

A PRACTICAL GUIDE TO THE INFORMATION GATEWAY

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1. On 1 October 2022 CPR PD6B was amended to add new jurisdiction "gateways".¹ The jurisdiction gateways play a crucial role in determining what claims have a sufficient factual connection with England and Wales to establish jurisdiction over that claim. The effect of the amendments to PD6B is to increase the circumstances in which the Court of England and Wales might take jurisdiction in a number of important respects. One such amendment is the new paragraph 3.1(25) – the "Information Gateway", which expressly gives the Court a power to order persons who are outside the jurisdiction to provide certain information.
2. The Service Sub-committee of the Rules Committee acted to cure an apparent lacuna in the Court's jurisdiction. *Norwich Pharmacal* orders and *Bankers Trust* orders are common against domestic defendants, obliging a third party to provide information identifying a wrongdoer or what has become of an applicant's misappropriated assets, but the ability of the Court to make such orders against foreign parties was uncertain, with a number of senior judges calling for a specific power to be introduced.²
3. Electronic transactions allow the near instantaneous transfer of money and digital assets across the world, making following the funds dissipated following a fraud all the more difficult. Frequently, obtaining information from foreign parties is crucial.
4. For this reason, the Service Sub-committee recommended the introduction of a new gateway which looks specifically to obtaining information. Due to the potential breadth of such a gateway, it was confined to information going to identifying either a defendant or what has become of the claimant's property.



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¹ The Civil Procedure (Amendment No. 2) Rules 2022 (SI 2022/783).

² See *AB Bank Limited v Abu Dhabi Commercial Bank* [2016] EWHC 2082 (Comm) and *CMOC v Persons Unknown* [2017] EWHC 3599.

5. It is not so long ago that in *DDM v Al Zahra PVT*³ the Court of Appeal noted that those acting for claimants should not assume that pre-action approaches to foreign entities "will receive any particular response, let alone a constructive one". In appropriate cases, the Court may now compel such a response.

Role of the Gateway

6. CPR Part 6 delimits the circumstances in which claims may be served outside the jurisdiction and foreign defendants brought before the English Court. In order for the Court to grant permission to serve out, the claimant has to establish in respect of each claim that the following three stages are satisfied:

- a. one of the jurisdictional gateways in paragraph 3.1 of CPR 6BPD applies; and
- b. the claim has reasonable prospects of success; and
- c. England is the proper place in which to bring the claim ("*forum conveniens*").

7. The Information Gateway is relevant at the first "gateway" stage. It follows a claimant still must show a reasonable prospect of success and that England is the *forum conveniens*. We address these criteria below in the context of the new gateway.

The terms of the Information Gateway

8. The Information Gateway is satisfied where:

(25) *A claim or application is made for disclosure in order to obtain information—*

(a) *regarding:*

- (i) *the true identity of a defendant or a potential defendant; and/or*

(ii) *what has become of the property of a claimant or applicant; and*

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

9. There are three steps to the gateway:

- a. That a claim or application is made for disclosure in order to obtain information.
- b. That the information sought is regarding (i) the true identity of a defendant or a potential defendant; and/or (ii) what has become of the property of a claimant or applicant.
- c. The claim or application is made for the purpose of proceedings already commenced, or which subject to the content of the information received, are intended to be commenced either by service in England and Wales or under CPR rule 6.32, 6.33 or 6.36.

A claim or application is made for disclosure in order to obtain information

10. It is likely that claims and applications for *Norwich Pharmacal* and *Bankers Trust* relief were the principal targets, and the Rules Committee could have chosen to limit the Court's new power to such orders. However, the Information Gateway as introduced contains no such limitation.

11. Both *Norwich Pharmacal* and *Bankers Trust* orders reflect the development of the Court's power to make injunctions to meet particular

³ [2019] EWCA Civ 1103 at [93].

circumstances before it. As noted by Lightman J in *Mitsui & Co v Nexen Petroleum*,⁴ an order of that nature is "a flexible remedy capable of adaptation to new circumstances". It is likely that in drawing the terms of the Information Gateway the Rules Committee wished not to exclude orders made under further developments in those lines of authority.

12. In principle though, there is no reason that other forms of order matching the description in the gateway should not now be served out of the jurisdiction. CPR 31.16 allows the Court to order pre-action disclosure and provided the appropriate classes of information are sought could be used in conjunction with the new gateway.⁵

The information that falls within the scope of (25)

13. The Information Gateway only applies where the information sought is regarding the identity of a defendant or potential defendant ("(25)(i)"), or what has become of the property of the claimant ("(25)(ii)").

14. It is easy to conceive of scenarios in which information might be usefully sought from a foreign respondent going to the identity of the defendant. In a classic *Norwich Pharmacal* scenario, it may be clear that money has been transferred from the claimant's bank account to a bank account of an unknown person – information might be sought as to the identity of the holder of the bank account.

15. The reference to a potential defendant is more interesting. It is likely intended to connote

those circumstances where there has been apparent wrongdoing, but the ultimate target of the claim is unclear. It is uncertain what threshold "potential" imports – how confident does a claimant need to be that the defendant they seek to identify is the correct defendant?

