

DISPUTE RESOLUTION BRIEFING

Information orders against third parties: new jurisdictional gateway

As part of a suite of changes to the Civil Procedure Rules (CPR) that will come into effect on 1 October 2022, a new jurisdictional gateway will be introduced to provide for service outside of the jurisdiction for Norwich Pharmacal and Bankers Trust applications.

This is a pragmatic and appropriate development that will largely, although not entirely, supersede previous case law dealing with the availability of other jurisdictional gateways. However, the previous case law will still be relevant where the new gateway does not apply and there remain significant issues to be resolved.

Third-party information orders

Norwich Pharmacal orders (NPOs) have traditionally been used where the applicant has been wronged but does not know the identity of the wrongdoer; for example, when requiring a journalist to identify the source of their information. The leading case established that an order requiring identification can be made against a third party who, although not a wrongdoer, has nonetheless been mixed up in the wrongdoing (*Norwich Pharmacal and others v Customs and Excise Commissioners* [1974] AC 133).

Since then, the scope of the remedy has expanded and it has become a flexible, although still exceptional, remedy that can be granted for various legitimate purposes without a need for the applicant to be planning substantive proceedings (*Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29). For example, the High Court has granted NPOs to obtain:

- The “missing piece of the jigsaw” necessary to establish a cause of action (*Carlton Film Distributors Ltd v VCI Plc* [2003] EWHC 616).
- The disclosure of records relating to alleged torture (*R (on the application of Binyan Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048).

The separate but related Bankers Trust order (BTO) has developed as a response to fraud,

requiring the disclosure of documents or information from a third party, often a bank or professional, to enable assets to be traced (*Bankers Trust Company v Shapira* [1980] 1 WLR 1274). For example, in *Kyriakou v Christie, Manson & Woods Ltd and others*, the High Court granted a BTO against a number of respondents, including auctioneers, a jeweller and a safety deposit company, which required them to provide documents and information about assets that had allegedly been misappropriated by the applicant’s estranged wife from the family home in Greece ([2017] EWHC 487 (QB)).

Although having a separate origin and basis in authority, BTOs are often associated with freezing injunctions, which can be supported by ancillary disclosure and made against certain third parties (see feature article “Freezing orders in practice: going nuclear”, www.practicallaw.com/w-020-2043).

International element

In the relatively early days of these information orders, the courts developed a principle of restraint in cases involving an international element. For example, in *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corporation*, the High Court refused to grant an NPO requiring a US branch of a bank that was not a party to the relevant action to provide documents held in the US that related to business that was transacted in the US ([1986] 1 Ch 482).

More recently, issues about formal jurisdiction, rather than discretion, have come to the fore. The key question is whether the courts have the power to order relief where the substantive proceedings will be in another jurisdiction.

The starting point is that the courts do not have jurisdiction to order disclosure in support of foreign proceedings except where authorised by statute (*Rio Tinto Zinc Corporation and others v Westinghouse Electric Corporation* [1978] AC 547). However, neither the Evidence (Proceedings in Other Jurisdictions) Act 1975 (1975 Act) nor the Crime (International Co-operation) Act 2003 cater for NPOs or BTOs, and the Court of Appeal has held that the

1975 Act excludes NPOs in relation to foreign proceedings (*R (on the application of Omar and others) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 118). The High Court later confirmed that the 1975 Act excludes NPOs in relation to foreign civil, as well as criminal, proceedings (*Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm); www.practicallaw.com/5-638-0464). On one view, this precludes any prospect of NPO or BTO relief. However, this form of relief is independently justified and, provided that it is seeking information, such as an identity, rather than evidence, there is an argument that it is not precluded.

The other aspect of jurisdiction that has arisen concerns the ability to serve an application on a respondent that is outside of the jurisdiction. This international dimension has become increasingly important as respondents such as internet service providers and crypto currency exchanges are often outside of the jurisdiction. There has traditionally been no jurisdictional gateway tailored for NPOs or BTOs and so applicants have sought to fit them within existing gateways (see box “Additional considerations for foreign respondents”). This will now change with the new gateway being introduced on 1 October 2022.

The new gateway

From 1 October 2022, Practice Direction (PD) 6B will be amended to include a new gateway in paragraph 3.1(25). The changes were made with particular regard to issues that had arisen in relation to cryptoassets and digital working. For example, the new gateway will help where there is suspected fraud and a need to find out about transactions in cryptocurrency where a cryptocurrency exchange, rather than a traditional bank, can provide the information required to permit tracing. It also makes the position clear for more traditional cases.

