



GREASING THE GATEWAYS

Simon Taube considers changes to service of trust claims out of England and Wales

KEY POINTS

What is the issue? New *Civil Procedure Rules* govern the situations where claims in the English and Welsh court in respect of a trust may be served on a defendant outside the UK and EU.

What does it mean for me? There will be increased opportunities to bring trust proceedings in the English and Welsh courts.

What can I take away? The Civil Procedure Rule Committee may soon introduce further new rules, widening the gateways for bringing claims in England.

In September 2013, the *Trust Quarterly Review* published a paper that I wrote for the Trust Law Committee (TLC) proposing a widening of the gateways for service of trust claims out of the jurisdiction of the courts of England and Wales.¹ The paper set out the TLC's proposals for widening the so-called 'gateways' in the provisions of the *Civil Procedure Rules* (CPR) that deal

with the service of proceedings on a defendant outside the jurisdiction. Those gateways identify the types of claim where the claimant may be able to obtain permission to serve proceedings on a defendant outside the UK.

This article explains the recent changes to the rules in the CPR on service of proceedings on a defendant outside the UK in cases not subject to EU legislation, and further possible changes to these rules that may follow soon.

BACKGROUND TO THE CHANGES

It will be recalled that, under the CPR, there are now three separate regimes dealing with service of a claim form outside the jurisdiction. The first relates to service of claim forms in Scotland and Northern Ireland: CPR 6.32. The second relates to cases where the permission of the court is not required, mainly in cases governed by the amended *Regulation (EU) No.1215/2012* (Judgments Regulation), by the *Lugano Convention*, or by statute: CPR 6.33. The third category, with which this article is concerned, relates to other cases: CPR 6.36.

CPR 6.36 provides that, in any case to which CPR 6.32 or 6.33 do not apply,

the claimant may only serve a claim form out of the jurisdiction with the permission of the court if any of the grounds (or 'gateways') set out in paragraph 3.1 of Practice Direction 6B apply (6BPD.3). CPR 6.37 specifies further important conditions that the claimant must satisfy before the court will grant them permission to serve their claim form outside the jurisdiction, including:

- the claimant must set out that they believe the claim has a reasonable prospect of success;
- they must state the defendant's address (or, if it is not known, in what place the defendant is, or is likely, to be found); and
- they must satisfy the court that England and Wales is the proper place to bring the claim.

THE NEW GATEWAYS

From April 2015, the grounds or gateways stated in 6BPD.3 have been amended in two important respects in the context of trust claims. First, the old sub-paragraph (12) has been replaced with the following provisions: 'A claim is made in respect of a trust which is created by the operation



of a statute, or by a written instrument, or created orally and evidenced in writing, and which is governed by the law of England and Wales.²

The major differences between the old and the new sub-paragraph (12) are as follows. The new sub-paragraph (12) is no longer confined to cases where the trustee is the defendant. Therefore, the trustee may now rely on this gateway where the claimant makes a claim as trustee in respect of a trust governed by English and Welsh law. Moreover, the new gateway applies not only to trusts in a written instrument but also to statutory trusts and oral declarations of trust that are evidenced in writing, provided the trusts are governed by English and Welsh law. This widening of the category of affected trusts reflects similar language in the Judgments Regulation.

Second, a new sub-paragraph (12A) has been introduced into 6BPD.3 as follows: 'A claim is made in respect of a trust which is created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, and which provides that jurisdiction in respect of such a claim shall be conferred upon the Courts of England and Wales.'

The new sub-paragraph (12A) follows closely the gateway relating to contracts where there is a clause conferring jurisdiction on the English and Welsh courts. The provision is designed to give effect to such clauses in trusts that confer jurisdiction on the English and Welsh courts.

In the recent case of *Crociani v Crociani* [2014] UKPC 40,³ the appellants unsuccessfully contended before the Privy Council that a clause in the trust instrument conferred exclusive jurisdiction on the courts of Mauritius. Nevertheless, the Privy Council went on to consider *obiter* the effect of such a clause. The appellants argued that, save in exceptional circumstances, the courts ought to enforce an exclusive jurisdiction clause in a trust in the same way as in the contractual context.

The Privy Council rejected this argument and concluded that it should be less difficult for a beneficiary to resist the enforcement of an exclusive jurisdiction clause in a trust deed than for a contracting party to resist the enforcement of such a clause in a contract. It is not a case where a party to a contract should be held to his bargain. Of course, a beneficiary who wishes to take advantage of a trust must accept its terms, but that commitment is not of the same order as in a commercial contract.

“The new sub-paragraph (12A) is no longer confined to cases where the trustee is the defendant”

Where a beneficiary wishes to avoid the clause and the trustees wish to enforce it, the court would normally expect the trustees to come up with a good reason for adhering to the clause, albeit that their failure to do so would not prevent them from invoking the presumption that the clause should be enforced. In the case of a trust, unlike a contract, the court has an inherent jurisdiction to supervise the administration of the trust. The court does not have a freewheeling, unfettered discretion to do whatever seems fair when it comes to trusts. However, the court's power to supervise the administration of trusts, which exists primarily to protect the interests of beneficiaries, represents a clear and significant distinction between trusts and contracts.

In practice, as a result of the provisions dealing with jurisdiction clauses in the amended Judgments Regulation, there may only be limited cases in which the provisions of sub-paragraph (12A) are relevant.

FURTHER POSSIBLE CHANGES

The initiative of the TLC in relation to trust claims has stimulated further consideration of the gateways in 6BPD.3. The Lord Chancellor's Advisory Committee on Private International Law, which is currently chaired by Lord Mance JSC, has contemplated further possible changes that are being considered by the Civil Procedure Rule Committee.

Some of the suggested changes relate to the general gateways in 6BPD.3, so as to permit, first, the claimant to include in their claim form ancillary claims arising out of similar facts to another pleaded claim that falls within the existing gateways, or, second, the expansion of the gateway relating to restitution and undue enrichment.

The possible changes to 6BPD.3 also include the following proposals that may interest trust and estate practitioners:

- **The expansion of the present sub-paragraph (11) so as to add the following words in italics: ‘(11) The subject matter of the claim relates wholly or principally to property within the jurisdiction,**

provided that nothing under this paragraph shall render justiciable the title to or the right to possession of immovable property outside England and Wales.’

- **The expansion of the present sub-paragraph (13) so as to add the following words in italics: ‘(13) A claim is made for a remedy which might be obtained in proceedings for the administration of the estate of a person who died domiciled within the jurisdiction or whose estate includes assets within the jurisdiction.’**
- **The expansion of the present sub-paragraph (15) so as to add the following words in italics: ‘(15) A claim is made against the defendant as constructive trustee, or as trustee of a resulting trust, where the claim arises out of acts committed or events occurring within the jurisdiction or relates to assets within the jurisdiction.’**

All the changes appear to be sensible and modest extensions of the existing gateways. If adopted by the Civil Procedure Rule Committee, the changes should reduce the risk of defendants taking technical points in order to defeat attempts to serve them with proceedings where the English and Welsh courts are the appropriate courts in which to adjudicate the claims.

1 *Trust Quarterly Review* (2013), volume 11, issue 3, pages 50–55, available at www.step.org/widening-gateways

2 The material part of the old sub-paragraph (12) stated: 'A claim is made for any remedy which might be obtained in proceedings to execute the trusts of a written instrument where –
(a) the trusts ought to be executed according to English law and
(b) the person on whom the claim form is to be served is a trustee of the trusts.'

3 Read Edward Cumming's analysis of *Crociani* on page 41



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