Neutral Citation Number: [2022] EWCA Civ 1270

Case No: CA-2022-001544

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Jacobs
[2022] EWHC 1907 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/09/2022

Before:

LADY JUSTICE NICOLA DAVIES
LORD JUSTICE MALES
and
LORD JUSTICE LEWIS

- -

Between:

ALEXANDER GORBACHEV	**Respondent/ Claimant**
-and-	
ANDREY GRIGORYEVICH GURIEV	**Defendant**
- and –	
1)FORSTERS LLP	**Respondent**
2)T.U. REFLECTIONS LIMITED **3)FIRST LINK MANAGEMENT SERVICES LIMITED**	**Appellants**

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Sam O'Leary and Harry Stratton (instructed by **Enyo Law LLP**) for the **Appellants**
Paul Stanley KC and Mark Belshaw (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Claimant**
No Appearance for the **Defendant**
Thomas James (instructed by **Forsters LLP**) for **Forsters LLP**

Hearing date: 19 August 2022

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Approved Judgment

Lord Justice Males:

1. The principal issue on this appeal is whether an order for disclosure of documents can be made against a third party outside England and Wales pursuant to section 34 of the Senior Courts Act 1981 ("the SCA") and CPR 31.17. Mr Justice Jacobs held in this case that such an order can be made. In so holding he disagreed with the view taken earlier this year by Mrs Justice Cockerill in *Nix v Emerdata Ltd* [2022] EWHC 718 (Comm).

2. The claimant in this action is Mr Alexander Gorbachev. He wishes to obtain third party disclosure of documents held electronically by Forsters LLP, a firm of English solicitors, and has issued an application against Forsters pursuant to CPR 31.17. Forsters' position is that they hold the documents on behalf of the appellants, T.U. Reflections Ltd and First Link Management Services Ltd ("the Trustees"), that the Trustees were the only proper parties to the application under CPR 31.17, and that any order for disclosure should be made against them.

3. On 11th April 2022 HHJ Pelling QC granted permission to the claimant, pursuant to CPR PD 6B, to serve the application for third party disclosure on the Trustees, which are Cypriot companies, out of the jurisdiction. The claimant submitted that permission could be granted under "gateway" (20) in Practice Direction 6B. This provides for service out of the jurisdiction with permission where:

> "(20) A claim is made – (a) under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to in this paragraph."

4. The enactment on which the claimant relies is section 34(2) of the SCA which enables the court to make orders for third party disclosure.

5. Judge Pelling also granted permission for the application to be served by alternative means pursuant to CPR 6.15, namely by delivery to Forsters' office within the jurisdiction and by email to two addresses specified in his order. Service was effected by those means on 12th April 2022. The Trustees' application to set aside Judge Pelling's order came before Mr Justice Jacobs on 6th July 2022. In his judgment dated 20th July 2022 he held that: (1) the court has jurisdiction to permit service of an application for third party disclosure out of the jurisdiction pursuant to gateway (20) of Practice Direction 6B; (2) it was appropriate to exercise that discretion in view of the fact that the documents are within the jurisdiction even though the Trustees are not; and (3) it was appropriate to order service by alternative means in view of the outstanding application against Forsters and the imminence of the trial. Each of these conclusions is now challenged by the appellant Trustees.

The issues

6. Accordingly the issues on this appeal are as follows:

Jurisdiction

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

Mr Sam O'Leary for the Trustees submitted that the court has no such jurisdiction for two reasons. The first depends on the meaning of the terms "claim" and "proceedings" in gateway (20). Mr O'Leary submitted that an application for third-party disclosure is not a "claim" and does not constitute "proceedings". The second submission is that, applying the principle of territoriality whereby, unless the contrary intention appears, an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters, section 34 of the SCA does not allow proceedings to be brought against persons outside England and Wales.

Discretion

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

Alternative service

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

The factual background

7. The application for disclosure arises out of a dispute between the claimant and the defendant, Mr Andrey Guriev concerning their interests in a valuable fertiliser business based in Russia called PJSC PhosAgro. That dispute is currently listed for a six-week trial commencing in January 2023. One of the issues in the trial will be how and why Mr Gorbachev was financially supported between 2004 and 2012 through two Cyprus Trusts which were created for his benefit and which are alleged to have been operated by Mr Guriev's close associates.

8. From 2006 onwards, the Trustees were advised by a partner at Lawrence Graham LLP who has since joined Forsters. As a result, Forsters have possession in this jurisdiction of documents which, on the claimant's case, are likely to be relevant to those issues. The documents are held electronically. Although they may deal also with other matters, the documents held by Forsters include documents concerning transactions taking place in this jurisdiction for which the Trustees engaged Forsters to give advice.

9. In 2021 the claimant's solicitors ("CMS") wrote to Forsters seeking disclosure of relevant documents. Negotiations continued between CMS and Forsters, while Forsters reviewed the documents in its files within the jurisdiction in order to determine whether it would be possible to provide the requested disclosure with the agreement of the Trustees. However, no agreement was reached and in August 2021 Mr Gorbachev issued an application seeking third party disclosure from Forsters under CPR 31.17 and section 34 of the SCA.

10. This application was listed for hearing before Judge Pelling on 11th April 2022. One point taken by Forsters was that no order could be made against them, because they held the documents on behalf of their clients, the Trustees. At the start of the hearing,

Judge Pelling invited the claimant to consider joining the Trustees to the application. The claimant's primary position was that such joinder was unnecessary and that Forsters were the correct respondent. However, the joinder of the Trustees would avoid the need for argument on that point. Accordingly 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 and by alternative means. That application was granted and an application notice was issued on the same day. Service was effected on the next day, 12th April 2022.

11. The Trustees applied to set aside Judge Pelling's order and this application came before Mr Justice Jacobs on 6th July 2022. Accordingly Mr Justice Jacobs was only concerned, as are we, with the Trustees' jurisdictional objections. The claimant's principal argument, that the application can be made against Forsters without joinder of the Trustees, has yet to be determined. So too has the question whether, if Judge Pelling's order for service was rightly made, an order for third party disclosure should be made.

The legal framework

Section 34 of the Senior Courts Act

12. Section 34 of the SCA enables orders to be made on the application of a party to proceedings against a third party. It provides in its current form:

> "(2) On the application, in accordance with rules of court, of a party to any proceedings, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who is not a party to the proceedings and who appears to the court to be likely to have in his possession, custody or power any documents which are relevant to an issue arising out of the said claim—
>
> (a) to disclose whether those documents are in his possession, custody or power; and
>
> (b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order—
>
> (i) to the applicant's legal advisers; or
>
> (ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or
>
> (iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.
>
> (3) On the application, in accordance with rules of court, of a party to any proceedings, the High Court shall, in such circumstances as may be specified in the rules, have power to make an order providing for any one or more of the following matters, that is to say—

> (a) the inspection, photographing, preservation, custody and detention of property which is not the property of, or in the possession of, any party to the proceedings but which is the subject-matter of the proceedings or as to which any question arises in the proceedings;
>
> (b) the taking of samples of any such property as is mentioned in paragraph (a) and the carrying out of any experiment on or with any such property.
>
> (4) The preceding provisions of this section are without prejudice to the exercise by the High Court of any power to make orders which is exercisable apart from those provisions.
>
> (5) Subsections (2) and (3) apply in relation to the family court as they apply in relation to the High Court."

13. The preceding section of the 1981 Act, section 33, makes similar provision for pre-action inspection, etc, of property and for pre-action disclosure to be obtained from a person who is likely to be a party to subsequent proceedings. Again in its current form, this provides:

> "(1) On the application, in accordance with rules of court, the High Court shall, in such circumstances as may be specified in the rules, have power to make an order providing for any one or more of the following matters, that is to say—
>
> (a) the inspection, photographing, preservation, custody and detention of property which may become the subject-matter of subsequent proceedings in the High Court or as to which any question may arise in such proceedings;
>
> (b) the taking of samples of any such property as is mentioned in paragraph (a), and the carrying out of any experiment on or with any such property.
>
> (2) On the application, in accordance with rules of court, of a person who appears to the High Court to be likely to be a party to subsequent proceedings in that court, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who appears to the court to be likely to be a party to the proceedings and to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that claim—
>
> (a) to disclose whether those documents are in his possession, custody or power; and
>
> (b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order—

> (i) to the applicant's legal advisers; or
>
> (ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or
>
> (iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.
>
> (3) This section applies in relation to the family court as it applies in relation to the High Court."

