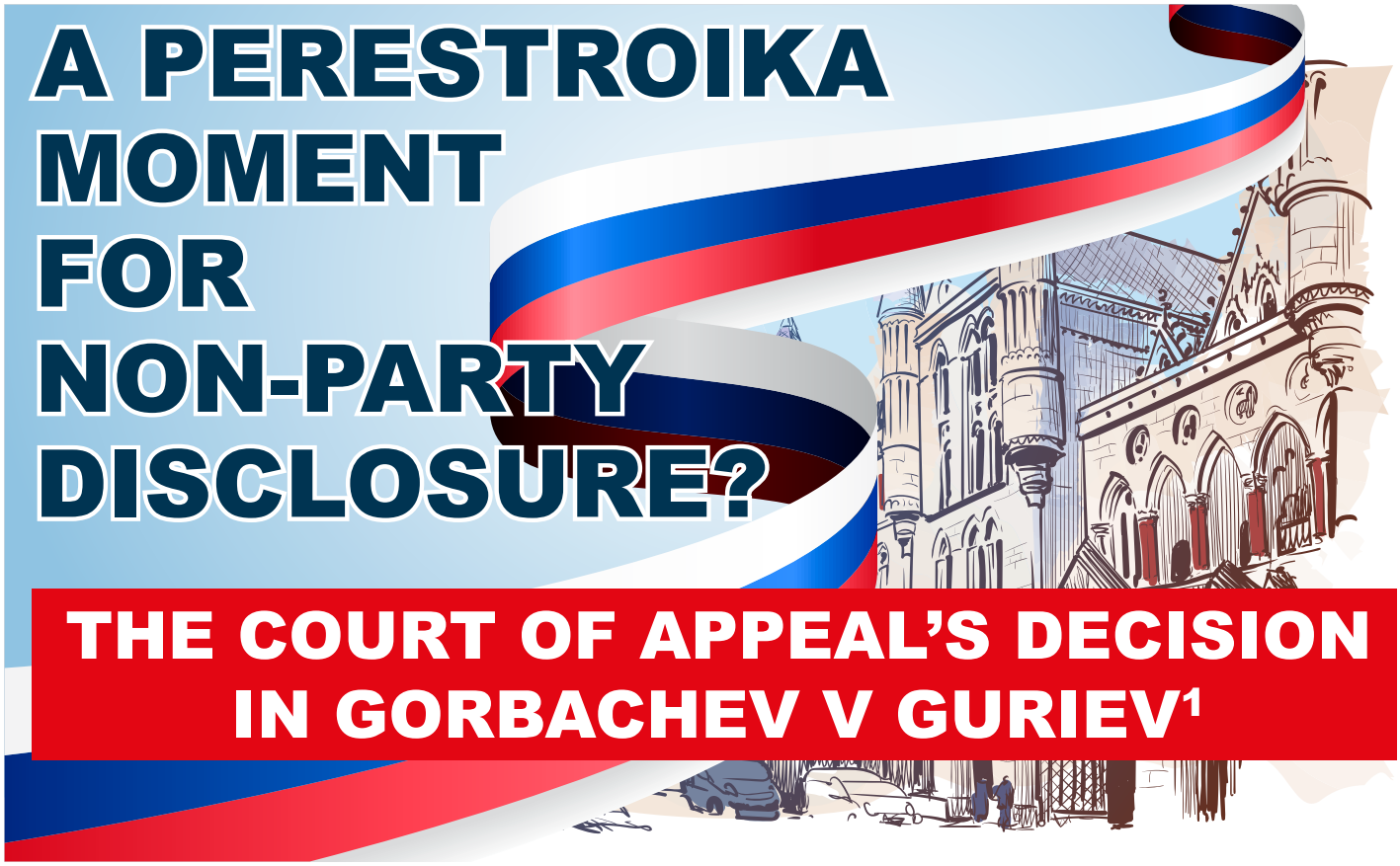
A PERESTROIKA MOMENT FOR NON-PARTY DISCLOSURE?



THE COURT OF APPEAL'S DECISION IN GORBACHEV V GURIEV[1]

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Whilst recent attention has been on the new gateways for service out of the jurisdiction to obtain information orders against non-parties, these gateways are confined to establishing the identity of a (potential) defendant and what has become of the applicant's property. However, what is the position on non-party and pre-action disclosure orders? This was the subject of two 2022 decisions which have gone under the radar by comparison to the new service out gateways, but which are equally of significance for disputes practitioners.[1]

The relevant provisions

Non-party disclosure applications are permitted under section 34 Senior Courts Act 1981 ("SCA81") and CPR 31.17. Section 34 enables orders to be made on the application of a party to proceedings against a third party, and rules of court giving effect to the provision are contained in CPR 31.17. A similar framework under section 33 SCA81 and CPR 31.16 addresses pre-action disclosure.