The new gateway applies to applications for the disclosure of information regarding either the identity of a potential defendant or what has become of the property of an applicant. It applies only where the substantive proceedings are intended to be brought in England and Wales under other heads of

jurisdiction. In other words, it sensibly focuses on whether there are jurisdictional grounds for the substantive proceedings.

The gateway will cover most scenarios where NPOs or BTOs are sought. However, there are a number that would still fall outside of its scope, in particular when the applicant is seeking something more than simply an identity. For example, an applicant may wish to find out what has happened to property that is under its control but not in its ownership, or to find the “missing piece of the jigsaw” or seek broader disclosure under the flexible Norwich Pharmacal remedy. In these areas at least, the existing case law remains relevant.

Relevant case law

If the new gateway is unavailable, an applicant for an NPO or BTO will need to consider whether the application falls within the traditional gateways. However, as these gateways were, at least for the most part, drafted with substantive proceedings in mind, the preliminary question is whether they can, as a matter of principle, ever apply to ancillary applications of this nature. This has not been fully considered in the decided cases on this form of relief but it raises an important point of principle.

The starting point is *Mercedes-Benz AG v Leiduck*, where the Privy Council held that an application for a freezing injunction could not be brought within any jurisdictional gateway because it was not a substantive claim ([1996] AC 284). Recently, in *Broad Idea International Ltd v Convoy Collateral Ltd*, the Privy Council declined to interfere with this interpretation because it was so long settled ([2021] UKPC 24). On the other hand, the Court of Appeal seemingly expressed a contrary view in the context of contempt proceedings (*Dar Al Arkan Real Estate Development Company and another v Al-Refai and others* [2014] EWCA Civ 715).

There is also a parallel line of authority that has developed in relation to third-party freezing injunctions, where a key consideration is whether the substantive claim would be within the jurisdiction (*Cruz*

Additional considerations for foreign respondents

Even where a jurisdictional gateway is available, when considering whether to grant a Norwich Pharmacal order (NPO) or a Bankers Trust order (BTO) against a respondent that is out of the jurisdiction, the court will need to consider:

- Whether England and Wales is the appropriate place to bring the claim, that is, the principle of *forum non conveniens*.
- The discretionary stage inherent in NPOs and BTOs, including the general principle of restraint in relation to information or documents that are based overseas.
- The possibility that foreign law may impose restrictions on disclosure.

City 1 Mauritius Holdings v Unitech Ltd and others [2014] EWHC 3704 (Comm)). These different lines of authority are inconsistent and will need to be reconciled.

There is a line of authorities dealing with NPOs and BTOs, but many were decided on without notice applications, or without opposition or full argument. The chief candidate has been the necessary or proper party gateway in paragraph 3.1(3) of PD 68. In *AB Bank Limited v Abu Dhabi Commercial Bank PJSC*, the High Court held that, although the underlying substantive claim was likely to be brought in the jurisdiction, the necessary or proper party gateway did not provide jurisdiction for an NPO against the third-party respondent bank because the NPO constituted final relief rather than an interim remedy against the bank and the substantive claim would be tried separately ([2016] EWHC 2082 (Comm); www.practicallaw.com/9-633-7685).

Since then, a series of decisions have reached the opposite conclusion, at least as regards BTOs, although the basis for the distinction has not always been clear and has been somewhat tentative (*CMOC v Persons Unknown* [2017] EWHC 3599 (Comm); *Ion Science Ltd v Persons Unknown*, unreported, 21 December 2020; *Fetch.ai Ltd v Persons Unknown and others* [2021] EWHC 2254 (Comm), www.practicallaw.com/w-032-7356) (see Briefing “Freezing orders: recent key developments”, www.practicallaw.com/w-034-1986).

Some will argue that the interpretation of the necessary or proper party gateway in *AB Bank* was too restrictive. Proceedings against an unknown defendant can legitimately be brought using the same claim form under CPR 7.3. *Dar Al Arkan* also supports a broader interpretation. On this view, where there is jurisdiction for the substantive claim, NPOs and BTOs can be sought on the basis that the respondents are necessary or proper parties to that substantive claim. It remains to be seen whether this will be tested further against the backdrop of the new gateway.

Finally, it is also possible to pursue a substantive claim for a proprietary injunction against an intended respondent to a BTO (*AA v Persons Unknown and others* [2019] EWHC 3556 (Comm); www.practicallaw.com/w-024-1478). This might be coupled with a claim against the wrongdoers as persons unknown, applying *Cameron v Liverpool Victoria Insurance Co Ltd* ([2019] UKSC 6). This can provide an alternative route to establishing jurisdiction and, once established on this basis, it would then be possible to seek an NPO or a BTO.

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