14. These provisions were originally enacted in the Administration of Justice Act 1970 pursuant to recommendations made by the *Winn Committee on Personal Injuries Litigation*. As originally enacted, they applied only to proceedings where a claim was made in respect of personal injuries or death. That remained the position when these provisions were re-enacted in the SCA in 1981, but the limitation to claims for personal injuries or death was removed with effect from 26th April 1999 by the Civil Procedure (Modification of Enactments) Order 1998 (S.I. 1998/2940). In the case of pre-action disclosure, the removal of the limitation to claims for personal injuries or death was a recommendation by Lord Woolf in his *Final Report on Access to Justice*. There was no equivalent recommendation in respect of third party disclosure, but the two provisions had always been viewed as a package and, if the limitation to claims for personal injuries or death was to be removed in the case of pre-action disclosure, it was logical that it should no longer apply in the case of third party disclosure either.

CPR 31.17

15. Rules of court giving effect to these provisions are now contained in CPR 31.16 (pre-action disclosure) and CPR 31.17 (third party disclosure). CPR 31.17 provides:

> "(1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.
>
> (2) The application must be supported by evidence.
>
> (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.
>
> (4) An order under this rule must–
>
> (a) specify the documents or the classes of documents which the respondent must disclose; and
>
> (b) require the respondent, when making disclosure, to specify any of those documents–

(i) which are no longer in his control; or

(ii) in respect of which he claims a right or duty to withhold inspection.

(5) Such an order may–

(a) require the respondent to indicate what has happened to any documents which are no longer in his control; and

(b) specify the time and place for disclosure and inspection."

16. It is apparent from the terms of section 34 and CPR 31.17 that an order for third party disclosure need not be limited to disclosure of particular documents, but may require disclosure of classes of documents.

17. Inspection, etc, of property under sections 33(1) and 34(3) is dealt with in a separate rule, CPR 25.5.

Service out of the jurisdiction

18. An application for third party disclosure under CPR 31.17 must be made by an application notice under CPR 23 (see *Civil Procedure* (2022), Volume 1, paragraph 31.17.2) and must be served on the third party. Service of documents is governed by CPR 6, although that rule does not make specific provision for service of applications for third party disclosure. It is common ground, however, that in the case of a third party out of the jurisdiction, permission to serve the application out of the jurisdiction must be obtained and that the applicant for such permission must satisfy the same three requirements as an application for permission to serve a claim form out of the jurisdiction.

19. These requirements, adapted so as to apply to an application for third party disclosure, are that:

(1) there is a good arguable case that the application against the foreign respondent falls within one or more of the "gateways" set out in paragraph 3.1 of Practice Direction 6B;

(2) there is a serious issue to be tried on the merits of the claim for third party disclosure; and

(3) in all the circumstances (a) England is clearly or distinctly the appropriate forum for the trial of the application and (b) the court ought to exercise its jurisdiction to permit service of the application out of the jurisdiction.

Gateway (20)

20. As already indicated, the "gateway" on which the claimant relies is gateway (20), which applies where a claim is made under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to in paragraph 3.1. The approach which should be taken to an application under gateway (20) was considered by this court in *Orexim Trading Ltd v Mahavir Port*

&Terminal Pte Ltd [2018] EWCA Civ 1660, [2018] 1 WLR 4847, where the issue was whether the court had jurisdiction to order service out of the jurisdiction of an application to set aside a transaction under section 423 of the Insolvency Act 1986. In a judgment with which Lord Justices Gross and Leggatt agreed, Lord Justice Lewison traced the history of gateway (20) and held that it should be given a "neutral" construction. However, it was implicit that the enactment relied on must be one which allows proceedings to be brought against persons not within England and Wales:

> "33. I think it must be implicit in this paragraph that the enactment in question must allow proceedings to be brought against persons not within England and Wales, otherwise it would be of extraordinary width. But it is not easy to see any other limitation from the words of the paragraph itself. In construing the words of the paragraph it is also worth bearing in mind a change in judicial attitude towards the service of proceedings outside England and Wales. In days gone by the assertion of extra-territorial jurisdiction was described as 'exorbitant'. But following the globalisation (and digitalisation) of the world economy that attitude can now be seen as out of date. In *Abela v Baadarani* [2013] UKSC 44, [2013] 1 WLR 2043, for example, Lord Sumption (with whom the other justices agreed on this point) said at [53]:
>
> > 'This characterisation of the jurisdiction to allow service out is traditional, and was originally based on the notion that the service of proceedings abroad was an assertion of sovereign power over the defendant and a corresponding interference with the sovereignty of the state in which process was served. This is no longer a realistic view of the situation. … Litigation between residents of different states is a routine incident of modern commercial life. A jurisdiction similar to that exercised by the English court is now exercised by the courts of many other countries. … It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like 'exorbitant'. The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum.'
>
> 34. As he pointed out in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 WLR 192 at [31]:
>
> > 'The jurisdictional gateways and the discretion as to *forum conveniens* serve completely different purposes. The gateways identify relevant connections with England, which define the maximum extent of the jurisdiction which the English court is permitted to exercise. Their ambit is a question of law. The discretion as to *forum conveniens* authorises the court to decline a jurisdiction which it possesses as a matter of law, because the dispute, although sufficiently connected with England to permit the exercise of

> jurisdiction, could be more appropriately resolved elsewhere. The main determining factor in the exercise of the discretion on *forum conveniens* grounds is not the relationship between the cause of action and England but the practicalities of litigation. The purpose of the discretion is to limit the exercise of the court's jurisdiction, not to enlarge it and certainly not to displace the criteria in the gateways. English law has never in the past and does not now accept jurisdiction simply on the basis that the English courts are a convenient or appropriate forum if the subject matter has no relevant jurisdictional connection with England. In *Abela v Baadarani*, I protested against the importation of an artificial presumption against service out as being inherently 'exorbitant', into what ought to be a neutral question of construction or discretion. I had not proposed to substitute an alternative, and equally objectionable, presumption in favour of the widest possible interpretation of the gateways simply because jurisdiction thus conferred by law could be declined as a matter of discretion.'

> 35. The key point, for present purposes, is that the question of construction is a 'neutral' one. Untrammelled by authority, it seems to me that the natural construction of "gateway" 3(20)(a) is that if, as a matter of construction, the enactment in question allows proceedings to be brought against persons not within England and Wales, then the court has power to allow those proceedings to be served abroad. Whether it should exercise that power is a different question."

21. Thus, if an enactment allows proceedings to be brought against persons not within the jurisdiction, gateway (20) is potentially applicable and, in deciding whether it does apply, there is no justification for giving the gateway a narrow construction. However, the prior question remains: does the enactment, in this case section 34(2) of the SCA, allow proceedings to be brought against persons not within the jurisdiction? That is a question of statutory interpretation.

Statutory interpretation

22. The modern approach to statutory interpretation is that the court seeks to give effect to the purpose of the legislation, which must be derived from its language and context. Thus in *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687 Lord Bingham said at [8] that:

> "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

23. Similarly, in *Test Claimants in the FII Group Litigation v HMRC* [2020] UKSC 47, [2022] AC 1, Lord Reed and Lord Hodge said:

> "It is the duty of the court, in accordance with ordinary principles of statutory interpretation, to favour an interpretation of legislation which gives effect to its purpose rather than defeating it."

