A New Frontier for Extraterritorial Disclosure Orders in England & Wales- Jonathan Schaffer- Goddard

In October 2022, an amendment to the Civil Procedure Rules in England established a new jurisdiction for limited extraterritorial disclosure orders ("information orders"). While the High Court of Justice (the "High Court") had made steps (in ex parte applications) towards the granting of such orders in the last few years, the new rules and a recent court decision have cemented the previously uncertain status of such orders.

The effect of this change in the rules is that the High Court may now give permission for an order to be served on an entity in the United States seeking disclosure of information to obtain either (a) the true identity of a defendant or potential defendant; or (b) what has become of the property of the claimant/applicant, so long as there are proceedings already commenced or intended to be commenced in the English Courts.

Financial entities and other holders of identifying information (such as social media networks and webhosting platforms) in the United States will now find themselves far more regularly on the receiving end of such orders. This post examines the scope of such orders, when they can now be made outside of the jurisdiction, and what entities in the United States faced with such orders might do if served with one.

The New Rules

English rules on jurisdiction over potential defendants outside the jurisdiction can be found in the "jurisdictional gateways" for service out of the jurisdiction in Practice Direction 6B of the Civil Procedure Rules. It is by an action falling within one of these gateways (and the satisfaction of the test set out below) that the English Court establishes its jurisdiction.

In October 2022 a new gateway was added to the rules at 3.1(25). It reads:

> 3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –
>
> *[…]*
>
> *(25) A claim or application is made for disclosure in order to obtain information—*
>
> *(a) 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*
>
> *(b) 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*

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Wales or pursuant to CPR rule 6.32, 6.33 or 6.36

In making this addition to the Civil Procedure Rules, the Rules Committee noted that there was a "concern regarding the ability of the Courts to assist parties seeking to obtain information from non-parties where assets have been removed from the jurisdiction."

The types of U.S. entities which will most regularly find themselves on the receiving end of such orders include banks and other financial institutions, social media companies, webhosting or blogging sites, and cryptocurrency exchanges.

In making any such order permitting service out of the jurisdiction the Court must decide whether to give that permission by considering: (1) Is there a serious issue to be tried on the merits? (2) Is there a good arguable case that the claim fell within one of the "gateways"? and (3) Is England and Wales the appropriate forum for the claim to be tried? (See Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2011] UKPC 7 at ¶71). Only if the Court is satisfied that these three criteria have been met will permission be given to serve out of the jurisdiction. Nevertheless, this approach offers a far broader exercise of jurisdiction than is available in U.S. courts for similar pre-action cross-border discovery. For example, N.Y. C.P.L.R. 3102(c) (pre-action discovery) has consistently been held in analogous cases at first instance to not apply to out of state defendants. See Kline v. Facebook, Inc. & Google, LLC (N.Y. Sup. Ct. 2019), Matter of Legal Aid Soc'y of Suffolk Cnty. to Compel Prod. of Documents from Indeed, Inc. Prior to Commencement of Action (N.Y. Sup. Ct. 2020), C.N.H. v. Levine (N.Y. Sup. Ct. 2021).

The Orders That May Be Made: *Bankers Trust and Norwich Pharmacal*

For almost fifty years, it has been common in England for courts to make orders for disclosure against otherwise innocent third parties that have become involved in or innocently facilitated wrongdoing by an unknown defendant. These orders require the innocent third party to disclose certain information to enable a potential claimant to commence proceedings against the ultimate defendant.

Where the court has the power to make such orders, they are a powerful means by which a claimant may identify otherwise unknown defendants, or obtain other information, in order to bring a claim. These orders are particularly important because they provide a remedy in circumstances where none would otherwise exist.

There are two main types of order: the Norwich Pharmacal and the Bankers Trust order. The Norwich Pharmacal Order derives its name from Norwich Pharmacal Co v Customs and Excise Commissioners [1974] A.C. 133, where it was first granted. It is available whether or not the identity of the defendant is known, and for claims arising out of tortious, contractual, and equitable wrongs. The conditions for granting a Norwich Pharmacal Order are set out in the judgment of Lightman J in Mitsui v Nexen Petroleum [2005] EWHC 625 (Ch) at ¶21:

> i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;
>
> *ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and*
>
> *iii) the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.*

The Banker's Trust Order derives from Bankers Trust Co v Shapira [1980] 1 W.L.R. 1274. In that case the Bankers Trust Company of New York, having a strong case that it had been defrauded by Frei and Shapira, sought from the bank which had received the money (Discount Bank (Overseas) Ltd in Hatton Garden, London) information as to the accounts into

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which the money had been paid as part of a tracing action (including what money remained, what payments were made and to whom). The Court of Appeal held that "In order to enable justice to be done – in order to enable these funds to be traced – it is a very important part of the court's armoury to be able to order discovery." It went on to note that where disclosure was sought from a bank to trace funds the jurisdiction "must be carefully exercised" in light of the confidential relationship between the bank and its customer.

