

A PRACTICAL GUIDE TO: Jurisdiction in Group Litigation



INTRODUCTION

Group litigation often gives rise to jurisdiction disputes, with significant time and resources being devoted to whether claims can be brought in England, and with cases frequently ending up before the appellate courts. Dealing with these issues, whether for claimants or defendants, requires familiarity with both the relevant legal principles and the practicalities of multi-party litigation.

The importance of jurisdiction cannot be overstated. Where a case is heard will often be the difference between victory and defeat, and certainly will have a fundamental impact on the shape and costs of the proceedings. Notably, choice of law rules, the mode of trial, availability of disclosure, evidence, costs, and availability of funding all depend on where a claim is heard. This means that claimants need to consider jurisdiction carefully in advance of issuing proceedings; and defendants need to be alert to what arguments are available to them and how they can be deployed at the right time.

Normally jurisdiction will need to be resolved at an early stage in group claims. While the courts generally take a pro-active and case-sensitive approach to case management in group litigation, and CPR 19B provides that an application for a GLO may be made “*at any time before or after any relevant claims have been issued*”, it would be unusual for the court to consider an application for a GLO in a claim where there is an outstanding jurisdiction dispute. There are numerous examples of GLOs being made by the courts only after protracted jurisdiction disputes.¹ The main exception is where only some of the claims are susceptible to a jurisdiction challenge, and the balance of claims will continue in any event: in such cases the question of jurisdiction in relation to those individual claims might be parked, and dealt with at a later stage, so as not to impede progress of the claims overall.

This Practical Guide does not seek to provide a comprehensive overview of all jurisdiction issues; rather it seeks to focus on those points which are of particular relevance to group claims.

The Jurisdiction Regime

No special regime exists for multi-party litigation, and claimants seeking to establish the English court’s jurisdiction over a defendant for the purposes of group litigation must do so in the same way as in any unitary claim. Jurisdiction is therefore established on the basis of service of the Claim Form in line with the relevant law/rules.

Where a defendant is present in the jurisdiction, service can be effected without permission from the court. Post-Brexit, this is sufficient to establish jurisdiction. A defendant present in the jurisdiction may also provide a useful anchor for service on other defendants out of the jurisdiction. Importantly, for present purposes, even where a defendant company

is registered overseas, it may be that it can be served in the jurisdiction if it has given an address for its UK establishment pursuant to the Companies Act 2006.

Once served in the jurisdiction, it is then for the defendant wishing to challenge jurisdiction to show that a foreign jurisdiction is clearly or distinctly the more appropriate place for the trial of the claim.

Where the defendant is outside the jurisdiction, the question arises as to whether permission to serve is needed. Permission is not needed to serve a Claim Form out of the jurisdiction if the claims fall within CPR r6.33, i.e. where the claim relates to a relevant consumer or employment contract or where there is a relevant jurisdiction clause in favour of England and Wales.

¹ See by way of example the *Okpabi* and *Vedanta* litigation, where GLOs were made years after the commencement of proceedings, but shortly after the resolution of appeals from jurisdiction challenges.

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These provisions have been used to serve foreign defendants in, for example, claims by football fans² and in consumer finance claims.³ If claimants are proposing to serve without permission from the court, they should take great care to consider whether this is wise, and whether each of the claims they wish to advance can be served without the need for permission.

If permission is needed, claimants can only serve the Claim Form if they show that (1) the claim has a real prospect of success (2) one of the grounds of jurisdiction in Practice Direction 6B is satisfied and (3) England is clearly or distinctly the appropriate place for the trial of the claim. Those criteria must be satisfied for each of the claimants' claims against each defendant.

Where permission is needed, while the grounds of jurisdiction in Practice Direction 6B (sometimes referred to as jurisdictional gateways) do not account in any way for the number of claimants bringing a claim, the number of claimants and the nature of the claim may be relevant to the assessment of whether England is the appropriate place for the trial of the claim. It is outside the scope of this Practical Guide to analyse the various grounds of jurisdiction. However, for present purposes, it is worth highlighting that the tort gateway applies both where damage (including consequential damage) has been sustained in the jurisdiction and also where damage results from acts committed in the jurisdiction. Moreover, given that there are often multiple defendants in group claims, "the necessary or proper party" gateway in CPR PD6B will frequently provide an additional ground where jurisdiction can be established over at least one of the defendants (for example because of such a defendant's presence within the jurisdiction).

Assessment of whether England is the appropriate place for the trial of the claim is a two-stage process. The court first considers where the case can be most suitably tried for the interests of all the parties and the ends of justice, before considering (if concluding at the first stage that England is not the proper place) whether there is a real risk that the claimants will not obtain substantial justice in the relevant foreign jurisdiction.