The principle of territoriality

24. One principle of statutory interpretation which is important in the present case is that legislation is generally not intended to have extra-territorial effect. This is known as the principle (or presumption) of territoriality or the presumption against extra-territoriality. It is a principle which has been firmly established for over 150 years, although the strength of the presumption varies depending on the context in which it falls for consideration (*Cox v Ergo Versicherung AG* [2014] UKSC 22, [2014] AC 1379 at [27]). I shall have to consider some of the relevant authorities later in this judgment, but for the moment it is sufficient to cite one well-known statement of the principle, by Lord Bingham in *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153:

> "11. In resisting the interpretation, upheld by the courts below, that the [Human Rights Act] has extra-territorial application, the Secretary of State places heavy reliance on what he describes as 'a general and well established principle of statutory construction'. This is (see *Bennion, Statutory Interpretation,* 4th ed (2002), p 282, section 106) that 'Unless the contrary intention appears, Parliament is taken to intend an Act to extend to each territory of the United Kingdom but not to any territory outside the United Kingdom'. In section 128 of the same work, p 306, the learned author adds: 'Unless the contrary intention appears … an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters'. In *Tomalin v S Pearson & Son Limited* [1909] 2 KB 61, Cozens-Hardy MR, with the concurrence of Fletcher Moulton and Farwell LJJ, endorsed a statement to similar effect in *Maxwell on The Interpretation of Statute* 4th ed (1905), pp 212-213:
>
> > 'In the absence of an intention clearly expressed or to be inferred either from its language, or from the object or subject-matter or history of the enactment, the presumption is that Parliament does not design its statutes to operate [on its subjects] beyond the territorial limits of the United Kingdom.'
>
> Earlier authority for that proposition was to be found in cases such as *Ex p Blain* (1879) 12 Ch D 522, 526, per James LJ, and *R v Jameson* [1896] 2 QB 425, 430, per Lord Russell of Killowen CJ. Later authority is plentiful: see, for example, *Attorney-General for Alberta v Huggard Assets*

> *Limited* [1953] AC 420, 441, per Lord Asquith of Bishopstone for the Privy Council; *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 145, per Lord Scarman; *Al Sabah v Grupo Torras SA* [2005] UKPC 1, [2005] 2 AC 333, para 13, per Lord Walker of Gestingthorpe for the Privy Council; *Lawson v Serco Limited* [2006] UKHL 3, [2006] ICR 250, para 6, per Lord Hoffmann; *Agassi v Robinson (Inspector of Taxes)* [2006] UKHL 23, [2006] 1 WLR 1380, paras 16, 20, per Lord Scott of Foscote and Lord Walker of Gestingthorpe. That there is such a presumption is not, I think, in doubt. It appears (per Lord Walker in *Al Sabah*, above) to have become stronger over the years."

Two first instance cases

25. It is convenient at this stage to consider the two first instance decisions before this case in which service out of the jurisdiction of applications for pre-action or third party disclosure was considered. The first case, *ED&F Man Capital Markets LLP v Obex Securities LLC* [2017] EWHC 2965, [2018] 1 WLR 1708, was a decision of Catherine Newman QC on an application for pre-action disclosure which was sought from a company and an individual in New York. The gateway relied upon was the predecessor to gateway (20) and the relevant enactment was section 33(2) of the SCA. The argument for the respondent to the application was that gateway (20) applies only where "a claim" is brought and that an application for pre-action disclosure is not a "claim"; and that an application for pre-action disclosure is not itself a form of "proceedings". This was, therefore, the same argument as the Trustees advance in this case, save that it was directed to pre-action disclosure governed by section 33 of the SCA and CPR 31.16, rather than third party disclosure governed by section 34 and CPR 31.17. In view of the common origin and similar language of these two provisions, however, it would be surprising if a different answer were to be given in the two cases.

26. Ms Newman rejected the argument, holding that the word "claim" included applications made before action, and that an application for pre-action disclosure is itself a freestanding set of proceedings despite the fact that it is begun by application notice rather than claim form. These being the only reasons advanced for saying that the court did not have jurisdiction to permit service out of the jurisdiction, Ms Newman held that the court did have such jurisdiction and should exercise that jurisdiction.

27. It is to be noted that there was no issue raised in *Obex* whether section 33(2) of the SCA was an enactment which allowed proceedings to be brought against a respondent not within the jurisdiction of the court. Accordingly the principle of territoriality was not considered at all.

28. The second case, *Nix v Emerdata Ltd*, was an application for third party disclosure against a respondent situated in New York where, it seems likely, its documents were located. The application was initially refused by Mrs Justice Cockerill on paper. She ruled as follows:

> "The Court has no jurisdiction to make orders against third parties who are resident outside the jurisdiction. The appropriate route for obtaining evidence from a witness outside the jurisdiction is either via a letter of request or via any jurisdiction in which the local court may offer to grant disclosure in support of proceedings in this jurisdiction."

29. The applicant then renewed the application at an oral hearing which the third party respondent (which had not been served) did not attend. The argument advanced at that hearing was that service out of the jurisdiction of an application against a third party was expressly contemplated by CPR 6.39(2), which provision must refer to an application for third party disclosure as it would otherwise have no function. Mrs Justice Cockerill rejected that argument, which has not been advanced in this case, pointing out a number of other circumstances in which CPR 6.39(2) might apply. It is apparent from her brief *extempore* judgment that her view that the court has no jurisdiction to make orders for disclosure against third parties resident outside the jurisdiction was largely because of the principle of territoriality. However, she also doubted the view of Ms Newman in *Obex* that an application for pre-action or third party disclosure qualified as "proceedings" within the meaning of gateway (20).

30. Mrs Justice Cockerill added at [23] that, even if there had been jurisdiction to order service out, she would not have exercised that jurisdiction "in circumstances where, for example, one is plainly trespassing on the letter of request regime":

> "27. This application is in essence (and acknowledged to be) a way around the letter of request regime. The letter of request regime is the proper, courteous, respectful method of obtaining evidence within a foreign jurisdiction from a foreign party. It is a very sensitive topic in many jurisdictions; one can see this in relation to disclosure via the many, many reservations to disclosure which are appended to the Hague Convention. Many countries take a still more cautious line as to disclosure generally and third-party disclosure in particular than this jurisdiction does. In those circumstances it would be invidious for this court to attempt to impose its standards on a third party based in another jurisdiction by an assertion of direct jurisdiction over them."

Gateway (20) – "claim" and "proceedings"

31. Mr O'Leary's submission was that the word "claim" in paragraph 3.1 of Practice Direction 6B refers to a claim to enforce a substantive as distinct from a procedural right; and that the term "proceedings" in gateway (20) refers to "claims or similar matters which are essentially freestanding", as distinct from applications (such as an application for third party disclosure) within such proceedings. He acknowledged that an application for pre-action disclosure would be a claim, but submitted that an application for pre-action disclosure was significantly different from an application for third party disclosure.

32. Mr Justice Jacobs dealt with these submissions in considerable detail. He pointed out that there are circumstances in which proceedings in court may be originated by an application and that the definition of the term "claim" in CPR 6.2 is a broad one:

> "'claim' includes petitions and any application made before action or to commence proceedings and 'claim form', 'claimant' and 'defendant' are to be construed accordingly."

Claim

33. In the light of this definition, Mr Justice Jacobs held that an application for third party disclosure is a "claim" for the purpose of gateway (20). His reasoning at [60] to [64] was, in summary, as follows:

(1) The word "claim" is broadly defined in CPR 6.2, the definition being non-exhaustive. There is, therefore, no reason to give the word a narrow meaning which excludes an application under CPR 31.17. Such an application involves the applicant seeking to invoke the court's jurisdiction, against another person, for an order that that person should provide disclosure.

(2) The definition of "claim" includes any application made before action, including an application notice issued for pre-action disclosure, pursuant to section 33 of the SCA and CPR 31.16, against a person who is not yet a party to proceedings. The decision in *Obex* on this point was correct.

(3) There is no good reason why an application for pre-action disclosure under section 33 and CPR 31.16 would be a "claim", but an application for third party disclosure under section 34 and CPR 31.17 would not. In both cases the applicant is seeking disclosure from a respondent who is not a party to existing proceedings.

(4) It is clear from CPR 6.39 that where an application notice is issued against a third party, permission can be obtained to serve the application notice out of the jurisdiction. That provision applies generally to application notices against third parties. Generally speaking, a party who issues an application notice against a third party will not be seeking to advance a substantive cause of action against the third party, as in the examples given by Mrs Justice Cockerill in *Nix v Emerdata Ltd* at [14]. It follows that CPR 6.39 applies to applications which can be described as being of a procedural rather than substantive character, including (as the definition in CPR 6.2 contemplates) an application made before action. Nevertheless, CPR 6.39 provides implicitly that the rules for service out of the jurisdiction apply to the application against the third party. Those rules include the list of gateways in paragraph 3.1 of Practice Direction 6B, nearly all of which begin with the words "a claim is made". It follows that CPR Part 6, and in particular CPR 6.39, contemplate that a "claim" of a procedural character is nevertheless within its scope.

34. I respectfully agree. The term "claim" in paragraph 3.1 of Practice Direction 6B is not used in any restrictive or technical sense. It includes both an application for pre-action disclosure and an application for third party disclosure.

Proceedings

35. Mr Justice Jacobs considered the question whether an application for third party disclosure constitutes "proceedings" at [65] to [86] of his judgment. His reasons for holding that it did included the following:

(1) "Proceedings" in gateway (20) must be given a neutral construction, in accordance with the decision of this court in *Orexim*. The concepts of "claim" and "proceedings" are closely linked, "proceedings" being the court process by which a "claim" is resolved. Just as the term "claim" is defined broadly to include an application of a procedural character, so too should the term "proceedings" be broadly defined. Focusing on the position as between the applicant and the third party from whom disclosure is sought, the application notice is the originating process which commences proceedings. Once it is served, the third party must respond to the application. In so doing the third party is engaged in court proceedings to determine whether disclosure should be ordered. It is not concerned with the claimant's substantive claim against the defendant.