A Bankers Trust Order may be distinguished from the related Norwich Pharmacal Order in that it applies in a narrower set of cases, namely those where there is a clear prima facie case that: (i) the relevant funds held by, or passed through, the respondent belong to the claimant; (ii) the claimant has been fraudulently deprived of them; and (iii) the claimant can demonstrate a real prospect that the information sought might lead to the location or preservation of assets to which the claimant might make a proprietary claim (see Hashim (No.5) [1992] 2 All E.R. 911). The criteria for making a Banker's Trust Order can be found in Kryiakou v Christie's [2017] EWHC 487 (QB), ¶¶ 14 – 16.

Whichever order is made, it is common (especially in fraud cases) for confidentiality orders to be made alongside them, requiring the party subject to the order not inform others of the proceedings or contents of the order (save to obtain legal advice). It is also expected for the Claimant seeking the order to undertake to cover any expenses and loss.

LMN v Bitflyer Holdings Inc

In the recent decision of LMN v Bitflyer Holdings the High Court considered, for the first time the application of the new jurisdiction rules to information orders.

The facts were quite standard. The claimant was an English company that operated a cryptocurrency exchange. It suffered a hack in which millions of dollars of cryptocurrency were stolen. In seeking to identify where those assets now were, it sought information orders from other exchanges (the defendants) incorporated in the USA, Singapore, the Seychelles, Japan, and the Cayman Islands (all entities to which the Claimant had traced funds already).

A Bankers Trust order was sought for extensive information including: (1) The names of the account holders; (2) All know-your-customer information and documents for those accounts; and (3) All information and documents which might identify the holder including "bank account and payment card details, email addresses, residential addresses, phone numbers, bank statements, correspondence and documents provided on account opening or verification"

The claimant also sought an explanation for what had happened to the funds transferred to each of the exchanges and the same information as set out above in respect of any accounts into which onwards transfers were made.

The case is notable, not only because it provides a clear and thorough reasoning of the process by which such orders will be made, but also because of the willingness of the court, in the context of the new jurisdictional gateway, to look past previously expressed judicial concerns about making such orders against entities outside of the jurisdiction: namely that it constitutes an infringement of the sovereignty of a foreign jurisdiction, is an exorbitant jurisdiction, and should only be made in exceptional circumstances (see Mackinnon v Donaldson, Lufkin & Jenrette Corp and AB Bank, Off-shore Banking Unit v Abu Dhabi Commercial Bank PJSC.

The case is also of interest because the information orders were also made against "unknown" defendants (being all the relevant entities within the corporate structure of the defendants) to ensure that the information required was provided.

Considerations When Responding to These Orders

Parties in the United States (and elsewhere) who are served with such orders are advised to comply absent a clear argument against either the breadth of the order or the exercise of jurisdiction. Anecdotally, it appears that companies routinely complied with similar orders before the most recent revisions to the rules put the English court's jurisdiction to issue such orders beyond doubt. The reputational risk of not complying with English court orders generally has

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encouraged compliance.

However, an order will typically be made ex parte and often without notice. Therefore, while compliance is advised, it is sometimes the case that such orders are overly broad when first made and that parties can have considerable success in narrowing them by challenging them at a further hearing.

In Bitflyer, Coinbase (the fifth defendant) successfully narrowed the scope of the information required under the order, removed provisions for certain confidentiality and jurisdictional undertakings by subsidiaries, and obtained an order that the claimant may not bring a substantive claim against the parties from whom it is seeking the information (in this case the exchanges) without the permission of the court. These three alterations to the ex parte order were significant and valuable to Coinbase. A party faced with such an order should also seek a ruling that it is not required to do anything prohibited by local law.

The order may be challenged on jurisdictional grounds if there are good reasons to resist service out of the jurisdiction (for example because England and Wales is not the appropriate forum for either the order sought or the underlying substantive claim).

Conclusion
The introduction of the new jurisdictional gateway and its use in Bitflyer makes clear that these powerful tools for pre-action discovery from third parties are now fully available in England against US companies. US companies, who will be used to more restrictive exercises of jurisdiction for this type of discovery within the US, will now need to prepare to answer such orders from England and prepare to act fast in response to them (a return date on an ex parte order is listed fourteen days after the ex parte order is made).

The views expressed in this post are solely my own and not those of Holwell Shuster & Goldberg LLP or 4 Pump Court.

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The full article has also been published on the Transnational Litigation Blog.

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