At the first stage, if there is an available alternative jurisdiction that could try the case, the court looks at a range of factors including:

- (a). Where the parties are based/resident. If a defendant has been served in England, the court will consider the strength of the defendant's connection to the jurisdiction.
- (b). Where the facts in issue took place or principally took place.
- (c). The location of any witnesses and the language(s) that they are likely to give evidence in.
- (d). The language and location of any documents.
- (e). The relevant applicable law and, if that law is not English law, any evidence of material differences between the applicable law and English law.
- (f). Any issues regarding the claimants' practical ability to prosecute the claims in the alternative jurisdiction (especially when compared to the defendants' ability to hire lawyers).⁴

When considering such factors, the court will take as realistic a view as it can (given the early stage of proceedings) about which matters are likely to be in dispute between the parties at any trial of the claims. However, if a defendant chooses not to indicate the way in which a claim will be defended, the court is entitled to proceed on the basis that the trial will consist of the claimant attempting to discharge the burden of proof.

At the second stage, the court will not only consider whether there are systemic issues with the alternative jurisdiction/its judiciary (such as allegations of judicial corruption or bias) but also whether the claimants will face issues such as obtaining adequate legal representation and/or expert evidence such that it can be said that there is a real risk that they will not obtain substantial justice. Claimants are required to provide "cogent evidence" demonstrating that there is such a risk, and expert evidence is likely to be necessary: for example, expert evidence will typically be needed to show that the specific claimants may not receive a fair trial and/or be able to access adequate funding (whether from their own means, legal aid, CFAs, NGOs or litigation funders) to pursue the claim in the alternative jurisdiction.

At both of these stages, group litigation can give rise to particular issues. Is the foreign regime able to handle group litigation? Is there a regime for joinder of actions in the foreign jurisdiction? If not, can the claimants obtain justice without such a regime? Is funding available not just for the legal representation but also for any necessary expert evidence? This may in turn all depend on the nature of the case: different considerations may apply to high and low value claims; complex and simple claims; or the type of issue that the claim raises.

² See *Abram and ors v Union des Associations Européennes de Football and anr* [2024] EWHC 1518 (KB).

³ See *Kalo v Bankmed Sal* [2023] EWHC 2606 (Comm).

⁴ The fact that access to justice issues are relevant at the first stage was confirmed in *Limbu and ors v Dyson Technology Ltd and ors* [2024] EWCA Civ 1564.

Practicalities for Serving Out of the Jurisdiction

Following Correct Process for Serving Out

If permission to serve out of the jurisdiction is required, then, given the timetable to effect such service (discussed below), an application should be made as soon as reasonably possible using the Part 23 process. The application needs to be supported by evidence (usually in the form of a witness statement by the applicant party's solicitor) that addresses the tripartite test for service out discussed above in relation to each and every cause of action and defendant. The evidence needs to specifically set out:

"(a) which ground in paragraph 3.1 of Practice Direction 6B is relied on;

(b) that the claimant believes that the claim has a reasonable prospect of success; and

(c) the defendant's address or, if not known, in what place the defendant is, or is likely, to be found" (CPR r6.37(1)).

Whilst there is no set rule as to the length or detail required for such evidence, the courts have repeatedly noted the need for proportionality in jurisdiction matters and the evidence should be no more detailed than is reasonably necessary to address the relevant service out criteria.

A draft order should be provided with the application, and this should specify the relevant time the defendant has for filing an acknowledgment of service and then filing a Defence.⁵

Given the defendant will not yet have been served with the Claim Form, an application seeking permission to serve out of the jurisdiction will usually be made *ex parte* without notice (and as such a duty of full and frank disclosure is imposed on the applicant, which is discussed further below). Usually, an application to serve out is dealt with relatively quickly on the papers with a sealed order being returned to the applicant.⁶ However, occasionally a judge, considering the written application and evidence, does not make an order without first listing an *ex parte* oral hearing⁷ and an applicant will need to allow for this possibility when considering the timing of an application.

Extensions of Time and Alternative Service: Claimants Beware

A failure to serve a Claim Form within the relevant time period means that the court lacks jurisdiction over the claim. It is vital to serve the Claim Form within the permitted time period if at all possible.

The CPR provides that a Claim Form is to be served on a defendant within 4 months (if in the jurisdiction) or 6 months (if outside the jurisdiction) of issue.