(2) The decision in *Obex*, holding that an application for pre-action disclosure constituted proceedings, is correct on this point also. While this does not necessarily mean that the same approach should be taken to third party disclosure, applications under CPR 31.16 and CPR 31.17 have considerable similarities, in that in both situations an application is being made for disclosure against a person who is not a party to existing proceedings. In both cases the effect of the application notice is to originate proceedings against that person.

(3) The criticisms of *Obex* in *Hollander, Documentary Evidence* 14th ed (2021), para 1-10 are mistaken. An application under CPR 31.17, pursuant to section 34 of the SCA, can properly be regarded as the commencement of proceedings against the third party. Prior to the application, the third party is not concerned with any court proceedings. As far as the third party is concerned, the application notice is the first step in the process of commencing proceedings against him, even though those proceedings are of a limited nature.

(4) The three cases relied on by the Trustees, *GFN SA v Bancredit Cayman Ltd* [2009] UKPC 39, [2010] Bus LR 587, *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647, [2012] 1 WLR 920 and *Nix v Emerdata Ltd*, do not assist them. The first two were dealing with different statutory provisions, while the argument in *Nix v Emerdata Ltd*, focused as it was on CPR 6.39, had been very different from the argument in the present case.

36. Once again, I respectfully agree with the conclusion of Mr Justice Jacobs on this issue. An application for third-party disclosure constitutes "proceedings" for the purpose of gateway (20). That gives the term "proceedings", in my view, a neutral and common sense meaning.

Conclusion on gateway (20)

37. I have dealt with this issue of "claim" and "proceedings" relatively briefly, because the submissions addressed to us appear to have been the same as those addressed to

Mr Justice Jacobs and his judgment deals with them comprehensively. No useful purpose would be served by my attempting to elaborate further on what is, after all, the natural meaning of two ordinary words in the English language.

The principle of territoriality

38. I deal next with the question whether section 34 of the SCA is an enactment which allows proceedings to be brought against a party out of the jurisdiction. That depends on the application of the principle of territoriality.

The judgment below

39. Mr Justice Jacobs acknowledged that there is a presumption in domestic law that legislation is generally not intended to have extra-territorial effect, and that the question is ultimately who is "within the legislative grasp, or intendment" of the relevant statutory provision, citing *Masri v Consolidated Contractors International (UK) Ltd (No. 4)* [2008] UKHL 43, [2010] 1 AC 90 at [10]. This phrase originated with Lord Wilberforce in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130 at page 152C and has often been cited in other cases. Mr Justice Jacobs said that there is nothing in section 34 of the SCA which expressly or impliedly provides that an application under that section can only be brought against persons in England and Wales; and that it is significant that the section operates in conjunction with rules of court, for three reasons. First, that means that an application for third party disclosure against a person out of the jurisdiction would involve the exercise of judicial discretion, not only when the initial application is made but also in the context of any application to set aside an order for service out. Second, the rule-making power, initially in section 84 of the SCA and now in section 2 of the Civil Procedure Act 1997, is very broad and extends to the making of rules applicable to persons outside the jurisdiction. Third, the decision in *Masri* supports the conclusion that section 34 can apply to persons outside the jurisdiction. For these reasons, the judge held that there is no reason why section 34 should be construed as confined to persons in England and Wales and every reason why it should not be so confined.

The parties' submissions

40. In summary the parties' submissions on this aspect of the appeal were as follows.

41. For the Trustees Mr O'Leary submitted that the effect of the judge's conclusion was to give the English court "a long-arm jurisdiction to make disclosure orders against persons anywhere in the world without going through the Hague Evidence Convention process" (a reference to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters concluded on 18th March 1970). The judge's reasoning reversed the presumption against extra-territoriality: instead of saying that there was nothing in section 34 which expressly or impliedly provided that an application could only be brought against persons in England and Wales, the judge should have applied the presumption unless there was a clear reason not to do so. However, the reasons which the judge gave for his conclusion were insufficient:

    (1) In accordance with the presumption, the authorities have consistently construed apparently broad and unconstrained powers to compel the production of documents as limited to persons within the jurisdiction.

(2) The existence of a judicial discretion is not a sufficient reason to depart from this approach. Without a hard edged jurisdictional rule, foreign witnesses would have to appear in the English courts to contest the exercise of jurisdiction over them and, even if successful, would have been dragged before the English courts without good reason and potentially at considerable expense.

(3) Further, the existence of a wide rule-making power does not assist. The Rules Committee's powers depend on the extra-territoriality of the underlying statute (in this case section 34 of the SCA) as held in *Orexim*. In any event, even if the statute authorised the Rules Committee to make provision for third party disclosure to be given by persons outside the jurisdiction, there is nothing in CPR 31.17, to which the principle of territoriality also applies, to suggest that it had done so.

42. Instead, Mr O'Leary submitted that the correct approach would have been as follows:

(1) As there is no express wording in section 34 that it is intended to apply to persons outside the jurisdiction; the question is whether that is implicit.

(2) The starting point in considering that question is the presumption against extra-territoriality.

(3) An order requiring a person to disclose documents is a sovereign act which encroaches on the sovereignty of the state where that person is located, and is therefore unlikely to be intended in the absence of clear words.

(4) It is contrary to the principle of comity to order disclosure to be given by a person outside the jurisdiction in circumstances where the English court would not make such an order in support of foreign litigation.

(5) There is a well established procedure, now governed by the Hague Evidence Convention, for obtaining evidence and documents from persons outside the jurisdiction; it would therefore be surprising if Parliament had intended to create a parallel process, circumventing the letter of request procedure.

(6) It is also an important factor that an order for production of documents is enforceable by committal for contempt of court; but there is no practical procedure for enforcing such an order against a witness out of the jurisdiction, and in any event it would be contrary to comity to do so.

43. Mr Paul Stanley QC[1] for the claimant supported the judge's reasoning. He accepted that in many and perhaps most cases it would not be appropriate to make an order for disclosure against a third party out of the jurisdiction as a matter of discretion and that such disclosure should be obtained, if at all, by means of a letter of request. Nevertheless, he submitted that the court has jurisdiction to make such an order. The presumption against extra-territoriality is merely that Parliament will not seek to intervene in matters that are *legitimately* the concern of another country. In modern times proceedings against persons outside the jurisdiction are routinely authorised and should no longer be regarded as "exorbitant". In the case of an order for third party disclosure, the existence of judicial discretion provides a sufficient safeguard against

[1] Now KC, but QC when he made the submission.

illegitimate intervention. Moreover, the principle of territoriality, 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.

44. Accordingly Mr Stanley submitted that, as a matter of jurisdiction, the power of the High Court in section 34 of the SCA "to order a person who is not a party to the proceedings" to give disclosure extends to any person, wherever in the world that person is to be found.

The authorities

45. In considering the authorities dealing with the territoriality principle, it is of course necessary to bear in mind that even broad statements of principle at appellate level must be understood in the context of the issues arising in the particular case.

46. I have already set out Lord Bingham's endorsement in *Al-Skeini* at [11] of the principle stated in *Bennion* that, "Unless the contrary intention appears … an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons or matters".

47. In the same case Lord Rodger of Earlsferry said:

> "44. So far as the application of statutes is concerned, there is a general rule that legislation does not apply to persons and matters outside the territory to which it extends: *Bennion, Statutory Interpretation*, p 306. But the cases show that the concept of the territoriality of legislation is quite subtle – 'slippery' is how Lord Nicholls of Birkenhead described it in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, 545, para 32.
>
> 45. Behind the various rules of construction, a number of different policies can be seen at work. For example, every statute is interpreted, 'so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law': *Maxwell on The Interpretation of Statutes*,12th edition (1969), p 183. It would usually be both objectionable in terms of international comity and futile in practice for Parliament to assert its authority over the subjects of another sovereign who are not within the United Kingdom. So, in the absence of any indication to the contrary, a court will interpret legislation as not being intended to affect such people. They do not fall within 'the legislative grasp, or intendment,' of Parliament's legislation, to use Lord Wilberforce's expression in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 152C-D. In *Ex p Blain* (1879) 12 Ch D 522 the question was whether the court had jurisdiction, by virtue of the Bankruptcy Act 1869, to make an adjudication of bankruptcy against a foreigner, domiciled and resident abroad, who had never been in England. James LJ said, at p 526:

> 'But, if a foreigner remains abroad, if he has never come into this country at all, it seems to me impossible to imagine that the English legislature could have ever intended to make such a man subject to particular English legislation.'
>
> On this general approach, for instance, there can be no doubt that, despite the lack of any qualifying words, section 6(1) of the [Human Rights Act] 1998 applies only to United Kingdom public authorities and not to the public authorities of any other state."