In seeking permission to serve such applications out of the jurisdiction, recent applicants have relied upon gateway (20) in CPR Practice Direction 6B. This provides for service out with permission where a "claim" made "under an enactment which allows proceedings to be brought" where such proceedings are not covered by any of the other gateways in the Practice Direction. The "enactment" relied upon was the relevant section of the SCA81, which enables the court to make orders for third party disclosure.

Nix v Emerdata Ltd[2]

These proceedings concerned the collapse of the 'Cambridge Analytica' business. The claimant had been the CEO, and the defendant had bought the business. The defendant applied for non-party disclosure against a New York law firm that had advised the claimant.

The application was initially refused on paper, the judge ruling that (i) there was no jurisdiction to make such an order against a non-party resident outside the jurisdiction, and (ii) the appropriate route was via a letter of request or a disclosure order in support of foreign proceedings granted in the relevant overseas jurisdiction.

The applicant renewed the application at an oral hearing. Two arguments were relied upon. The first (which was rejected) was that CPR rule 6.39 contemplated such an application. The second was to rely upon gateway (20). The judge considered that the court had no jurisdiction to make disclosure orders against third parties out of the jurisdiction, because legislation is generally not intended to have extra-territorial effect. She also doubted the decision in Obex[3], questioning whether pre-action or non-party disclosure qualified as "proceedings" within the meaning of gateway (20). Further, even if the court had had jurisdiction to order service out, as a matter of discretion it

1 [2022] EWCA Civ 1270
2 [2022] EWHC 718 (Comm)
3 ED&F Man Capital Markets LLP v Obex Securities LLC [2017] EWHC 2965, where permission was granted to serve a pre-action disclosure application out of the jurisdiction under gateway (20)'s predecessor.

would not have done so because that would have trespassed on the letter of request regime.

The Court of Appeal's decision in Gorbachev v Guriev

Mr Gorbachev and Mr Guriev were involved in a dispute concerning their interests in a valuable fertiliser business based in Russia called PJSC PhosAgro. One of the issues involved how and why Mr Gorbachev was financially supported between 2004 and 2012 through two Cypriot trusts. The trustees of those trusts had been advised by a partner who had joined the English law firm Forsters, which firm therefore had in their possession in England potentially relevant documents. Mr Gorbachev applied against Forsters for non-party disclosure.

Initially, Forsters resisted the application, arguing that it should have been made against the trustees. Mr Gorbachev therefore joined the trustees to the application and sought permission to serve them out of the jurisdiction, relying upon gateway (20).

Permission was granted. After service, the trustees unsuccessfully applied to set aside the order: (i) an application for non-party (and pre-action) disclosure was a 'claim' for the purpose of gateway (20) and section 34 SCA81, which should be interpreted expansively, (ii) similarly, such an application constituted 'proceedings' under gateway (20), and (iii) whilst legislation is generally not intended to have extra-territorial effect, section 34 did not limit an application to persons within England and Wales.

The trustees appealed. The Court of Appeal dealt briefly with the definitions of 'claim' and 'proceedings', upholding the first instance decisions. It focussed on the territoriality principle, discussing how the courts had consistently held that apparently wide and general words enabling documents to be obtained should be interpreted subject to the territoriality principle. If wide-ranging orders for disclosure of documents held by third parties abroad were too readily available that would infringe international comity objectionably by circumventing procedures such as the letter of request regime. They would also be difficult to enforce.

Nevertheless, the importance of the territoriality principle differed depending on the circumstances. In Guriev, the key was that - unlike Nix - the documents were in England. Territoriality had little or no relevance, and it was questionable whether the letter of request regime would have been effective. By sending documents to their English lawyers, the trustees had subjected them to the English court's jurisdiction and therefore accepted the risk of their being subject to production. Nor did it matter that those documents were held electronically. If a third party's documents were within the jurisdiction, they must be available to the court to ensure a just outcome, irrespective of the third party's location. Further, it could not be said that the first instance judge's discretion had been exercised incorrectly.

Where does that leave matters?

It is clear from Guriev that both pre-action and non-party disclosure applications are 'claims' and 'proceedings' for the purpose of sections 33 and 34 SC81 and gateway (20) as appropriate, and that such applications are available against overseas parties where documents are held within the jurisdiction.

However, where do matters stand when an overseas party's documents are located out of the jurisdiction? There are two views as to the application of the territoriality principle. One view is that section 34 should be confined to disclosure of documents within the jurisdiction. The other, as held at first instance in Guriev, is that there is jurisdiction to order disclosure against a party based anywhere in the world, with the exercise of discretion providing a safeguard against infringing international comity and circumventing the letter of request procedure.

The Court of Appeal in Guriev did not need to decide this issue, saying that there is something to be said for both views. The question was best left to a case where it would make a difference, albeit that would likely be a rare instance where, for example, the letter of request regime was unavailable.

Nevertheless, the expansive view of the English courts' jurisdiction to order disclosure in Guriev - coupled with the new gateways available for service out - represents a positive development for litigants, many of whom have disputes of an international nature, and emphasises the desirability of the English courts for hearing such matters.

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