A good reason is generally needed to extend time beyond those periods, and particularly if the effect of any such extension would effectively be to extend a statutory limitation period.⁸ Where there is no good reason for failure to serve the Claim Form in the usual period, the court has a discretion to extend time but is unlikely to do so. If claimants fail to serve on time and an application is made retrospectively, the court may only allow the application if *"the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so"* and *"the claimant has acted promptly in making the application"* (CPR r7.6(3)(b)-(c)).

The mere fact that a claim is multi-party litigation does not, of itself, justify an extension of time to serve the Claim Form. Further, the Court of Appeal has held that *"the fact that an extension of time was needed to obtain funding (or rather because of a desire that funding be in place for the whole of the litigation so as to eliminate or minimise any risk to the claimants)"* is not a good reason for an extension of time.⁹

However, in particular cases, the burden imposed by the nature of the claim may be the cause of delays and justify the extension of time. As Constable J recognised in *Wragg and ors v Opel Automobile* [2024] EWHC 1138 (KB), [99], the heavy administrative burden of dealing with the Foreign Process Section in a document-heavy group claim *may* on certain facts justify an extension of time. Sometimes delays in effecting service by the Foreign Process Section or foreign authorities may justify an extension. As in every claim, the court will consider what actions have been taken by the claimants following the issue of proceedings; it will therefore be necessary for claimants to consider before issue what steps will need to be taken to serve the Claim Form and the likely time that will be required to carry out those steps.

To avoid the difficulties with service out of the jurisdiction, claimants sometimes apply for an order pursuant to CPR r6.15 permitting service by an alternative method (e.g. via email) or at an alternative place (e.g. at a law firm representing the foreign defendant(s)). CPR r6.15 requires a *"good reason"* for alternative service. Claimants should approach such applications with caution, particularly where seeking to effect service in a country which is a Contracting State to the Hague Convention on Service of Judicial and Extrajudicial Documents. In such cases, alternative service may in rare cases still be appropriate, but some particular feature of the case warranting such an

⁵ CPR PD6B, §6.2-6.4 provides details of how the time periods are to be calculated.

⁶ See for example the King's Bench Division Guide, §6.17.

⁷ See for example *Wright and ors v BTC Core and ors* [2023] EWHC 222 (Ch), [9].

⁸ See *ST v BAI (SA) t/a Brittany Ferries* [2022] EWCA Civ 1037 where the Court of Appeal held that *"the actual or potential expiry of a limitation defence is a factor of considerable importance"* on applications to extend time for service of a Claim Form.

⁹ *ST v BAI (SA) t/a Brittany Ferries*, [64].

order must be identified and a mere desire to avoid delay is not sufficient. In cases where the Hague Convention does not apply, a more permissive approach may be taken by the court; however, caution is still needed as a defendant may still seek to set aside the *ex parte* order for alternative service.

Practicalities of Challenging Jurisdiction

Mode and Time for Challenging Jurisdiction

CPR Part 11 sets out a timetable for making an application to challenge jurisdiction. This section deals with the default time periods for challenging jurisdiction, but those periods may be varied by court orders and/or in specialist courts¹⁰ and it is therefore important to ensure that a party fully understands the time periods that apply to their claim. It is also important that defendants intending to challenge jurisdiction do not accidentally submit to the jurisdiction by taking a step that amounts to a recognition of the court's jurisdiction to try the claim. Examples of such conduct may include requesting an extension of time to put forward a defence or engaging with broader case management proposals without a specific agreement that such engagement is without prejudice to a jurisdiction challenge. The question of submission is fact sensitive, but defendants should do their best to avoid the question arising in the first place.

CPR Part 11 provides that “A defendant who wishes to make such an application must first file an acknowledgment of service” and, within 14 days of the acknowledgment of service, make an application challenging jurisdiction. A failure to challenge jurisdiction in time results in the defendant being deemed to have submitted to the jurisdiction (CPR r11(5)) unless an application is made to retrospectively extend time to challenge jurisdiction. Such applications will be closely scrutinised by the Court.¹¹

As noted above, the order granting permission will specify when an acknowledgment of service is due. The default is that the time period for an acknowledgment of service runs from service of the Particulars of Claim (CPR PD6B, §6.3).

In group litigation, it is common for parties to agree that the Particulars of Claim shall not be served until after a GLO application has been determined (not least because the form of pleadings will likely be impacted by the GLO issues listed in the GLO itself). This may put a party wishing to challenge jurisdiction in limbo: can a Part 11 application be made without first filing an acknowledgment of service? If not, can an acknowledgment of service be filed *before* Particulars of Claim have been filed and served? There are no clear answers

in the case law, but those involved in group litigation would be well-advised to attempt to agree a procedure for challenging jurisdiction well in advance of any issues arising.