48. Lord Rodger went on to say that different considerations might apply to British citizens, where it might more readily be concluded that legislation was intended to apply to them when travelling or residing abroad.

49. The principle, therefore, is that legislation does not generally apply to persons and matters outside the jurisdiction. But Parliament may and sometimes does provide in express terms that legislation is to apply to persons anywhere in the world. Equally, it may appear by necessary implication from the language, or from the object or subject matter or history of the enactment, that it is intended to have such application.

50. While the concept of a person within the territory is relatively straightforward, the *Bennion* formulation does not explain what is meant by a "matter" within or outside the jurisdiction. It leaves open the possibility, however, that although a person may be outside the jurisdiction, the relevant matter with which the court is concerned may properly be regarded as within the jurisdiction. In such a case, it seems to me that any presumption against extra-territoriality has less force than would otherwise be the case. That illustrates, perhaps, what Lord Nicholls meant in *Quark* by the "slipperiness" of the territoriality principle, and shows that the extent to which legislation affecting persons outside the jurisdiction is contrary to international comity will depend on the circumstances.

51. The passages from *Al-Skeini* cited above were also cited by Lord Lloyd-Jones giving the judgment of the Supreme Court in *R (KBR) Inc v Director of the Serious Fraud Office* [2021] UKSC 2, [2022] AC 519 at [21]. He described Lord Bingham's statement as "a particularly clear statement of this principle". Lord Lloyd-Jones explained that the rationale of the principle is that one state should not infringe the sovereignty of another state in breach of the rules of international law, but that even where there would be no breach of international law, the comity of nations may require restraint as a matter of mutual respect between states:

> "24. The presumption reflects, in part, the requirements of international law that one state should not by the claim or exercise of jurisdiction infringe the sovereignty of another state in breach of rules of international law. Thus, for example, legislation requiring conduct in a foreign state which would be in breach of the laws of that state or otherwise inconsistent with the sovereign right of that state to regulate activities within its territory may well be a breach of international law. There is clearly a compelling rationale for the presumption in such cases. However, the rationale and resulting scope of the

> presumption are wider than this. They are also rooted in the concept of comity. The term 'comity' is used here to describe something less than a rule of international law. Judge Crawford explains that certain usages are carried on out of courtesy or comity and are not articulated or claimed as legal requirements. 'International comity is a species of accommodation: it involves neighbourliness, mutual respect, and the friendly waiver of technicalities.' (Crawford, *Brownlie's Principles of Public International Law*, 9th ed (2019), p 21. See also F A Mann, *Foreign Affairs in English Courts*, (1986), p 134.) In the particular context of claims to extra-territorial jurisdiction Crawford observes (at p 468):
>
> > 'Comity arises from the horizontal arrangement of state jurisdictions in private international law and the field's lack of a hierarchical system of norms. It plays the role of a somewhat uncertain umpire: as a concept, it is far from a binding norm, but it is more than mere courtesy exercised between state courts. The Supreme Court of Canada said in *Morguard v De Savoye* [1990] 3 SCR 1077, 1096 citing the US Supreme Court in *Hilton v Guyot* 159 US 113, 164 (1895) that:
> >
> > > "Comity is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its law".'
>
> 25. The lack of precisely defined rules in international law as to the limits of legislative jurisdiction makes resort to the principle of comity as a basis of the presumption applied by courts in this jurisdiction all the more important. As a result, the presumption in domestic law is more extensive and reflects the usages of states acting out of mutual respect and, no doubt, the expectation of reciprocal advantage. Accordingly, it is not necessary, in invoking the presumption, to demonstrate that the extra-territorial application of the legislation in issue would infringe the sovereignty of another state in violation of international law."

52. It follows from this explanation that in some contexts it will not be contrary to international law, and will not indicate a failure of mutual respect between states, for a state to legislate with extra-territorial effect. An example, given by Lord Rodger in *Al-Skeini* at [46] and by Lord Lloyd-Jones in *KBR* at [23], is that a state may have a legitimate interest in legislating in respect of the conduct of its own nationals abroad. In such cases, as Lord Lloyd-Jones put it, "the strength of the presumption against extra-territorial application of legislation will be considerably diminished and it may not apply at all."

53. This accords with the explanation by Lord Bridge in *Holmes v Bangladesh Biman Corporation* [1989] AC 1112 at pages 1126F-1127B that the principle of territoriality is concerned with the *illegitimate* usurpation of authority over foreign nationals:

> "At the heart of the issue lies a principle embodied in a line of authority which I shall have to examine and which certainly establishes a presumption limiting the scope which should be given to general words in a United Kingdom statute in their application to the persons, property, rights and liabilities of the subjects of other sovereign states who do not come within the jurisdiction of the United Kingdom Parliament. This presumption is often described, and has been referred to throughout the argument of this case at all levels, as 'the presumption against extraterritorial legislation'. This may be a convenient shorthand expression, but if it is understood as accurately and comprehensively expressing the principle involved it is potentially misleading. I cannot help thinking that it has led to some confusion of thought in discussion of the issue arising in this appeal. In one sense all legislation enacted in the United Kingdom to give effect to international conventions, long familiar in the field of maritime law, is extraterritorial in effect. But it would be absurd to suggest that in legislating to embody the terms of such internationally agreed conventions in our municipal law, Parliament is in any sense usurping an illegitimate authority over the subjects of foreign states. But it is precisely such illegitimate usurpation which Parliament is presumed not to intend and it is against such usurpation that the so-called presumption against extraterritorial legislation is directed."

54. Thus the relevant question in that case was whether the legislation in question, concerned with carriage by air not within the scope of any international convention, was "not simply whether such legislation may take effect in relation to extraterritorial carriage by air, but whether it is subject to any limitation arising from the presumption that Parliament is not to be taken, by the use of general words, to legislate in the affairs of foreign nationals who do nothing to bring themselves within its jurisdiction". Implicitly, therefore, legislation which affects foreign nationals who have done something to render themselves subject to the jurisdiction of the United Kingdom does not, or at least may not, infringe the principle of territoriality. Such legislation does not amount to the usurpation of an illegitimate authority over such foreign nationals.

55. The same distinction between legislation which amounts to an illegitimate usurpation of the authority of a foreign state and legislation which is no more than a legitimate intervention appears from Lord Justice Lewison's judgment in *Orexim*:

> "22. The general principle of international law is that each sovereign state makes laws which apply to its own territory and to no other. One legislature does not have power to make laws for a territory outside its jurisdiction in such a way that what it enacts becomes the law of that external territory. … There is,

> therefore, a presumption that Parliament will not seek to intervene in matters that are legitimately the concern of another country. Countries respect one another's sovereignty and the right of each country to legislate for matters within their own boundaries. However, a legislature does have power to make legislation that attaches significance to matters occurring outside the territory for which it is law. This is, in broad terms, what we mean by the principle of territoriality."

Evidence and documents

56. One area which has proved particularly sensitive has been attempts by one state to compel evidence or disclosure of documents from persons beyond the jurisdiction of that state. Where a witness is within the jurisdiction, their attendance at trial can be compelled, and their documents can be obtained, by means of a subpoena, requiring them either to testify at the trial or to produce documents. But a subpoena cannot be issued against a witness out of the jurisdiction (although section 36 of the SCA enables a subpoena to be issued against a witness in Scotland or Northern Ireland). The issue of a subpoena, involving as it does the exercise of compulsory state power, was described by Mr Justice Hoffmann in *Mackinnon v Donaldson, Lufkin & Jenrette Securities Corporation* [1986] 1 Ch 482 at page 494 as "an exercise of sovereign authority to require citizens and foreigners within the jurisdiction to assist in the administration of justice".

