

No Power to Serve Disclosure Application on Foreign Non-Party Outside the Jurisdiction

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Introduction. In *Alexander Nix v Emerdata Limited* [2022] EWHC 718 (Comm), the High Court held that it did not have jurisdiction to grant permission to serve a third-party disclosure application on a foreign non-party outside the jurisdiction. Mrs. Justice Cockerill held that the appropriate route for obtaining evidence within a foreign jurisdiction from a foreign non-party was via the “letter of request” regime.¹

Background. The dispute in *Nix v Emerdata* relates to the collapse of the well-known political consulting firm, “Cambridge Analytica,” which went into administration in 2018 following the Facebook–Cambridge Analytica data scandal. Emerdata Limited (the “Defendant”) is a company that bought the business of Cambridge Analytica, and Alexander Nix (the “Claimant”) was at all material times the CEO of Cambridge Analytica (until early 2018).

On 13 December 2021, the Defendant issued two applications, including:

- A third-party disclosure application against Schulte Roth and Zabel LLP (the “Respondent”)—the New York law firm which had advised the Claimant at the time of the events giving rise to the dispute—seeking access to the communications that passed between the Defendant’s representatives and the Claimant (the “TPD Application”)²; and
- An application for permission to serve the TPD Application on the Respondent outside the jurisdiction (the “Service Application”).

On 21 January 2022, the Court dismissed the Service Application on the papers. However, at the Defendant’s request, the Court restored the Service Application at an oral hearing so that it could hear further argument.

¹ A party to proceedings in England may apply to the English courts to issue a “letter of request” to a foreign court requesting that they order the taking of evidence and send that evidence to the English court for use in the proceedings.

² The TPD Application was brought under Civil Procedure Rule (“CPR”) 31.17 (*Orders for disclosure against a person not a party*). A CPR 31.17 application is permitted under section 34 of the Supreme Court Act 1981.

Is There Power to Permit Service of an Application for Third Party Disclosure Outside the Jurisdiction? The key question raised by Mrs Justice Cockerill in this case was “*how does th[e] court have jurisdiction over [a] third party from whom disclosure is sought – and why should a partnership based in the U.S., which ex hypothesi is not capable of being made subject to the jurisdiction by virtue of residence here, be susceptible to the court’s orders?*”

The Defendants sought to answer this question (i) on the basis of gateway 20(a) of paragraph 3.1, Practice Direction 6B (“PD 6B”) (which provides that a claim form may be served outside the jurisdiction with the court’s permission 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 gateways) and (ii) in reliance on CPR 6.38 and CPR 6.39, which state as follows:

- (6.38(1))** Where the court’s permission is required for the claimant to serve the claim form outside the jurisdiction, the claimant must obtain permission to serve any other document in the proceedings outside the jurisdiction; and
- (6.39(1))** Where an application notice is to be served out of the jurisdiction on a person who is not a party to the proceedings rules 6.35 and 6.37(5)(a)(i), (ii) and (iii) do not apply.

The Submissions. First, the Defendant contended that CPR 6.39 could only contemplate actions like the Service Application (*i.e.*, service of an application notice on a foreign non-party).

Further, the Defendant highlighted that whilst CPR 6.39 does not explicitly require a party to apply for permission to serve an application notice outside the jurisdiction on a foreign non-party, it may imply that such permission is required because it selectively excludes CPR 6.35 (*period for responding to the claim form where permission was not required for service*) and parts of CPR 6.37(5)(a) from its remit.

Second, the Defendant noted that by virtue of CPR 6.38(1), the Court’s permission would seemingly be required to serve an application on a foreign non-party if permission had been required to serve the claim form outside the jurisdiction. Although, the Defendant noted that this was not such a case, as both the Claimant and Defendant were resident in England.

Finally, the Defendant argued that gateway 20(a) of PD 6B paragraph 3.1 was available for applications, such as the Service Application, which are made under an enactment, but which require the issue of an application notice instead of a claim form.

To further this argument, the Defendant relied on *ED&F Man Capital Markets LLP v Obex Securities LLC*³ (“*ED&F Man*”) where Mr. Justice Aikens allowed an application for pre-action disclosure under CPR 31.16 (*Disclosure before proceedings start*)⁴ to be served out using gateway 20(a) on the basis that such an application was a “proceeding” brought “under an enactment.”

The Judgment. The Court rejected the Defendant’s submissions and held that there is no jurisdiction to grant permission to serve a disclosure application on a foreign non-party outside the jurisdiction. The decision continues a line of authorities that have held the English courts will not usually order a third party to disclose documents relating to a foreign company where the documents are outside the jurisdiction.⁵

In considering CPR 6.38 and CPR 6.39, Mrs. Justice Cockerill noted that an application notice may be served out of the jurisdiction on a foreign non-party in circumstances where, for example, there is an application which engages a third party such as an anti-suit injunction on notice, or in the context of an outward letter of request to enable a potential respondent abroad to appear if it so wished. However, there is no reason why CPR 6.39 must be used for an application for third party disclosure under CPR 31.17.

The Court also rejected arguments that *ED&F Man* was good authority to support an application for service out of the jurisdiction of the TPD Application using gateway 20(a) (which requires that a “*claim is made under an enactment which allows proceedings to be brought*” (emphasis added)). Mrs. Justice Cockerill distinguished *ED&F Man*, as it concerned a different rule (CPR 31.16), and noted that *ED&F Man* had been doubted by “strong commentators,” and that several subsequent authorities pointed strongly against it.⁶ Accordingly, the Court found it did “*not regard ED&F Man as being any sound basis for saying that 20(a) provides a gateway for applications such as this.*”

Notably, the Court considered that the Service Application was merely a way around the letter of request regime, and that “[t]he letter of request regime is the proper, courteous, respectful method of obtaining evidence within a foreign jurisdiction from a foreign party.”

Further, Mrs. Justice Cockerill commented *obiter* that even if the Court had jurisdiction to grant the Service Application, she would not be minded to do so where a party was plainly trespassing on the letter of request regime.

³ [2017] EWHC 2965 (Ch).

⁴ An application for disclosure before proceedings have started is permitted under section 33 SCA 1981.

⁵ Hollander Documentary Evidence (13th ed., 2018) at [29-15].

⁶ See, for e.g. Hollander, Documentary Evidence (13th ed., 2018) at [1-10], which submits that the decision in *ED&F Man* is “clearly wrong.”

Commentary. The Court has affirmed it has no jurisdiction to make orders against third parties who are resident outside the jurisdiction. In particular, courts cannot grant permission for service outside of the jurisdiction of a disclosure application against a foreign non-party.

The decision has also cast serious doubt on the correctness of the decision in *ED&F Man* (i.e., that the court has the power to serve out an application for pre-action disclosure). In *ED&F Man*, the Court of Appeal had granted leave to appeal, but the case was settled before appeal. This present decision has given support to the views expressed by commentators that *ED&F Man* was wrongly decided.

The appropriate route for parties wishing to obtain evidence from a witness outside the jurisdiction is either via letter of request or via any jurisdiction the local court may offer to grant disclosure in support of proceedings in England and Wales.

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Please do not hesitate to contact us with any questions.

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