Despite the fact that, on a Part 11 challenge, claimants retain the burden of proof, the application challenging jurisdiction needs to be supported by evidence (CPR r11(4)(b)) which will usually address the factors relevant to the giving of permission to serve out of the jurisdiction. If evidence of foreign law or similar is required to determine the jurisdiction challenge, the parties will need to liaise to seek to agree directions or apply to the Court to have directions set.

Sufficiency of the Claimants' Pleadings

Defendants often wish to challenge jurisdiction on the basis that the claimants' claim does not disclose a real prospect of success. As demonstrated by the decisions in *Lungowe v Vedanta Resources Plc* [2019] UKSC 20 and *Okpabi v Royal Dutch Shell* [2021] UKSC 3, such arguments can be particularly difficult for defendants to succeed on at the jurisdiction stage in complex group litigation.

Where a defendant is served out of the jurisdiction, it is for the claimants to establish that they have an arguable claim. However, in *Okpabi* at [107], Lord Hamblen made clear that this assessment should be conducted by reference to the Particulars of Claim and that “The factual averments made in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupported”. He also held at [22] that “it is generally not appropriate for a defendant to dispute the facts alleged through evidence of its own”.

Defendants must, therefore, be judicious in considering the points they wish to rely on if challenging the merits of the claim at the jurisdiction stage. It will often be more useful for a defendant to consider the constituent components of the cause of action to identify whether a “knock-out blow” is possible by reference to e.g. causation or limitation. Defendants may also wish to consider whether it is possible to resist certain parts of the claim even if not the entire claim (e.g. by reference to certain portions of the claimant cohort, or causes of action/heads of loss advanced).

Offering Undertakings

In order to satisfy the English court that another country is an available forum for a trial of the claim to take place, it is not uncommon for defendants to undertake to submit to the jurisdiction of the proposed alternative foreign court (as happened in *Lungowe v Vedanta Resources Plc* and more recently in *Limbu and ors v Dyson*) or undertake not to run any

¹⁰ Such as in the Commercial Court, see CPR r58.7(2).

¹¹ See e.g. *Ibrahim v AXA Belgium* [2024] EWHC 856 (KB).

limitation argument in the foreign court. Such an undertaking should be given at an early opportunity, otherwise there is a risk that the court will refuse to take account of it.¹²

Two recent judgments (*Limbu and ors v Dyson and Da Silva and ors v Brazil Iron Ltd and anr* [2025] EWHC 606 (KB)) have considered more involved undertakings designed to meet arguments that there is a real risk that the claimants will not obtain substantial justice in the relevant foreign jurisdiction, and in particular a risk caused by a potential lack of funding in the foreign jurisdiction. Such undertakings have generally been focused on the defendant(s) funding part of the claimants' reasonable costs/expenses in the foreign jurisdiction. However, in neither of the cases were the undertakings offered considered satisfactory to meet the risk of substantial injustice, and in both cases it was found that they would inherently give rise to conflicts of interest. It remains to be seen whether undertakings can be designed to meet those concerns, by for example leaving the question of funding in the hands of an independent third party.

Challenging Ex Parte Orders

The duty to make full and frank disclosure (which is considered more fully in 2TG's Practical Guides to Freezing Orders and Anti-Suit Injunctions) is an important duty which applies on any without notice application. Where an *ex parte* order has been obtained for permission to serve a defendant out of the jurisdiction, or extending time to serve the Claim Form, consideration must be given as to whether that order might be set aside for failure to comply with the duty.

As Constable J confirmed in *Wragg and ors v Opel Automobile* [2024] EWHC 1138 (KB) at [66], the duty to give full and frank disclosure "*plainly is not*" subject to different principles when applying for permission to serve out of the jurisdiction in group litigation. Claimants remain under the same duty as in ordinary litigation to fully disclose all material matters relevant to the application, including those adverse to the application being made.¹³ This may, in complex multi-party litigation, place a very heavy burden on those seeking permission to serve out of the jurisdiction and defendants should be alert to consider whether a breach has occurred.