57. In the same case Mr Justice Hoffmann referred at page 494A to objections by the United Kingdom to orders made by foreign courts, in particular United States courts, requiring British companies to produce "documents situated outside the United States and concerned with transactions taking place abroad". Those objections were given statutory recognition in section 2 of the Protection of Trading Interest Act, which provides:

> "(1) If it appears to the Secretary of State—
>
> > (a) that a requirement has been or may be imposed on a person or persons in the United Kingdom to produce to any court, tribunal or authority of an overseas country any commercial document which is not within the territorial jurisdiction of that country or to furnish any commercial information to any such court, tribunal or authority; or
> >
> > (b) that any such authority has imposed or may impose a requirement on a person or persons in the United Kingdom to publish any such document or information,
>
> the Secretary of State may, if it appears to him that the requirement is inadmissible by virtue of subsection (2) or (3) below, give directions for prohibiting compliance with the requirement.
>
> (2) A requirement such as is mentioned in subsection (1)(a) or (b) above is inadmissible—

> (a) if it infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom; or
>
> (b) if compliance with the requirement would be prejudicial to the security of the United Kingdom or to the relations of the government of the United Kingdom with the government of any other country.
>
> (3) A requirement such as is mentioned in subsection (1)(a) above is also inadmissible—
>
> (a) if it is made otherwise than for the purposes of civil or criminal proceedings which have been instituted in the overseas country; or
>
> (b) if it requires a person to state what documents relevant to any such proceedings are or have been in his possession, custody or power or to produce for the purposes of any such proceedings any documents other than particular documents specified in the requirement. …"

58. As Mr Stanley submitted, the critical concern here is the location of the documents in question. Neither the 1980 Act nor the objections to which Mr Justice Hoffmann referred were directed to documents held in the United States, even by a British company. Indeed, Mr Justice Hoffmann stated the applicable principle as being that "a state should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction". Their conduct within the jurisdiction, however, is another matter.

59. The long standing practice of states has been to deal with the problem of evidence and documents outside their jurisdiction by means of letters of request whereby a court in which proceedings are taking place will request a court in the jurisdiction where a witness is located to require the witness to answer questions or to produce documents. That was described by Mrs Justice Cockerill in *Nix v Emerdata Ltd* at [27] as "the proper, courteous, respectful method of obtaining evidence within a foreign jurisdiction from a foreign party [which] is a very sensitive topic in many jurisdictions". The procedure is now governed by the Hague Evidence Convention and, for incoming requests, by the Evidence (Proceedings in Other Jurisdictions) Act 1975.

60. The 1975 Act contains safeguards to limit the disclosure which may be required, for example that a person shall not be required to state what documents relevant to the foreign proceedings are or have been in his possession, custody or power or to produce any documents other than particular documents specified in the order (section 1(4)); or to give evidence which would be prejudicial to national security (section 3(3)).

61. Other parties to the Hague Evidence Convention, including Cyprus, have made similar declarations limiting the scope of disclosure which they will permit pursuant

to a letter of request. Such declarations are expressly permitted by Article 23 of the Convention:

> "A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."

62. Just as the English courts will not give effect to incoming requests which do not respect these limits, they will not make outgoing requests of foreign courts which would have that effect. As Lord Justice Wilson put it in *Charman v Charman* [2005] EWCA Civ 1606, [2006] 1 WLR 1053 at [29], following the decision of Sir Donald Nicholls V-C in *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] Ch 142 at page 152:

> "It would be unconscionable for the English court to make an outgoing request in circumstances in which, had it been incoming, it would not give effect to it; nor could the foreign court reasonably be expected to give effect to the English court's request in such circumstances. 'Do unto others as you would be done by', as Lord Denning MR reminded us, in this context albeit obiter, in *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation* [1978] A.C. 547 at 560H."

63. It is notable, therefore, that the letter of request procedure is distinctly narrower than the procedure for third party disclosure pursuant to section 34 of the SCA and CPR 31.17. The letter of request procedure does not extend to requiring a person to state what documents are or have been in his possession, custody or power and is limited to disclosure of particular specified documents. This is a matter of express statutory provision in the case of incoming requests and of necessary restraint in the case of outgoing requests. In contrast, section 34 of the SCA and CPR 31.17 expressly permit an order to be made requiring a person to state what documents are or have been in his possession, custody or power and permit also an order for disclosure of classes of documents. This is effectively the "pre-trial discovery of documents as known in Common Law countries" referred to in Article 23 of the Hague Evidence Convention.

Orders for production of documents abroad

64. Against this background I consider next five cases in which the principle of territoriality has been applied to legislation empowering the court to order a person to give evidence or to produce documents.

65. In *Mackinnon v Donaldson, Lufkin & Jenrette Securities Corporation* the claimant sought an order under section 7 of the Bankers' Books Evidence Act 1878 (which enables a court to order inspection "of any entries in a banker's book" for the purpose of legal proceedings) requiring an American bank with a branch in London to produce books and papers held at its head office in New York. Because the bank could be served at its London branch, there was no issue about the English court's jurisdiction over the bank. Mr Justice Hoffmann noted that, if there had been no London branch, the only ways in which an order could have been obtained for the production of such documents would have been by way of a letter of request to the courts of New York

or by direct application to the New York courts themselves. (The case was decided before the amendment of SCA section 34 removing the limitation to personal injury cases: therefore the issue we have to decide could not arise). He held at page 493 that, although the English court had personal jurisdiction over the bank, it did not have subject matter jurisdiction:

> "The content of the subpoena and order is to require the production by a non-party of documents outside the jurisdiction concerning business which it has transacted outside the jurisdiction. In principle and 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."

66. Mr Justice Hoffmann went on to explain that the order for production of documents taking effect in New York was an infringement of the sovereignty of the United States and that it was necessary for the English court to exercise its jurisdiction with due regard to the sovereignty of other nations. He accepted at page 496 the bank's submission that "as between states which are party to the Hague Convention or similar bilateral treaties, evidence should ordinarily be obtained only by the methods prescribed or permitted in the convention".

67. Turning to the question whether this was an exceptional case so as to justify an order for production of documents in New York, Mr Justice Hoffmann held at page 499 that "it would be wrong to undertake a process of weighing the interests of this country in the administration of justice and the interests of litigants before its courts against those of the United States". He continued:

> "It is likewise inappropriate to decide the matter on a balance of convenience between the plaintiff and the bank. It seems to me that in a case like this, where alternative legitimate procedures are available, an infringement of sovereignty can seldom be justified except perhaps on the grounds of urgent necessity relied upon by Templeman J in *London and County Securities Limited v Caplan* (unreported)."

68. It is fair to say that the principle of territoriality appears to have been applied in this case, not as a principle of statutory interpretation affecting the scope of section 7 of the Bankers' Books Evidence Act, but rather as a powerful and ultimately decisive factor going to the court's discretion. There is, perhaps, some tension between saying on the one hand that the court did not have subject matter jurisdiction and, on the other hand, that production of documents abroad could be ordered in an exceptional case (a court either has jurisdiction or it does not), but the overall thrust of the judgment is clear. It is clear also that the availability of the letter of request procedure and the need to avoid circumventing the methods for obtaining documents prescribed or permitted in the Hague Evidence Convention were important considerations.

69. In *In re Tucker* [1990] Ch 148 applications were made under section 25 of the Bankruptcy Act 1914 against a British subject resident in Belgium. Section 25(1)

enabled the court to summon any person capable of giving information respecting the debtor, his dealings or property to give evidence or produce documents, while section 25(6) enabled the court to order any person who, if in England, would be liable to be brought before it under the section to be examined in Scotland, Ireland, or any other place out of England.

70. It was held, however, that the section did not assert jurisdiction over persons resident abroad. After citing statements of the principle of territoriality in *Ex parte Blain* (1879) 12 Ch D 522 and *Clark v Oceanic Contractors Inc* [1983] 2 AC 130 Lord Justice Dillon (with whom Sir Nicolas Browne-Wilkinson V-C and Lord Justice Lloyd agreed) continued at page 158:

> "I look, therefore, to see what section 25(1) is about, and I see that it is about summoning people to appear before an English court to be examined on oath. I note that the general practice in international law is that the courts of a country only have power to summon before them persons who accept service or are present within the territory of that country when served with the appropriate process. There are exceptions under R.S.C. Order 11, but even under those rules no general power has been conferred to serve process on British subjects resident abroad. Moreover, the English court has never had any general plan to serve a *subpoena ad testificandum* or *subpoena duces tecum* out of the jurisdiction on a British subject resident outside the United Kingdom, so as to compel him to come and give evidence in an English court. Against this background I would not expect section 25(1) to have empowered the English court to haul before it persons who could not be served with the necessary summons within the jurisdiction of the English court.
>
> I then find that an alternative procedure is provided by orders in aid under section 122 which could be used to secure the examination of persons resident in Scotland or Ireland or within the jurisdiction of other British courts before the bankruptcy courts of those countries. This procedure, while taking advantage of the jurisdictions of those other courts, also respects those jurisdictions."

