice only after the third party has been served (as a non-respondent) with the order against the defendant: **Piroozadeh v Persons Unknown** [2023] EWHC 1024 (Ch)

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Drafting an effective order

- The documents, or classes of document, must be defined as clearly and precisely as possible: eg seeking disclosure of monthly statements for a numbered account with a known bank. Asking for too much risks the refusal of the application.
- The order should expressly give the respondent liberty to apply to challenge the order by a set date: the deadline for compliance should be after this date: **Osbourne v Persons Unknown** [2022] EWHC 1021 (Comm) at [45].
- The order must specify the date for acknowledgment of service

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Undertakings to be offered to the court for the protection of the respondent

The order must include

- a cross-undertaking in damages to cover any liability incurred by the respondent in complying with the order
- an undertaking to pay the respondent's reasonable costs of compliance (and see CPR 48.3)
- an undertaking not to use the information or documents disclosed otherwise than for the purpose of the proceedings without the permission of the court (as to which see CPR 31.22)
- an undertaking to use reasonable endeavours to keep the information confidential: see **LMN v Bitflyer** [2022] EWHC 2954 (Comm) at [47]
- a proviso that the respondent is not required to do anything prohibited by local law: see **LMN v Bitflyer** [at [37]

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The third party's costs

- Third party disclosure applications are non-adversarial proceedings.
- Therefore the respondent will usually be awarded its costs of compliance if it acts reasonably, even the costs of unsuccessfully challenging the jurisdiction or opposing the application. But the respondent does not get a "free ride": see the CA's costs judgment in **Gorbachev v Guriev** [2023] CA Civ 327 (Males J at [51])
- Nor can the respondent adopt the approach of "leaving no stone unturned": **Constantin Medien AG v Ecclestone** [2023] EWHC 2519 (Ch)

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Letters of request addressed to the foreign court

The jurisdiction of the English court to issue a letter of request to a foreign court seeking document production or the oral examination of a witness arises under:

- The 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters https://www.hcch.net/en/instruments
- Other bilateral treaties
- At common law (rarely exercised)

The scope of the documents which can be sought is “considerably narrower” than under CPR 31.17. Train of inquiry disclosure is not available. The leading case is **Panayiotou v Sony Music Entertainment** [1994] Ch 142

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Factors relevant to the English court's discretion to issue the letter of request

Whether the evidence sought is material: **First American Corporation v Zayed** [1999] 1 WLR 1154

The cost of obtaining the evidence: **Honda Giken KKK v KJM Superbikes** [2007] EWCA Civ 313

Whether the cost and effort of obtaining the evidence is disproportionate to the benefit to be obtained (provided that the court can form a clear view on that matter): **Prudential Guarantee v Marsh Ltd** [2016] EWHC 3607 (Admin)

Whether the foreign court would be receptive to the request: **BB Energy (Gulf) DMCC v Al Amoudi** [2021] 7 WUK 20

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Section 1782 of the US Code

The application can be made prior to the commencement of proceedings. **See Intel Corp. v. Advanced Micro Devices, Inc.**, 542 U.S. 241 (2004),

The US court must be satisfied that applicant is not trying to circumvent restrictions on disclosure in the home court.

Section 1782 is not available where the documents are sought for use in a non-US commercial or investment treaty arbitration: **ZF Automotive US Inc v Luxshare Ltd** 596 US (2022).

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Letters of request received from the foreign court

- An exclusive regime: section 1 of the Evidence (Proceedings in other Jurisdictions) Act 1975.
- Applies both to existing and contemplated proceedings, but “discovery” (ie train of inquiry disclosure) cannot be sought.
- The English court will give effect to a request from the foreign court as far as it can properly do so: **First American Corporation v Zayed** [1999] 1 WLR 1154.
- However, the English court will protect the respondent from an oppressive request by narrowing or even refusing it, as was the outcome in **First American.**