However, breach of the duty of full and frank disclosure does not automatically lead to the discharge of the order obtained in breach. The court will consider whether this would be just, and will consider among other factors the culpability of the breach and proportionality. In this regard, as Constable

J accepted in *Wragg*, proportionality may mean that "*the information that it may be reasonably proportionate to provide on an application to serve out relating to a limitation defence in a unitary action may potentially be different from that which is proportionate in a large group action. That is not heresy. It is the application of the universally applicable principles to the circumstances of a particular case.*"

In *Mex Group v Ford* [2024] EWCA Civ 959, the Court of Appeal deprecated the practice of presenting a long shopping list of alleged failures of full and frank disclosure. Defendants should focus criticisms on substantive issues which warrant criticism and which may lead to orders being set aside, rather than relying on less obviously important failures to make proper disclosure when making without notice applications. If there has been a breach of the full and frank disclosure obligation but not one sufficiently egregious to justify setting aside the service out permission the court may still mark its disapproval by awarding costs, including on the indemnity basis, against the defaulting party.¹⁴

¹² Undertakings should be given early where possible. An offer to submit to the foreign jurisdiction made only on appeal was roundly dismissed in *Sharab v HRH Prince Al-Waleed Bin Talal Bin Abdul-Aziz Al-Saud* [2009] EWCA Civ 353.

¹³ The case law is clear that precisely what level of detail is required to meet the full and frank disclosure obligation in a service out application is likely less heavy than in a (more draconian) freezing injunction: *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2003] EWHC 3418 (Comm), [25]-[26].

¹⁴ See *PJSC National Bank Trust and ors v Mints and ors* [2021] EWHC 692 (Comm).

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Recognised by Chambers and Partners as one of the “Stars at the Bar”, Charles is head of the Group Litigation Team and is listed in the directories as one of the country’s leading group litigation silks. He has long specialised in handling or defending complex large group claims, often with an international element, for claimants and defendants.

Current and recent group work includes business human rights, environmental, consumer, medical device, sport, automotive, financial, consumer fraud and disaster claims.

“His mastery of jurisdiction issues is second to none”; “An absolute wonder and the most outstanding lawyer.”; “[A] top silk in group litigation; “He’s a brilliant advocate, he always delivers a masterclass. He’s a real star.”; “One of a handful of counsel I would instruct on ‘bet the company’ cases.”; “Highly intelligent, pragmatic, commercial and very user-friendly.”

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Marie Louise is a leading advocate practising at the forefront of international group litigation. She has acted in many of the landmark group cases in recent years including *Vedanta v Lungowe*, *Okpabi v Shell* and *Iraqi Civilians v MOD*. Most recently she was leading counsel in the Court of Appeal for the successful appellants in *Limbu v Dyson*.

She was nominated for Group Litigation Silk of the Year by Legal 500 in 2023 and 2022 and was awarded Silk of the Year for Personal injury at the 2024 Legal 500 awards.

Marie Louise specialises in private international law, acting for both Claimants and Defendants in a broad range of international claims.

“She has encyclopaedic knowledge of the law and combines this with the tactical mind needed for group litigation. She is a go-to silk for group claims”; “Marie Louise is an authority on jurisdiction issues and a pleasure to work with. She was willing to go above and beyond to help us navigate a number of complex issues”

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Tom commenced practice at 2TG in 2020 and has quickly developed a reputation as a sought-after group litigation junior, often in cases involving conflicts of laws issues. He acts for claimants and defendants both led and unled in some of the highest profile cases.

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2TG's expertise

2TG has a well-established and highly regarded Group Litigation practice and members have been instructed in many of the high-profile and leading actions in recent years, including the diesel emissions litigation, many business human rights disputes and cases concerning several different clinical devices and pharmaceutical products.

Due to the nature of the disputes generally at the heart of group litigation, there is much overlap with the barristers' work in private international and administrative law, as well as with specialist areas of practice such as product liability, personal injury, professional negligence, business human rights, healthcare, sport, consumer, fraud, data protection and environmental law. We are often called on to deal with group actions so that we can draw on this specialist knowledge.

Our international group matters generally relate to business human rights, environmental law and personal injuries where we represent claimants and defendants in very high-profile public interest cases. We are regularly instructed by UK and overseas governments, public authorities, insurers, communities and global corporations. The issues raised are often complex, including difficult questions of conflict of laws, tort, limitation, liability and contribution. Our barristers have worked on many of the leading cases including the African Minerals litigation, the Shell litigation/Okpabi, Vedanta, the Kenyan Emergency Group Litigation, the Cyprus Emergency Litigation and Iraqi Civilians Litigation.

Our barristers are routinely instructed to act on other 'series of claims' where disputes involving numerous claims and multiple parties are allocated to a certain Court and judge so that the matters are dealt with concurrently and with shared reference. This includes a number of high-profile examples in the Healthcare sector such as litigation in relation to intraocular lenses and various multi-party surgical mesh disputes with all these matters involving hundreds or thousands of claimants.

The rise of duty of care and negligence group litigation claims in Sport, against various regulatory and governing bodies, has seen the Sports Team at 2TG instructed by World Rugby and the Football Association in relation to the alleged mismanagement of concussion and subsequent association with advanced neurological and neurodegenerative disorders.

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