71. Turning to section 25(6), Lord Justice Dillon referred to the "established procedures" for obtaining evidence from witnesses abroad by the issue of a letter of request or by obtaining evidence on commission. He continued:

> "On the fundamental points, however, which Wright J had in mind and which led him to the conclusion which he put on construction of the subsection, I have no doubt that Parliament did not intend to confer on the bankruptcy court any jurisdiction which could be exercised in breach of the established criteria of international law with regard to comity. I have no doubt also that the question whether any person ordered to attend for examination abroad could be compelled to come up for examination or could be punished if he refused to

> come, or came and would not answer, are highly material to the making of any order."

72. Four points of significance may be noted. First, the effect of the principle of territoriality was to limit the scope of the section as a matter of jurisdiction, and not merely to guide (or even constrain) the exercise of the court's discretion. Second, the background was the absence of any power to issue a subpoena to a person abroad to give evidence or produce documents in English proceedings: this meant that it was unlikely to have been Parliament's intention to create such a power by general words. Third, the availability of an alternative route to obtain such evidence or documents in the foreign court where the person was to be found militated against the implication of such a power. Fourth, the difficulty of enforcing any order was also a material factor telling against any such implication.

73. In contrast, the decision of this court in *In re Seagull Manufacturing Co Ltd* [1993] Ch 345 was that section 133 of the Insolvency Act 1986, authorising the public examination of an officer of an insolvent company, a liquidator, administrator, receiver or manager, or a person concerned in the promotion, formation or management of the company, did enable an order to be made against a former director living in the Channel Islands.

74. The issue in *Masri v Consolidated Contractors International (UK) Ltd (No. 4)* [2008] UKHL 43, [2010] 1 AC 90 was whether an order could be made under CPR 71.2 for the examination of an officer of a judgment debtor company who was resident and domiciled out of the jurisdiction. Giving the only reasoned speech, Lord Mance cited the principle of territoriality as stated in *Bennion, Statutory Interpretation*, 4th ed (2002) as approved by the House of Lords in *Al-Skeini* and Lord Wilberforce's statement in *Clark v Oceanic Contractors Inc* that the question whether an enactment applies in relation to foreigners outside the jurisdiction depends upon who is "within the legislative grasp, or intendment" of the relevant provision. He noted that where the court's power to issue a subpoena was plainly limited by section 36 of the SCA to witnesses within the United Kingdom, even a wide rule-making power would not enable a rule to be made permitting the issue of a subpoena to a witness outside the United Kingdom.

75. However, where no such "statutory constraint" applied, the terms of the rule-making power in section 1 of the Civil Procedure Act 1997 were sufficiently broad to permit the making of rules by which the English court would exercise jurisdiction over persons abroad to cover new causes of action and situations. Nevertheless, the presumption against extra-territoriality still applied when considering the scope of the rule actually made. Applying that principle, Lord Mance held that there was nothing in CPR 71 to enable the court to summon a third party witness (even an officer of the judgment debtor) who might have information about the judgment debtor's assets. In reaching that conclusion, he had regard to *In re Tucker* and to the rule that there was no power to summon witnesses from abroad to give evidence in English proceedings. *In re Seagull*, on the other hand, was concerned with insolvency litigation in the public interest, in contrast with purely private civil litigation. Lord Mance's conclusion was that:

> "26. In my view CPR Pt 71 was not conceived with officers abroad in mind, and, although it contains no express exclusion

> in respect of them, there are lacking critical considerations which enabled the Court of Appeal in *In re Seagull* to hold that the presumption of territoriality was displaced and that the relevant statutory provisions there, on its true construction and having regard to the legislative grasp or intendment, embraced a foreign officer. Although CPR Pt 71 is limited to officers of the judgment debtor company, I regard the position of such officers as closer to that of ordinary witnesses than to that of officers of a company being compulsorily wound up by the court. I conclude that CPR Pt 71 does not contemplate an application and order in relation to an officer outside the jurisdiction."

76. Again, therefore, the principle of territoriality operated to restrict the scope of apparently wide and unlimited general words.

77. Finally, *KBR* was concerned with section 2(3) of the Criminal Justice Act 1987 which authorised the Director of the Serious Fraud Office to require a "person under investigation or any other person" to produce "any specified documents which appear to the Director to relate to any matter relevant to the investigation or any documents of a specified description which appear to him so to relate". The issue was whether documents held in the United States by a United States company which was the parent company of the United Kingdom company under investigation could be obtained in this way. I have already cited Lord Lloyd-Jones' explanation of the principle (or presumption) of territoriality and its rationale. Turning to the question whether the presumption was rebutted in *KBR*, Lord Lloyd-Jones said that:

> "27. … The answer will depend on the wording, purpose and context of the legislation considered in the light of relevant principles of interpretation and principles of international law and comity."

78. He noted that when legislation is intended to have extra-territorial effect, Parliament frequently makes express provision to that effect; and that the more exorbitant the jurisdiction, the more is likely to be required in order to rebut the presumption. In the case of section 2 of the 1987 Act, there was no clear indication in the language either way, and it was therefore necessary to consider the purpose of the legislation, including whether it was necessary to give a statute extra-territorial effect in order to achieve that purpose and whether there are other means available by which the purpose might be achieved. As in *Masri*, impracticality of enforcement was also "a particularly relevant consideration".

79. Lord Lloyd-Jones considered the legislative history, concluding as follows:

> "45. I have referred to this legislative history in some detail because it supports KBR Inc's case. It can be seen that successive Acts of Parliament have developed the structures in domestic law which permit the United Kingdom to participate in international systems of mutual legal assistance in relation to both criminal proceedings and investigations. Of critical importance to the functioning of this international system are

> the safeguards and protections enacted by the legislation, including the regulation of the uses to which documentary evidence might be put and provision for its return. These provisions are fundamental to the mutual respect and comity on which the system is founded. (See generally *Gohil v Gohil* [2012] EWCA Civ 1550; [2013] Fam 276.) It is to my mind inherently improbable that Parliament should have refined this machinery as it did, while intending to leave in place a parallel system for obtaining evidence from abroad which could operate on the unilateral demand of the SFO, without any recourse to the courts or authorities of the state where the evidence was located and without the protection of any of the safeguards put in place under the scheme of mutual legal assistance."

80. The Divisional Court, while recognising the principle of territoriality, had considered that it could be given effect by treating section 2(3) of the 1987 Act as subject to a requirement, in the case of documents held outside the jurisdiction by a foreign company, that there was "a sufficient connection between the company and the jurisdiction". Lord Lloyd-Jones referred to the example of some provisions of the Insolvency Act 1986 where legislation was interpreted as conferring wide powers, but subject to a safeguard against the exorbitant exercise of those powers in the form of judicial discretion. However, he rejected the suggestion that section 2(3) could be interpreted in this way for four reasons:

> "65. … In this way, the courts have interpreted the 1986 Act as conferring the widest of powers but have provided a safeguard against the exorbitant exercise of those powers in the form of judicial discretion. This approach, however, provides no basis for the implication of a similar limitation on section 2(3) of the 1987 Act. First, it was only necessary under the 1986 Act because such a broad reading of the power was compelled by the language, purpose and context of the provision. In my view, for reasons already stated, there is no warrant for such a broad reading of section 2(3) of the 1987 Act. In particular, such a reading would be inconsistent with the Parliamentary intention as evidenced by the scheme and history of the legislation. Secondly, section 2(3) confers a power not on a court but on the SFO. As a result, there is no scope here for limiting the operation of a broad interpretation or safeguarding against exorbitant claims of jurisdiction by the exercise of judicial discretion. Thirdly, a statutory rule which empowers the SFO to demand the production of documents by foreigners outside the jurisdiction when there is a sufficient connection between the addressee and the jurisdiction, without defining what would constitute such a connection, would be inherently uncertain. Fourthly, there is no basis for the implication of such a limitation and any attempt to do so would exceed the appropriate bounds of interpretation and usurp the function of Parliament. As Hughes LJ put it in *Perry* [2013] 1 AC 182, to do so would involve illegitimately re-writing the statute."

Analysis

81. The parties' submissions on jurisdiction which I have summarised above adopted relatively extreme positions. Mr O'Leary for the Trustees submitted that, applying the principle of territoriality to section 34 of the SCA, the English court never has jurisdiction to order the production of documents by a third party outside the jurisdiction, while Mr Stanley for the claimant submitted that it always has jurisdiction to do so, albeit that in the majority of cases that jurisdiction will not be exercised as a matter of discretion.