16. The rule in (25)(ii) will facilitate identifying what has become of, for instance, misappropriated money, cryptocurrency or similar assets. It is not uncommon for money to be broken into smaller sums and sent across the world and (25)(ii) will have a clear role in tracing claims.

17. The gateway and its utility are not limited to claims where there has been fraud. For example, in an appropriate case, a claimant seeking to bring an action against a company within a large corporate group may be able to serve an order on the basis of the gateway to identify which of the many companies is the appropriate defendant.

For the purpose of proceedings already commenced or intended to be commenced

18. The Information Gateway is subject to a requirement that the claim or application must be for the purpose of proceedings already commenced, or which subject to the content of the information received, are intended to be commenced either by service in England and Wales or under CPR 6.32, 6.33 or 6.36.

19. CPR 6.32 refers to service of a Claim Form in Scotland and Northern Ireland where permission of the Court is not required. CPR 6.33 refers to service out of the United Kingdom

⁴ [2005] EWHC 625 (Ch) at [20].

⁵ The Information Gateway, where it applies, appears to obviate the controversy surrounding serving applications for pre-action disclosure out of the jurisdiction apparent from *ED&F Man Capital Markets LLP v Obex Securities LLC* [2017] EWHC 2965 (Ch).

where permission is not required (for instance where there is a choice of court agreement in favour of England). CPR 6.36 refers to circumstances in which a Claim Form may be served out of the jurisdiction with permission, and three stage test under CPR 6.37.

satisfy the Court that they have reasonable prospects of success of satisfying the test for obtaining such an order. It is significant that in *LMN Butcher J* did not appear to consider it necessary to decide separately whether the underlying claim the claimant intended to bring subsequently had a reasonable prospect of success.⁷

20. The use of "subject to the content of the information received, are intended to be commenced" potentially introduces an important restriction. (25)(b) arguably contemplates that the information sought is the missing piece of the puzzle i.e. once the identity of the holder of a bank account is known, the picture is complete and the claim can be brought. It is unclear whether a respondent to an application could resist it on grounds that, even if the information is known, the claimant will still lack sufficient information to commence the claim.

Forum conveniens

21. (25)(b) does not expressly require that the applicant demonstrate that reliance on CPR 6.32, 6.33 and 6.36 be well founded, or otherwise indicate the standard required. In *LMN*,⁶ Butcher J approached the question on the basis that the claimant must show that "there is a good arguable case" that it would be possible to serve proceedings out of the jurisdiction on the basis of one of the relevant rules.

23. CPR 6.37(3) provides that "the court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim." CPR 6.37 imports the requirement that England be the *forum conveniens*. Strictly, England must be the *forum conveniens* in respect of the claim to be served out i.e. the application or claim for an information order.

24. It would be artificial to assess whether England and Wales is the proper place to bring a claim for information without having regard to the underlying claim and the circumstances that give rise to the need for information. The weight to be accorded to *forum conveniens* factors in this context will be a matter of ongoing consideration.

25. In *LMN* at [28], Butcher J appeared to consider only whether England and Wales was the proper place to bring the underlying claim, rather than separately considering whether it was the proper place to bring the claim for the information order. Whether such an approach is appropriate or permissible will doubtless be the subject of argument in future cases.

26. In the international fraud context, there may be a particular role for access to justice arguments. For instance, it may be asked whether a claimant can properly rely on the

Other parts of the jurisdiction framework

Merits of the claim

22. It is still necessary for the claimant or applicant to show that the claim to be served out of the jurisdiction has reasonable prospects of success. It follows that where the claim brought is a free-standing request for a *Norwich Pharmacal* order, the claimant will need to

⁶ *LMN v Bitflyer Holdings Inc* [2022] EWHC 2954 (Comm) [27].

⁷ [25].

absence of a power in a foreign court to order disclosure against a particular entity as a reason why the Court should hear the Claimant's application for an information order.

the scope for information orders to be granted against foreign defendants, the Rules Committee has sought to back them up with significant sanctions.

Ex Parte Orders

27. There is an important practical question as to whether the Court will grant the information order sought, *ex parte*, at the same time that permission is granted to serve the claim for the order out of the jurisdiction, or simply grant permission to serve the application with a view to resolving the substantive application at the *inter partes* stage. Applicants inviting the Court to take the former approach will need to be doubly mindful of their duty of full and frank disclosure.
28. In *LMN*, Butcher J declined to grant a "rolled up" hearing of the application for permission to serve the claim out of the jurisdiction under the gateway and the substantive information order itself. He did so by reference to the circumstances of that particular case, having determined that the alleged fraud was not particularly recent and that no respondent to the order was alleged to have been itself fraudulent. Other applications in different circumstances will no doubt be treated differently.

Enforcement

29. The Information Gateway and the ability to make an order for disclosure against a foreign person, places directly in issue the territorial ambit of the Court's ability to enforce their orders. If the foreign entity simply ignores the order for disclosure, what recourse is there? Breach of an injunction is contempt of court, and alongside the Information Gateway was introduced a new gateway (24) for applications relating to contempt. In addition to expanding

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