82. In the typical case where it is sought to obtain documents held abroad from a person abroad, I have no doubt that the principle of territoriality has an important role in considering the scope of section 34 of the SCA. The cases have 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 is 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 section 34 and CPR 31.17. That would infringe international comity in ways that would be objectionable to foreign states, just as the United Kingdom has objected when other states have sought to obtain documents here without using the letter of request procedure and, even then, has limited the documents which can 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.

83. However, the critical fact in the present case is that the documents whose production is sought are located in England, even though the Trustees whose consent (I will assume) is required for their production are outside the jurisdiction. Mr O'Leary submitted that in the case of documents held electronically, this is a matter of little or no consequence, but I would not accept this. 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 is, as Mr Justice Jacobs put it, not the result of chance that they are held within the jurisdiction.

84. In such circumstances the principle of territoriality has little or no application. To require the production of documents located within the jurisdiction does not involve any illegitimate interference with the sovereignty of the state where the owners of the documents, i.e. the Trustees, are located. To the extent that there is any interference at all, arising from the fact that any order to produce the documents will be made against the Trustees personally, that interference is legitimate. By sending the documents to England, the Trustees have made the documents subject to the jurisdiction of the English court and, to the extent necessary, can be regarded as having accepted the risk that, like any other documents within the jurisdiction, they may be subject to production in the courts of England and Wales.

85. The cases have recognised that the strength of the principle of territoriality varies according to the circumstances. None of the cases concerned with the principle of territoriality to which I have referred have been concerned with documents located within the jurisdiction. That includes *Nix v Emerdata Ltd*, which is the only case directly concerned with third party disclosure, as well as *Obex*, which was concerned

with pre-action disclosure (although, as I have said, there was no issue there about the principle of territoriality). In all of the cases in which it has been necessary to consider whether an order to produce documents can be made against a person abroad, the documents themselves have been abroad. In those circumstances it is not difficult to see why careful consideration needed to be given to the principle of territoriality in interpreting the applicable legislation or why the application of that principle led to the conclusion that no order could be made as a matter of statutory interpretation.

86. But where the documents are here, the position is very different. It is in accordance with the purpose of the legislation that documents held by third parties which are 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: *ex hypothesi*, such documents will either have been created within the jurisdiction or will have been sent within the jurisdiction by the third party against whom an order is sought. An example canvassed in argument was the case of a doctor in private practice who retires abroad, but whose documents, including a claimant's medical records, remain 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. To order the production of documents which are here involves no infringement of the sovereignty of any other state and no breach of comity. Moreover, even if the third parties are abroad, if the documents are here there will be no difficulty in enforcing any order for their production.

87. Conversely, it is not at all clear that documents located within the jurisdiction could be obtained by means of a letter of request to the courts of a foreign state. The foreign court might well take the view that production of such documents was a matter for the courts of England and Wales. At all events, we were shown no authority in which a court of one state has ordered disclosure of documents pursuant to a letter of request when the documents are located in the jurisdiction of the requesting court. There is, therefore, no question in the present case of circumventing the letter of request procedure. On the contrary, if the Trustees' documents cannot be obtained pursuant to section 34 of the SCA and CPR 31.17, it may well be that they cannot be obtained at all.

88. I would hold, therefore, that section 34 of the SCA allows an application to be brought against a third party out of the jurisdiction for an order to produce documents which are located within England and Wales. I see no difficulty in interpreting the words "any documents" in section 34(2) as referring to any documents present within England and Wales.

89. That conclusion makes 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 are two views as to the way in which the principle of territoriality would operate in such a case. One view is that section 34 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 is that, as Mr Stanley submitted and as Mr Justice Jacobs held, the court has 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.

90. There is something to be said for both of these views. The former view provides clarity and certainty, and avoids any possibility of an infringement of international comity. The latter view provides for the possibility of doing justice in an exceptional case, accepting the risk that cases may be argued to be exceptional, even if the argument is ultimately rejected. However, I think it preferable to leave this question to be decided in a case where it makes a difference. Such a case is likely to be rare. Even if jurisdiction exists to make an order against a third party for production of documents held abroad, in view of the availability of the letter of request procedure it would only be in an exceptional case that it would be appropriate to exercise that jurisdiction, for the reasons given by Mrs Justice Cockerill in *Nix v Emerdata Ltd*. Still less would it be appropriate to do so in order to obtain documents (for example, classes of documents) which could not be obtained pursuant to a letter of request.

91. If the question does arise, it will be necessary to consider, among other things, the extent of the court's jurisdiction to make orders in respect of property under section 34(3) (and the equivalent provision in section 33(1) dealing with pre-action orders) as well as the legislative history by which the jurisdiction was initially limited to personal injury litigation and was subsequently extended to all kinds of civil litigation. At first blush it seems unlikely that sections 33(1) and 34(3) permit orders for (for example) the detention or taking of samples of property abroad and, if they do not, that might be an indication that the provisions for disclosure of documents are similarly limited in their territorial scope. Similarly, if the legislation as originally enacted limited to personal injury cases did not apply to documents outside the jurisdiction, as to which I express no view, it seems unlikely that the removal of the limitation as part of the reforms to civil procedure following Lord Woolf's report were intended to change the position. However, these were matters which, understandably, were only lightly touched on in the submissions in this appeal.

92. In the result, I consider that Mr Justice Jacobs was right to conclude that the court has jurisdiction to make an order for disclosure of documents against the Trustees in this case, and therefore that there was jurisdiction to make an order for service of the application on the Trustees out of the jurisdiction under gateway (20).

Discretion

93. I can deal with the issue of discretion more briefly. Mr Justice Jacobs recognised that the judgment of Mrs Justice Cockerill in *Nix v Emerdata Ltd* "set out powerful reasons why, generally speaking, applications against overseas third parties should generally be made using the letter of request regime". He considered, however, that the fact that the documents are here, that they concern transactions in respect of which the Trustees had engaged English solicitors for advice, and that some of those transactions had taken place within the jurisdiction, was an important distinction. So too was the existence of as yet unresolved proceedings pursuant to section 34 of the SCA and CPR 31.17 against Forsters, which it would be convenient to determine with the Trustees before the court. Mr Justice Jacobs concluded:

> "104. I consider that these matters are sufficient to justify the exercise of the court's discretion to order service out of the present proceedings on the Trustees, notwithstanding that (as shown by *Nix*), applications should generally use the letter of request procedure."

94. Mr O'Leary challenged this approach, but in my judgment this was an exercise of discretion which cannot be said to have been wrong.

Service by alternative means

95. CPR 6.15 enables a court to make an order for alternative service where it appears that there is "a good reason" to do so. It was common ground that the applicable principles were accurately summarised by Mr Justice Foxton in *M v N* [2021] EWHC 360 (Comm) at [8] and [9]. In particular, where a respondent is domiciled in a state which is a party to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters concluded on 15 November 1965 ("the Hague Service Convention"), it must be shown that there is a good reason for allowing alternative service instead of requiring service to be effected pursuant to that Convention.

96. Mr Justice Jacobs considered that there was a good reason to allow alternative service in the present case without requiring service to be effected 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 the imminent trial date.

97. Mr O'Leary submitted that this was wrong. There was no need for the application against the Trustees to be determined before the trial, which could if necessary proceed without the evidence which the claimant hopes to obtain. Delay or inconvenience were not a good reason to bypass the Hague Service Convention. Moreover, Mr Justice Jacobs had failed to take into account that any delay was of the claimant's own making as the application against the Trustees was made very late, even though it had been apparent since August 2021 (when the claimant issued his application against Forsters) that the documents would not be provided voluntarily.

98. Once again, I consider that there was no error in the judge's conclusion rendering it necessary for this court to interfere. It is 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, and that this was a material factor to be considered, but I see no reason to doubt that the judge had it well in mind. He had set out the chronology earlier in his judgment and, as Mr O'Leary confirmed, the claimant's delay was in the forefront of his submissions before the judge. The judge was entitled to conclude that, notwithstanding the delay, there was a good reason to permit alternative service.

Disposal

99. I would dismiss the appeal. The court has and should exercise jurisdiction in this case. Whether an order for third party disclosure should be made will be a matter for the Commercial Court to decide.

Lord Justice Lewis:

100. I agree.

Lady Justice Nicola Davies:

101. I also agree.